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¹ Became Chief Justice June 7, 1898.

² Appointed June 7, 1898.

³ Beginning May 23, 1898.

⁴ Beginning May 23, 1898.

⁵ Resigned.

⁶ Appointed September 7, 1898, to succeed Charles Allen.

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THE
NORTHEASTERN REPORTER.
VOLUME 51.

(171 Mass. 596)

STONE v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. July 1, 1898.)

**NEGLIGENCE—DESTRUCTION OF BUILDINGS BY FIRE—
PROXIMATE CAUSE—REMOVEDNESS—EVIDENCE—
INSTRUCTIONS—CONCURRENT ACTS OF PARTIES.**

1. Defendant's railway depot, freight house, and a platform used mostly for storing oil were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil leaking from the barrels. A teamster not connected with defendant brought goods to be shipped by it, and, in lighting his pipe, threw a match on the ground underneath the platform, which immediately caught fire, and with it the oil standing on the platform, destroying the plaintiff's buildings, as well as those of defendant. All the oil had been on the platform for a longer time than 48 hours, which was prohibited by law. Plaintiff's buildings would probably not have been burned if there had been no oil on the platform. *Held*, that the fire resulting from leaving the oil on the platform could not be apprehended by defendant, and, its acts not being the proximate cause of the fire, plaintiff could not recover.

2. In an action for negligence, where the court is able to say that the injury is the remote, and not the proximate, result of defendant's acts, it is proper to so direct the jury.

3. Where defendant was negligent in keeping oil upon a platform which was subsequently fired by the carelessness of another, the acts of defendant and the third person are not concurrent.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action by Edward E. Stone against the Boston & Albany Railroad Company. From a verdict for defendant directed by the clerk, plaintiff brings exceptions. Exceptions overruled.

W. S. B. Hopkins, H. W. King, and C. M. Rice, for plaintiff. F. P. Goulding and F. L. Dean, for defendant.

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances: The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street.

51 N.E.—1

On the side of the freight house, and extending beyond it about 75 feet, was a wooden platform about 8 feet wide and 4 feet high, placed upon posts set in the ground, the underside being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings, and his principal buildings were about 75 feet from the point on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil, which had leaked from the barrels, and which not only saturated the platform, but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 13, 1893, from 25 to 30 barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but the most of them were probably full and nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car, to wait for the defendant's foreman of the yard, who was to help him unload the boots; that, in stepping in, he stubbed his toe, and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; that at this time he was standing in the door of the car, facing

the platform. It must be assumed upon the evidence that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed. It spread fast, and was almost immediately upon the top of the platform,—running up a post, according to one of the witnesses,—and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than 48 hours. According to the testimony of the plaintiff, the platform was never, to his knowledge, empty of oil or oil barrels. It was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years,—ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff, in substance, contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform, and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. St. c. 102, § 74, providing that the oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than 48 hours without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not; and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort. Upon the evidence, the supposed tort of the defendant, whether it be called "negligence" or "nuisance," appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant, as a common carrier, was bound to transport it and deliver it to the consignees. The oil, as is well known, was an article of commerce, and in extensive use, and the defendant was bound to transport it, and keep it for a reasonable time, after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon the platform from leaky barrels. But we may assume without discussion that the defendant was

in fault in keeping the oil there so long, and that, if the oil had been removed within 48 hours after its arrival, the fire would probably not have been attended with such disastrous consequences.

Nevertheless, the question remains—and, in our view, this becomes the important and decisive question of the case—whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant any finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it. In approaching this question, it must be borne in mind that Casserly was in no sense a servant, agent, or guest of the defendant. He brought a load of goods to the defendant's station, to be carried upon the defendant's railroad. The defendant was bound by law to accept and carry them. It could not lawfully exclude Casserly from its ground. By Pub. St. c. 112, § 188, it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad, and for the use of its depot and other buildings and ground. Casserly came there in his own right, and the defendant is not responsible for him in the same way that perhaps it might be responsible for a servant, agent, or (according to some statements of the law) guest. *Lothrop v. Thayer*, 138 Mass. 466. It is also to be borne in mind that this was not a case of spontaneous ignition of a substance liable to ignite spontaneously, as was the case in *Vaughan v. Menlove*, 3 Bing. N. C. 468. Nor did the defendant owe to the plaintiff the duties of a carrier of passengers or freight towards its customers, or any other duties growing out of a contract with the plaintiff. There was no contract of any kind between the plaintiff and the defendant.

The rule is very often stated that, in law, the proximate, and not the remote, cause is to be regarded; and, in applying this rule. It is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, among others: *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. 84; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208; *Hayes v. Inhabitants of Hyde Park*, 153 Mass. 514, 27 N. E. 522; *Freeman v. Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013; *Lynn Gas & Electric Co.*

v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690; Insurance Co. v. Tweed, 7 Wall. 44; Railroad Co. v. Kellogg, 94 U. S. 469; Railroad Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661; Reiper v. Nichols, 31 Hun, 491; Read v. Nichols, 118 N. Y. 224, 23 N. E. 468; Mars v. President, etc., 54 Hun, 625, 8 N. Y. Supp. 107; Leavitt v. Railroad Co. (Me.) 36 Atl. 998; Cuff v. Railroad Co., 35 N. J. Law, 17; Curtin v. Somerset, 140 Pa. St. 70, 21 Atl. 244; Railroad Co. v. Salmon, 39 N. J. Law, 299; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, 406; Shear. & R. Neg. §§ 38, 666; Whart. Neg. § 134 et seq. It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of Lane v. Atlantic Works, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court say: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening or contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many

cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below (McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464; The Joseph B. Thomas, 81 Fed. 578); when sheep, allowed to escape from a pasture, and stray away in a region frequented by bears, were killed by the bears (Gillman v. Noyes, 57 N. H. 627); and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas (Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522); and in other cases not necessary to be specially referred to. In all of these cases the real ground of decision has been that the result was or might be found to be probable, according to common experience. Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated: Davidson v. Nichols, 11 Allen, 514; McDonald v. Snelling, 14 Allen, 290; Tutein v. Hurley, 98 Mass. 211; Hoadley v. Transportation Co., 115 Mass. 304; Hill v. Winsor, 118 Mass. 251; Derry v. Flitner, Id. 131; Freeman v. Accident Ass'n, 156 Mass. 351; 30 N. E. 1013; Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, and cases there cited; Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259; Rhodes v. Dunbar, 57 Pa. St. 274; Hoag v. Railroad, 85 Pa. St. 293; Behling v. Pipe Lines, 160 Pa. St. 359, 23 Atl. 777; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, 405, 406; Halle's Curator v. Railway Co., 9 C. C. A. 134, 60 Fed. 557; Clark v. Chambers, 8 Q. B. Div. 327; Whart. Neg. (2d Ed.) §§ 74, 76, 78, 138-145, 155, 955; Cooley, Torts, *69, *70; Add. Torts, *40; Pol. Torts, *388; Mayne, Dam. *39, *47, *48. For a recent English case involving a case of remoteness, see Englehart v. Farrant [1897] 1 Q. B. 240. The rule exempting a slanderer from damages caused by repetition of his words rests on the same ground. Hastings v. Stet-

son, 126 Mass. 329; *Shurtleff v. Parker*, 130 Mass. 293; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any exciting circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along, and throw down a lighted match, where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification, if any, of this doctrine, should be made in case of the storage of high explosives, like gunpowder and dynamite, we do not now consider. See *Rudder v. Koopmann* (Ala.) 22 South. 601; *Kinney v. Koopmann* (Ala.) 22 South. 593, and cases there cited; *Rhodes v. Dunbar*, 57 Pa. St. 274, 290.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute. But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299. In *Hobbs v. Railway*, L. R. 10 Q. B. 111, 122, *Blackburn, J.*, said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. *Hammond Co. v. Bussey*, 20 Q. B. Div. 79, 89; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 468; *Cuff v. Railroad Co.*, 35 N. J. Law, 17; *Behling v. Pipe Lines*, 160 Pa. St. 359, 28 Atl. 777; *Goodlander Mill Co. v. Standard Oil Co.*, 11 O. C. A. 253, 63 Fed. 400, 405, 406; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; *Carter v. Towne*, 103 Mass. 507; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Hutchinson v. Gaslight Co.*, 122 Mass. 219; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208.

The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that, therefore, it was a case where two wrongdoers, acting at the same time, contributed to the in-

jurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in *Lane v. Atlantic Works*, 111 Mass. 136, the negligence of the defendants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

The fact, if established, that the defendant's platform, with the oil upon it, constituted a public nuisance, is immaterial, under the circumstances of the present case. If the plaintiff proved a nuisance, he need not go further and show that it was negligently maintained. But we have assumed the existence of negligence on the part of the defendant. Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. *Hanlon v. Railroad*, 129 Mass. 310; *Hyde Park v. Gay*, 120 Mass. 589; *Hall v. Ripley*, 119 Mass. 135; *Damon v. Inhabitants of Scituate*, Id. 66; *Kidder v. Inhabitants of Dunstable*, 11 Gray, 342; *Hayes v. Railroad Co.*, 111 U. S. 228, 241, 4 Sup. Ct. 369. In order to maintain a personal action to recover damages for a public nuisance, the plaintiff must show that his particular loss or damage was caused by the nuisance, just as in case of any other tort. *Wesson v. Iron Co.*, 13 Allen, 101, 103; *Stetson v. Faxon*, 19 Pick. 147, 154. And, in considering the question of remoteness, it makes no difference what form of wrongdoing the action rests upon. *Sherman v. Iron Works Co.*, 2 Allen, 524; *The Notting Hill*, 9 Prob. Div. 105, 113; *Mayne*, Dam. 48, note.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger coming upon the defendant's premises for his own purposes and in his own right. Exceptions overruled.

KNOWLTON, J. (dissenting). I agree to nearly all of the propositions of law in the opinion of the majority, but I do not agree that the case presents no question of fact for the consideration of a jury. It seems to me that the principal question is whether there was evidence of negligence on the part of the defendant in reference to the risk of such an accident as happened. I think that there was such evidence. To say nothing of the particulars testified to, the fact that one is acting in violation of a criminal statute is always evidence of negligence. See Pub. St. c. 102, § 74. The opinion assumes that there was evidence of negligence on the part of the defendant in keeping so large a quantity of oil for so long a time in such a

place. It seems to me that, if the defendant's conduct was negligent, it was in reference to the risk of just such an accident as happened. I do not know that any other kind of negligence is charged. It was to diminish the liability to such accidents that the statute was enacted. If there was negligence in violating the statute, it was because, from the storage of large quantities of kerosene oil for a long time in such an inflammable place, there was serious danger of a great and uncontrollable conflagration in connection with some accident which ought to have been contemplated, and which, in the absence of the oil, would be likely to cause little or no damage. I do not see what negligence on the part of the defendant could have been found from the evidence except its failure to anticipate and guard against such a danger. To constitute negligence creating a liability for the damages to the plaintiff, it is not necessary that the defendant should have contemplated the particular event which occurred. It is enough if it should have contemplated the probable happening of some accident of this kind, which involves danger to the property of others, that ought to be guarded against. I think the jury well might have found that the burning of the plaintiff's property was a direct result of the defendant's conduct in keeping this oil on the platform.

(171 Mass. 494)

GATELY v. OLD COLONY R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1898.)

EMINENT DOMAIN—ABOLITION OF GRADE CROSSINGS—ASSESSMENT OF DAMAGES—NOTICE.

St. 1890, c. 428, § 5, relating to the abolition of crossings at grade by railroads and other roads, provides for the assessment by a jury in the superior court of damages to persons injured, on petition by a party interested, without notice, within one year after the decree of the court confirming the decision of the commission appointed under section 1 to determine whether alterations are necessary, and how they shall be made. Section 1 requires, before the commission is appointed, a notice, "by a public advertisement, or otherwise, as the court shall deem desirable." Under section 3, before it can act there is to be "due notice and hearing," and "it shall prescribe the manner and limits" within which the alterations are to be made. Section 4 requires the clerk of the court "within 30 days after the making of said decree to cause a copy of such decision and decree to be filed with the county commissioners of the county or counties in which the land or other property taken, and the crossing are situated, and also to be recorded in the registry of deeds for the counties and districts in which such land, property, and crossings are situated." *Held*, that the statute gave ample notice to an owner, whose land was taken, of an assessment of damages under section 5, and no other notice was necessary.

Report from superior court, Suffolk county; Henry N. Sheldon, Judge.

Petition by Anne Gately against the Old Colony Railroad Company for the assessment

of damages. A motion to dismiss the petition was sustained, and the case was reported to the supreme judicial court for its advisory opinion. Petition dismissed.

C. G. Keyes and C. D. Keyes, for petitioner.
J. H. Benton, Jr., for defendant.

LATHROP, J. The petition in this case alleges that a portion of the petitioner's land was taken by the respondent for railroad purposes by a decree of the superior court made on June 23, 1894, and she asks that her damages sustained by the taking be assessed by a jury at the bar of that court. The petition was filed on November 26, 1895, and the respondent moved to dismiss the petition on the ground that the court had no jurisdiction. This motion was granted, and the petition was dismissed. The report of the presiding justice, on which the case comes before us, states that the land was taken by a decree of the court made on June 23, 1894, under the provisions of St. 1892, c. 433, and St. 1893, c. 126. By the statute of 1892 (chapter 433, § 5), the statute of 1890 (chapter 428, §§ 1-8) is made applicable to all proceedings under the act, and by the statute of 1893 (chapter 126, § 1) it is provided that damages shall be assessed and recovered as provided by St. 1890, c. 428. All of these statutes relate to the abolition of crossings at grade by railroads and other roads. The statute of 1890 (chapter 428, § 5) provides for the assessment of damages by a jury in the superior court on petition brought within one year after the date of the decree of the court confirming the decision of the commission appointed under section 1. The petitioner contends that section 5 is unconstitutional, because it does not provide for notice to the owner whose land is taken. But the entire proceeding of taking the land is by a suit in court. Before the commission is appointed, section 1 requires a notice, "by public advertisement, or otherwise, as the court shall deem desirable." Before the commission can act, there is, by section 3, to be "due notice and hearing," and "it shall prescribe the manner and limits" within which the alterations are to be made. By section 4, it is made the duty of the clerk of the court, "within thirty days after the making of said decree, to cause a copy of such decision and decree to be filed with the county commissioners of the county or counties in which the land or other property taken and the crossing are situated, and also to be recorded in the registry of deeds for the counties and districts in which such land, property and crossings are situated." It thus appears that the statute makes ample provision for notice, and no other notice is necessary. *Allen v. Charlestown*, 111 Mass. 123; *Holt v. Somerville*, 127 Mass. 408; *Collins v. Holyoke*, 146 Mass. 208, 307, 15 N. E. 908. Petition dismissed.

(171 Mass. 510)

THOMAS v. CROSBY et al.(Supreme Judicial Court of Massachusetts.
Suffolk. June 25, 1893.)**TRUSTS—CONSTRUCTION.**

A deed of trust was executed by a husband and signed by the wife in token of her assent and of her release of dower and homestead. The deed provided that, on the death of the husband, a third of the property conveyed should go to his wife for her life, and the remainder to his child or children for life. If the wife died, the children or their issue were to receive the entire income; if the children and their issue died, the wife was to receive the entire income. On the death of the last survivor of his wife and the child living at the date of the deed, the corpus of the trust was to be conveyed to the children then living and the heirs of such children as have deceased. In the event of the death of the wife and the child or children before his death, the trust was to cease, and the property revert to the husband. At the time the deed was executed, he had a wife and one child. *Held*, that the trust was a family settlement, and not for the benefit of another wife or for children by another wife.

Case reserved from supreme judicial court, Suffolk county; James M. Morton, Judge.

Bill by one Thomas against one Crosby and others in the nature of a bill of review. Dismissed.

Geo. Royal Pulsifer, for plaintiff. Charles J. Noyes and E. B. Callender, for respondent Henry A. Thomas, Sr.

FIELD, C. J. The present bill is not strictly a bill of review, because the present plaintiff was not a party to the first suit, or privy to any of the parties; but the bill may be taken as an original bill, by a plaintiff who alleges that his rights are affected by the decree entered in that suit, and it partakes somewhat of the nature of a bill of review. The deed of trust to which the bill relates was of two parcels of land, with the buildings thereon; and it was executed by Henry A. Thomas and his wife, who signed it in token of her assent and of her release of all right to dower and homestead. After making certain provisions for himself and for himself and his family during his life, he directed the trustee, among other things, as follows: "On the death of the said Henry A. Thomas, to pay the income of said trust estates, after first paying the interest on said mortgages, taxes, and expenses, to Mary E., the wife, and to the child or children of the said Henry A. Thomas, as follows, viz.: One-third thereof to the said Mary E., and the remaining two-thirds to the child, or, if more than one, to the children, of the said Henry A., the said share to each during their respective lives. And if either of the children dies, his (or her) portion to the surviving child or children, unless he leaves issue living, who shall then take by right of representation. But if all the children and such issue, or the said Mary E., decease, either class living, the other, and whether before or after the said Henry A.'s death; the surviving class to take the

whole income during the life of any of its members. On the death of the last survivors of said wife and child or children, or within twenty-one years after the decease of said wife and of the child now living, whichever event shall first happen, then to transfer and convey said trust estates as then constituted, and all accumulations thereof, to and among the heirs of said child or children of said Henry A., if all be then deceased; but, if not, then to such children as shall then be living, and to the heirs of such as may have deceased, in equal shares."

The following clause of the deed of trust is very significant: "In the event of the death of the said Mary E., and the child or children of said Henry A., during the lifetime of said Henry A., all the trust estate and property then held under this deed of trust shall thereupon forthwith be conveyed and transferred to the said Henry A. Thomas, and thereupon this trust shall cease." The possibility of his having children by Mary E. would end with her death, but the possibility of his having children by other women whom he might marry would end only with his death, and there might be a posthumous child. When this deed was executed Henry A. Thomas' family consisted of himself, his wife, Mary E., and one child by her. The trust contemplates that he might have other children, but, we think, other children by Mary E. Thomas. After his death, his wife, Mary E. Thomas, and his children are to receive the whole income for their lives, Mary E. to receive one-third and the children or their issue two-thirds. If any child dies, her or his portion of the income is to go to the surviving children, unless the child dying leaves issue, when it is to go to the issue by right of representation. If Mary E. dies, the children, or the issue of such children, if any are living, are to receive the whole income; and, if all his children and their issue die, Mary E., if living, is to receive the whole income. On the death of the last survivor of his wife and child or children, or within 21 years after the death of his wife and the child living at the date of the deed, the corpus of the trust is to be conveyed to the children then living, and to the heirs of such children as have deceased. We regard the deed of trust as a sort of family settlement for himself, his wife, Mary E., and the one child, their issue living at the date of the deed, and for any other children, issue of himself and his wife, Mary E., who might thereafter be born, and the issue and heirs of such child or children; but the trust, we think, is not for the benefit of another wife or for children by another wife. Under this construction of the deed of trust, the plaintiff has no interest in the trust, and cannot impeach the decree entered in the first suit.

In the present suit a guardian ad litem or next friend has been appointed to represent persons not ascertained or not in being, pursuant to St. 1893, c. 453. It does not appear

that any such guardian ad litem or next friend was appointed in the first suit. Whether, if Fannie E. Fiske should die before the provision for the conveyance of the corpus of the trust to her heirs took effect, and should leave issue, and her mother should survive her father, such issue would not be beneficiaries under the trust; or whether, on the death of Mary E. Thomas and of Fannie E. Fiske, her father having died while one or both were living, the heirs of Fannie E. Fiske would not be beneficiaries,—we cannot consider under the present bill. If the trustee has any doubt whether he would be protected against the claim of such issue or heirs by the decree in the former suit, if he obeys the decree, it is for him to ask to have that decree reviewed. The present bill must be dismissed, because the plaintiff has no standing in court. So ordered.

(171 Mass. 468)

NORTHRUP v. BUFFINGTON et al.

(Supreme Judicial Court of Massachusetts.

Suffolk. June 23, 1898.)

GAMBLING CONTRACT—OPTION TRADES—RECOVERY OF MARGINS.

1. Where purchases and sales of stocks on margins are mere wagering contracts, intended to be settled by payment of differences, without any intention of delivery, margins deposited and profits earned by the rise or fall of the market cannot be recovered.

2. Where both parties to a wagering stock contract are cognizant of its character, it is immaterial that the broker through whom it was made was doing business as agent for another. Money deposited with him as margins cannot be recovered.

Exception from superior court, Suffolk county; Henry N. Sheldon, Judge.

Action by S. C. Northrup against G. E. C. Buffington and others to recover payments and profits on stock contracts. From a judgment in favor of defendants, plaintiff brings exceptions. Exceptions overruled.

J. L. McLean, for plaintiff. F. Burke, for defendants.

MORTON, J. The only evidence before the court and jury was the auditor's report and the ticket referred to in it. The auditor found that each transaction set out in the amended declaration, which was what the plaintiff relied on, was a wager upon the future market price of the particular stock alleged to have been purchased; that neither party expected to account for anything except the difference in the market prices; and that no stock was purchased, sold, or delivered, or was intended to be. The plaintiff contends, in substance, that since it appears from the report that the defendants were doing a commission business for Doran, Wright & Co., who were stockbrokers in New York and Boston, the wager, if any, must be deemed, as matter of law, to have been between him and Doran, Wright & Co., and that the defendants are liable to him for

the sums paid to them as margins, and received by them from the sales of the stocks, the sales having resulted in every case in a profit. But the auditor has found that the sums described as margins were paid by the plaintiff to the defendants to protect them in the transactions referred to, and were not paid on account of actual purchases of stock, or intended by either party to be so applied. In other words, they were the stakes put up by the plaintiff in the various transactions into which he entered with the defendants, and which the auditor has found were wagers upon the future market prices of the stocks to which they related. It is clear that the law will not assist the plaintiff to recover back money paid under such circumstances. *Harvey v. Merrill*, 150 Mass. 1, 11, 22 N. E. 49.

It does not appear that, when the transactions were "closed out" by the plaintiff's orders from time to time, the defendants received the proceeds of them. The plaintiff abandoned the count for money had and received. But, assuming that the defendants did receive them, the law will not aid the plaintiff to recover the proceeds, any more than it will the money which he paid to the defendants on account of the transactions. The auditor has found, in effect, that all parties were cognizant of the character of the transactions. The fact that the defendants were doing a commission business for Doran, Wright & Co. was immaterial if the jury found, as they properly could find, that the contracts were wagering contracts, and were so understood and intended by all parties. The case differs, therefore, from *Bridger v. Savage*, 15 Q. B. Div. 363. See *Cohen v. Kittell*, 22 Q. B. Div. 680. The instructions which the plaintiff requested were rightly refused. The transactions in question all occurred before the passage of St. 1890, c. 437, and that statute is not, therefore, applicable. Exceptions overruled.

(171 Mass. 496)

LEONARD v. HAWORTH.

(Supreme Judicial Court of Massachusetts.

Middlesex. June 24, 1898.)

WILLS—TRUSTS—ELECTION OF WIDOW—PERPETUITIES—LIFE INTEREST—NEXT OF KIN.

1. A will appointing a brother as executor and trustee, where the provisions of the will required action by him after the death of certain devisees, will be construed as nominating such brother as a legal trustee.

2. A testamentary provision for the funeral expenses and erection of a monument for the widow of testator on her death is not abrogated by her waiver of the provisions of the will and election to take dower.

3. The provision is not void as creating a perpetuity for a use not charitable.

4. Nearest of kin means nearest of blood relations.

5. A will devising the use of certain realty to testator's wife for life, and the use of other realty as a home for his aged married sister for life, the personalty being devised absolutely, and on the death of his wife, and after all

the provisions of the will had been carried out, devising all the realty to his nearest of kin (said sister without issue and an aged brother with two elderly unmarried daughters), shows an intention that the property should not be divided until the death of the survivor of the wife and sister, and then among those who are at that time his nearest blood relations.

Report from supreme judicial court, Middlesex county; Lathrop, Judge.

Petition by Sylvester B. Leonard against Clarissa W. Haworth for the construction of the will of James Leonard. From a decree of the probate court, defendant appeals. Reported for the full court. Modified and affirmed.

W. H. Anderson for plaintiff. F. A. Fisher, for defendant.

BARKER, J. The questions for decision are whether the testator's estate is to be held in trust; whether a part of his estate shall be retained to meet and discharge the funeral expenses of his widow, and to place a suitable tablet at the head of her grave, notwithstanding the fact that she has waived the provisions of his will; and whether, under the direction that "when my wife has deceased and her funeral expenses have been paid, and all the provisions named in this will have been carried out, I will what is left of my estate be divided among my nearest of kin," those who were the testator's nearest of kin at his death take a vested remainder, or those who will be his nearest of kin at the time of distribution will take under a remainder now contingent. The testator died in his seventy-fourth year, and the will was written by himself, in the belief that he had not long to live, a few months before his death. His property consisted of a share of stock worth \$1,175, a gold watch worth \$75, mechanic's tools worth \$25, other personalty worth \$100, and three parcels of real estate,—his home, and one single and one double tenement house,—the whole value of the real estate being \$12,370. His debts did not exceed \$200. The language of his will indicates that he was somewhat illiterate, and that he had no exact knowledge of the meaning of legal terms. His wife was 72 years of age and without issue. When the will was made and at the testator's death his only next of kin were Clarissa W. Haworth, a sister, the wife of Thomas Haworth, then in her seventy-fourth year, and then and now without living issue, and Sylvester B. Leonard, a brother, the executor, then in his seventy-first year, and who had two unmarried daughters then of the respective ages of 40 and 35 years. The sister had for many years occupied the tenement, the use of which was given to her for life, paying rent therefor to the testator.

The widow having waived the provisions of the will, real estate to the amount of \$5,000 has been assigned to her under the statute, and this amount is in excess of the value of either of the three parcels of the

testator's real estate. She has been given an allowance of \$400, and the testator's personalty is insufficient by more than \$300 for the payment of the allowance, the charges of administration, the debts, and the legacies. The cemetery lot wherein the testator is buried was the property of his mother when she died intestate, her only heirs at law having been the testator and his brother and sister. The widow is unwilling that her funeral expenses shall be paid, or a tablet be placed at the head of her grave, by the executor of the testator, or paid for out of his estate.

1. Whether the remainder is vested or contingent, the estate cannot be finally settled while the widow and the sister both live. While the will contains no devise or bequest to any one as a trustee of the testator's estate, it does nominate and appoint his brother to be executor and trustee. The ultimate division which the testator contemplated was not to be made until all the provisions of his will had been carried out, and this would require action on the part of an executor or trustee after the death of the survivor of his widow and his sister. We think, therefore, that the word "trustee" was not used merely as a synonym for executor, and that the brother may be appointed as trustee.

2. While there is no explicit provision that the funeral expenses of the testator's widow shall be paid out of his estate, we think it sufficiently appears to have been his intention that they should be so paid, and that she should be buried in the lot owned by himself and his brother and sister, and by the side of her deceased daughter, and that a suitable tablet should be placed at the head of his widow's grave at the expense of his estate. If his widow's present intentions shall continue, it may be impossible for the executor or trustee to carry out these intentions of the testator. But they are not merely provisions made for her in his will. They are directions as to the disposal of his own estate, which he might properly make, and which are to be carried into effect by his executor or trustee if possible. While a testamentary provision for the preservation, adornment, and repair of a private monument is void, as creating a perpetuity for a use not charitable, this provision is open to no such objection, as it would be completely performed upon the decease of the testator's wife. While, since her waiver of the provisions made for her benefit, she cannot demand that funds shall be kept to pay the expenses of her funeral, or to erect a suitable tablet at the head of her grave, it is yet the duty of the executor to retain funds sufficient for those purposes, until, upon the widow's death, the funds shall be so expended, or their use as the testator has willed that they should be used shall have been shown to be impossible. This provision may have some effect upon the members of the testator's family other than his

widow, and, not being solely for her personal benefit, is not abrogated by her waiver. See *Plympton v. Plympton*, 6 Allen, 178, 182; *Brandenburg v. Thorndike*, 139 Mass. 102.

We think that it was the testator's intention that his estate should not finally be divided or go to his next of kin until the death of the survivor of his wife and sister, and that it should then be divided among those persons who should then be his next of kin. By the scheme of his will, taking into consideration the value and amount of his real and personal estate, he intended that his wife should have the use of his home, and the rents and income of two of his tenement houses, during her life, and that his sister should have the use of his other tenement house during her life. This, for the time during which his wife and sister should both live, disposed of all his real estate. His household furniture, ornaments, library, and pictures were given absolutely to his wife, and his tools and watch to his brother. This disposed of his personality, except the one share of stock, worth \$1,075, which he would not suppose to be more than enough to pay his debts, and the legacy to the trustees of the cemetery, and the expenses of his wife's funeral and of the tablets which he directed to be put up, and the charges and expenses of administration. His wife and sister were both old and childless, and he would naturally expect that they would live about the same length of time, and that when both should be dead there would be no living kin of his blood except his brother, that brother's daughters, and their children, if they should marry. His sister's husband was alive, and, if the testator gave to her a vested interest in the estate, its value was so small that upon her death her husband, if he survived her, might take it all under the statute, or, at any rate, the much larger share of it; so that, practically, whatever the sister should take by way of remainder would not go to his kin, but to a stranger in blood. It is to be noticed that there are no words specifically giving the remainder to next of kin, or explicitly giving the legal title to trustees during the life estates, but that the final disposition is made by this provision: "When my wife has deceased, and her funeral expenses have been paid, and all the provisions named in this will have been carried out, I will what is left of my estate be divided among my nearest of kin." These words "nearest of kin" mean nearest blood relations. *Swasey v. Jacques*, 144 Mass. 135, 10 N. E. 758; *Keniston v. Mayhew*, 169 Mass. 166, 169, 47 N. E. 612. They indicate an intention that after all has been done which he has provided elsewhere in his will shall be done, including the use of a certain one of his tenements by his sister during her whole natural life, all that is then left of his property shall be divided among those who shall then be his nearest blood rela-

tions. If this intention did not appear from the whole scope of the will, the sister being at the testator's death only one of his next of kin, the construction would be otherwise. *Keniston v. Mayhew*, *ubi supra*; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699; *Hearl v. Read*, 169 Mass. 216, 222, 223, 47 N. E. 778. But, in view of the circumstances before mentioned, we think the intention of this testator was that those who should be his nearest blood relations at the death of the survivor of his wife and sister should then take what should be left of his property.

The result is that the decree appealed from is correct, save that, instead of declaring that the balance of the estate will, under the seventh clause of the will, vest in and become the property of those who, after the decease of Mrs. Haworth, are then the nearest of kin of the testator, it should declare that the time of vesting will be at the death of the survivor of the widow and the sister. Decree to be entered accordingly.

(171 Mass. 516)

**SHEPARD & MORSE LUMBER CO. v.
ELDRIDGE.**

(Supreme Judicial Court of Massachusetts.
Suffolk. June 29, 1898.)

CHECKS—FORGERY OF PAYEE'S NAME—LIABILITY OF DRAWER—NEGLIGENCE OF PAYEE—KNOWLEDGE OF EMPLOYEE—ESTOPPEL—NOTICE TO DRAWER—PREJUDICING RIGHTS.

1. The payee of a check collected by the forging of payee's indorsement by its employé is not precluded from recovering on it from the drawer because of its negligence in not discovering, by an examination of its books, that such employé had previously forged and collected many checks sent to it by its customers.

2. Where a check is stolen from the payee, and put into circulation by a forged indorsement, the payee is not answerable as if he had been intrusted with the drawer's signature in blank, with authority to use it in making or giving currency to negotiable paper.

3. The drawer of a check is not relieved of his legal obligation as such to pay it on failure of the drawee so to do on proper indorsement and due demand, though it was taken by the payee as an absolute payment of a debt.

4. The fact that one had been in the habit of purchasing goods of another for 10 years, and of making payment by checks, imposes no liability on the latter to use due care that the checks be not stolen or the indorsement forged.

5. The payee of a check is not charged with notice that checks have been embezzled and collected on forged indorsements by its employé, because of the knowledge of such employé, or because the means of knowledge existed in its books of account, which would have been discovered if the monthly trial balances had been made by an honest employé.

6. A holder of a check stolen from him, and collected by a forged indorsement of its employé, but under the honest belief of the holder that it had been collected in due course of business, need not give notice to the drawer and drawee, or to the public, as for a lost check, before discovering the forgery.

7. The knowledge of embezzlements of an employé, acquired by his examination of books of account, which was not made in the performance of any duty owing by the employer to any other party, cannot be imputed to the employer; nor is he chargeable with the information which

his means of knowledge disclosed, where not willfully ignorant.

8. The receipting of subsequent bills for goods without informing the debtor that his checks given for previous bills had not extinguished such debts, but not done with intent to mislead the debtor, nor with expectation that the debtor would thereby change his position, does not estop the creditor from showing that the checks were in fact never paid by the drawee.

9. A payee of a check who misleads the drawer to his prejudice by failure to inform him that the check had been stolen and been paid by the drawee on forged indorsements, and thereby affects the right of the drawer to protect his rights therein, is estopped from maintaining an action against the drawer on the check.

10. A payee of a check paid by the drawee on a forged indorsement who, on discovering the forgery, obtained the check from the drawer as a paid check, and did not at once notify the drawer that he claimed it as his own property, prejudiced the rights of the drawer, so as to prevent a suit against him on the check.

Exceptions from superior court, Suffolk county; James R. Dunbar, Judge.

Action by the Shepard & Morse Lumber Company against Albert R. Eldridge. There was a judgment for plaintiff, and defendant excepts. Exceptions sustained.

W. C. Loring and Clapp & Glover, for plaintiff. L. S. Dabney and H. P. Harriman, for defendant.

BARKER, J. The plaintiff sues upon two checks drawn by the defendant upon his banker,—one for \$446.24, dated January 25, 1895; the other for \$561.97, dated July 20, 1895. Both were written to the plaintiff's order, and were mailed by the defendant to the plaintiff, in payment of bills for goods bought by the defendant of the plaintiff. Each check was duly received by the plaintiff, and the bills for which the checks were sent in payment were duly receipted by the plaintiff, and returned to the defendant,—one on January 26, 1895, and the other on July 24, 1895. The check of January 25, 1895, was presented at the bank on which it was drawn on January 30, 1895. It then purported to bear the indorsement of the plaintiff and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, by which it was presented; and on that day the amount of the check was paid by the National Bank of Wareham, on which it was drawn, to the Merchants' National Bank of New Bedford, and the same amount was charged to the defendant's account by the National Bank of Wareham. This check was returned to the defendant by his bank on June 25, 1895, and remained in his possession until January 30, 1896. The check of July 20, 1895, was drawn upon the National Bank of Wareham, and was presented to that bank on July 20, 1895, purporting to bear the plaintiff's indorsement and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford; and on that day the

amount of the check was paid by the National Bank of Wareham to the Merchants' National Bank of New Bedford, and was charged to the defendant's account by the National Bank of Wareham, and this check was returned by that bank to the defendant on November 20, 1895, and remained in his possession until January 30, 1896. The evidence tended to show that the indorsements purporting to be those of the plaintiff upon these checks when they were paid by the Wareham National Bank were forgeries, made by a clerk in the employment of the plaintiff, which clerk had feloniously converted the checks to his own use, had forged upon them the plaintiff's indorsements, and had deposited the checks with the forged indorsements to his own credit in the Old Colony Trust Company, by which they were collected of the Wareham National Bank through the Merchants' National Bank of New Bedford. It appeared that the plaintiff, on January 29, 1896, was informed of these forgeries, and of the misappropriation by its clerk of these checks. Thereupon the plaintiff sent one Gray to the defendant to procure the checks, and the defendant handed them to Gray on January 30, 1896, under circumstances which the defendant offered to show, but evidence of which was excluded. On the same day or the next day, the plaintiff notified the indorsers of the checks that the plaintiff's indorsements upon them were forgeries. The plaintiff gave no such notice to the National Bank of Wareham, and no other notice except the oral statements of Gray made in obtaining the checks from the defendant on January 30, 1896, was given by the plaintiff to the defendant until February 10, 1896, when the plaintiff wrote to the defendant a letter which stated that the checks bore forged indorsements of the plaintiff. On February 12, 1896, the plaintiff indorsed the checks upon allonges, and forwarded them to its bankers for collection from the Wareham National Bank. Payment was refused by that bank, and the checks were protested by a notary public for nonpayment on February 14, 1896, after which his suit was brought upon them by the plaintiff, the payee, against the defendant, the drawer of the checks. The National Bank of Wareham is solvent. The case was tried by a judge of the superior court without a jury, and, after a finding for the plaintiff, the defendant's exceptions are before us for consideration. It appears from the bill of exceptions that at the trial much evidence was admitted de bene which was afterwards stricken out at the plaintiff's request, and also that much evidence offered by the defendant was excluded. Two findings of specific facts were made in connection with the refusal of the court to give rulings asked by the defendant at the close of the evidence. The questions for decision will be better understood after a statement of the facts which the evidence introduced

or offered tended to prove in addition to those already recited.

The plaintiff is a dealer in lumber, with its place of business in Boston. The defendant is a dealer in lumber, with his place of business in Bourne. The defendant had been dealing with the plaintiff for some ten years, buying lumber of the plaintiff once in three or four months. When he bought lumber, the plaintiff sent him a bill, and he usually paid it by mailing back the bill with a check for the amount. A receipted bill was then returned to him, in which payment was usually acknowledged for the plaintiff by Harry M. Fowle, who had authority so to do, and who was the clerk who forged the plaintiff's indorsements upon the checks in suit, and converted them to his own use. Fowle entered the plaintiff's employment in January, 1889, at the age of 17 or 18, in answer to an advertisement, and was set to do office boy's work. In 1893, when 21 years old, he became the ledger clerk, and so continued until his arrest, in January, 1896. There were ten or more persons in the plaintiff's office, including its president, treasurer, and directors. Its treasurer was H. B. Shepard, and its cashier was H. S. Shepard, who took care of the money, kept the cash account, and made entries on the cash books. Fowle's duties were to receive and open letters, look over checks, statements, and settlements of accounts as they came in, and see that they were proper and in accordance with the ledger, to receipt and return to customers their paid bills, to post the ledger, and to take off trial balances. Accounts of the plaintiff's business were kept in ledgers, cash book, bill books, journals, and check books, and a trial balance which was taken by Fowle each month of the business of the last preceding month. The treasurer had his desk in the office, and at his pleasure had access to all the books, and he occasionally examined the books and the trial balances. The letters received were often opened by Fowle, and, when not opened by him, those which contained checks in payment for merchandise were placed with the bills upon his desk, for him to examine the bills and the ledger with the checks, and see if the proper settlement had been made, and to receipt the bills, and return them receipted to the customers. It was Fowle's duty after the examination to pass the checks to the cashier, and at the close of the day to give him a list of the payments; and this course of business was known to the treasurer, and was pursued with the authority and assent of the plaintiff.

The checks sued upon, with the accompanying bills, were received by mail at the office, each within a day or two after its date, and, in the usual course of business, were placed upon Fowle's desk, and intrusted to him for the usual examinations, and to be thereafter handed to the cashier as

usual. A receipted bill for the payment by each of these checks was sent to the defendant, the acknowledgment of payment being stamped upon the bill with a stamp furnished for that purpose by the plaintiff, and which Fowle had authority to use in receipting bills. The plaintiff's name, as it appears in the forged indorsements, was stamped upon the backs of the checks with a stamp which the plaintiff provided to be used in making indorsements, and which was kept with other stamps in the office in the cashier's desk. The words, "H. B. Shepard, Treas.," following the plaintiff's name in the indorsements, were written by Fowle. He also sometimes stamped the checks which were to be deposited by the plaintiff with a stamp provided by the plaintiff, and to which Fowle had access, and which stamped on them the words, "For deposit only, to the credit of the Shepard & Morse Lumber Company." After the receipt by the plaintiff of the check of January 25, 1895, and the return to the defendant of the receipted bill acknowledging payment, and before the giving of the check of July 20, 1895, the defendant bought of the plaintiff two other invoices of lumber, and paid for them in the same way, with his checks mailed to the plaintiff with the bills which had been sent out by the plaintiff; and neither of these bills contained any reference to any other unpaid bill, and he received in due course receipts acknowledging the payment of both of the intervening bills. The two bills for which the checks sued upon were given appeared by the plaintiff's ledger to have been paid, and in each instance the amount of the check was credited to the defendant in the ledger account in Fowle's handwriting, with a reference in each instance to a page which should have been a page of the cash book, but the cash book had no corresponding item. An examination of the books after the credit of the check of January 25, 1895, to the defendant's account in the ledger, would have shown that no such payment appeared upon the cash book. The trial balance made by Fowle at the end of January, 1895, was forced by him by omitting from the entry of sundries credited to merchandise on January 31st, a sum equal to the amount of the check. If this trial balance had been made up by an honest clerk, the loss of the check of January 25, 1895, would have been discovered; and in like manner, if the plaintiff's trial balance for July, 1895, had been made up by an honest clerk, the loss of the check of July 20, 1895, would have been discovered in August, 1895. Fowle had been defrauding the plaintiff for two or three years before January, 1896, by taking checks sent in by its customers in payment, falsely indorsing them as he indorsed the checks in suit, collecting them for his own benefit, and concealing these frauds by crediting the checks upon the ledger to the per-

sons who sent them in payment, deducting the amounts from the monthly credits to merchandise, and forcing the trial balances, so that, if the monthly trial balances made before January, 1895, had been made by an honest clerk, the stealings of Fowle would have been discovered before that time. During the same period he had defrauded the plaintiffs in other ways. The whole amount which he had taken from the plaintiff, by misappropriating about 100 checks of customers, was more than \$40,000. He kept a complete list of all the checks and money which he had taken. From some time in 1893 he had a deposit with the Old Colony Trust Company, and he deposited to his credit in that account the checks in suit, and also most of the other checks belonging to the plaintiff, and payable to its order, on which he forged its indorsement, and which he converted to his own use in a similar way. He also deposited to his own credit, in the same account, from time to time, other funds; and from time to time he drew checks upon the Old Colony Trust Company against this account. Through February and March and August and September, 1895, he had money to his credit on deposit in the Old Colony Trust Company, and also in January, 1896.

In December, 1895, and two or three times before that, the plaintiff's treasurer had his attention called to the fact that Fowle was spending more than his salary; and, in consequence, the treasurer, in December, 1895, looked over the journal and the ledger to some extent, but he made no other examination of the books, and had no one else make any examination. On January 27, 1896, the plaintiff's treasurer was told by one of the plaintiff's clerks that Fowle had deposited to his own credit in the Old Colony Trust Company checks payable to the plaintiff's order. The treasurer thereupon ascertained from the trust company that Fowle had deposited with it such checks, and requested the trust company to have the banks upon which the checks were drawn return to them, so that he could see the indorsements. He then consulted an attorney. Fowle owed the plaintiff a bill for lumber; and on January 28, 1896, the plaintiff, through its treasurer, took from Fowle a check for \$193.20, upon the Old Colony Trust Company, in payment of the lumber bill, which was for lumber used in building a house of Fowle, in Clifton. This check was paid by the trust company on January 29, 1896. On that day, Fowle was arrested at the instance of the plaintiff; and upon that day he gave to the plaintiff's treasurer a complete list of all the plaintiff's checks which he had misappropriated by forgery, including the checks now in suit. On the same day, the plaintiff brought suit against Fowle in an action of tort or contract, in which the damages were laid at \$10,000; and, on the writ, real estate belonging to Fowle was attached. The

declaration was for money obtained by false pretenses, or wrongfully taken or embezzled, but did not include the checks now in suit. A judgment for the plaintiff had been entered in the suit, upon which execution has issued. Before Fowle's arrest, and after the plaintiff's treasurer knew that checks payable to the plaintiff's order had been deposited by Fowle to his own credit in the Old Colony Trust Company, another check drawn for \$140 by Fowle upon that company was, on January 29, 1896, with the consent of the plaintiff, paid by the Old Colony Trust Company, and charged against Fowle's deposit. On the same day, after obtaining from Fowle the full list of misappropriated checks, including the checks in suit, the plaintiff sent one Gray to the defendant to obtain the checks in suit. Gray got them and brought them to the plaintiff's treasurer, on January 30th or 31st. To obtain the checks, Gray told the defendant that the plaintiff wanted the two checks to see whether the indorsements were forgeries. The defendant, after finding the checks among the vouchers returned from his bank, said he did not think they were forgeries, that the signatures looked like Mr. Shepard's; and the defendant got out some letters with Mr. Shepard's signature, and compared them, and thought the indorsements were not forgeries, and so stated. Gray asked to have the checks, telling the defendant that the purpose for which he wanted them was for a prosecution for forgery, and that, if they turned out to be forged, no harm should come to the defendant in letting them go out of his possession. On the faith of these assurances, and on the further statement of Gray that the checks should be returned to the defendant when the prosecution for forgery should be finished, and on the faith of a written receipt, the defendant allowed Gray to take the checks. The receipt was of the following tenor: "Bourne, Mass., Jan. 30, 1896. Received of A. R. Eldridge paid checks, no number, dated Jan. 25th and July 20, 1895, amounting to 448.24 and 561.97, respectively. To be returned when the case is finished. Shepard & Morse L. Co., per Geo. F. Gray." When the plaintiff's treasurer, on January 30th or 31st, got these checks from Gray, he immediately saw that the indorsements of his signature thereon were forgeries; and he immediately gave notice to all the indorsers except Fowle that those indorsements were forgeries, but he gave no notice at that time to the National Bank of Wareham, and he gave no notice to the defendant until February 10, 1896, when he sent a letter of the following tenor: "Boston, February 10, 1896. Mr. A. R. Eldridge, Bourne, Mass.—Dear Sir: The Shepard & Morse Lumber Company desires to acknowledge the receipt from your concern of the following checks, drawn by you on the National Bank of Wareham, Mass., payable to the order of the Shepard & Morse Lumber Company, and

all bearing forged indorsements, 'Shepard & Morse Lumber Co., H. B. Shepard, Treas.': Date Jan. 25, 1895, amount \$446.24; date July 20, 1895, amount \$561.97. Shepard & Morse Lumber Co., by H. B. Shepard, Treas." The first notice of the forgeries which is shown to have been given to the Wareham National Bank is that which was contained in the plaintiff's indorsements upon the allonges, stating that the checks were for the first time indorsed by the Shepard & Morse Lumber Company by those indorsements, dated February 12, 1896, and that no prior indorsements were recognized, which allonges annexed to the checks were presented to the Wareham Bank on February 14, 1896, when payment of the checks was demanded and refused. Besides his pay from the plaintiff, which was \$20 a week, and his deposit in the Old Colony Trust Company, Fowle had other property. Soon after he became the ledger clerk, he told the plaintiff's treasurer that he had inherited considerable property from his father, who had been a partner in Fowle, Torrey & Co., carpet dealers in Boston, and that he was not obliged to work. In December, 1895, the treasurer, after hearing that Fowle was spending more than his salary, inquired of a gentleman who might be supposed to know how much Fowle had inherited from his father. The reply was that Fowle did inherit, but that the gentleman did not know how much; that he judged from his style of living that he had inherited considerable property, but did not know or have means of knowing how much; and the treasurer made no further inquiry. On February 10, 1896, Fowle was absolutely insolvent, and has been so ever since.

The evidence offered by the defendant to prove many of the facts above recited was excluded at the trial, and, at the close of the evidence, so much of it as had been admitted *de bene*, and tended to prove lavish expenditure on the part of Fowle, and to show the extent of the plaintiff's losses by Fowle's depredations, was stricken out. The defendant's requests for rulings, however, were framed as if all the evidence were in; and, in refusing them, the judge made two special findings of fact, which were, in substance, that the defendant's position had not been changed to his prejudice after the misappropriation of the checks by Fowle, and that Fowle was not permitted by the plaintiff's negligence to obtain payment of either check. The requests for rulings were, in substance, that the plaintiff could not maintain the action; that the plaintiff's neglect, after the discovery of the forgery of the indorsements, to give notice of the same to the defendant until February 10th, was an unreasonable delay, which of itself discharged the defendant; that it was an unreasonable delay, which discharged the defendant if his position had in the meantime been changed to his prejudice; that the assurances given by the plain-

tiff through Gray, on January 30, 1896, to induce the defendant to give up the checks then in his possession, and the receipt then given by Gray, are an adoption and ratification of the indorsements and of the payment of the checks thereon, so that the defendant cannot be held liable on the checks; also, that those assurances and the receipt estop the plaintiff from maintaining the action if the defendant's position was changed to his prejudice by giving up the checks; and that his position was so changed. There were also requests with reference to the trial balances for February and July, 1896, to the effect that if the examination of the books for making up the trial balances would have disclosed to an honest clerk the loss of the checks, and brought to the plaintiff's knowledge facts which, by the exercise of due care and diligence, would have disclosed the forgeries, the plaintiff cannot escape the knowledge to be thereby imputed to it, because the examinations and trial balances were made by Fowle; that the plaintiff must be deemed to have had knowledge of the first forgery in February, 1895, and of the second in August, 1895, and cannot recover, because it did not give notice of the forgeries to the defendant at those times, and because of unreasonable delay after those dates in giving notice to the defendant, and because of the delay since those dates, if the defendant's position has been changed to his prejudice. There were also requests to the effect that if Fowle was permitted, by the negligence of the plaintiff, to get possession of the checks, and to obtain payment on them, the plaintiff could not recover, and that if, in the month after each check was given, the plaintiff had means of knowledge that the check had been taken from it, and collected by Fowle, and remained ignorant of those facts by reason of its want of ordinary care, the plaintiff could not recover on the check, and that in those circumstances it could not recover on the check if in the meantime the defendant's position had been altered to his prejudice. There was also a request to the effect that if the plaintiff knew that the defendant was its regular customer, and that he had been buying lumber of it for years, paying for it with his checks sent to the plaintiff by mail, and that Fowle, on the receipt of such checks, was in the habit of receipting the bills, and returning them to the defendant as paid, and that he was authorized so to do; and if the plaintiff knew or had reason to believe that the defendant relied upon the return of the receipts as evidence that his checks had been duly received by the plaintiff, and had been duly honored, and had been collected by it,—it was the plaintiff's duty to take reasonable care of such checks, and to use ordinary care in availing itself of the means of information in its possession to ascertain whether such checks were duly collected for its account, and it

was bound to the defendant to know at any time when, by the use of ordinary care, it had the means of knowledge in its possession, that it had lost, without receiving payment, any check so received from the defendant, and at once to inform the defendant thereof, and that a failure so to inform itself and to notify the defendant would discharge him. There were further requests, to the effect that the plaintiff's action in asking for and taking from Fowle the check given by him to the plaintiff on February 28, 1896, after the plaintiff knew that Fowle had deposited to his own credit checks payable to the plaintiff, was a ratification by it of Fowle's appropriation to his own use of the checks, and that the plaintiff's action in requesting the Old Colony Trust Company to pay checks of Fowle's after the plaintiff had such knowledge was such a ratification.

One question for decision is whether the plaintiff can recover if, by its own negligence in the conduct of its business, Fowle was in its employ, and intrusted with the possession of the checks, when ordinary care would have shown the plaintiff that Fowle was dishonest, and had already stolen from it, and collected, by forging the plaintiff's indorsement, many checks previously sent to it by its customers. The finding of fact that Fowle was not permitted by the negligence of the plaintiff to obtain payment of either check does not render this question immaterial, because, if the plaintiff's negligence in this regard was a material consideration, much evidence relevant to it was stricken out or excluded, and the finding made without considering that evidence has no weight. It is apparent that the judge below considered such negligence on the part of the plaintiff wholly immaterial. If it was so, the exclusion of evidence tending to establish it did the defendant no harm; but the finding of fact must be laid one side, and, notwithstanding that finding, we must inquire whether the plaintiff's negligence, if it could be found from the evidence offered, was a defense.

The doctrine of contributory negligence as a defense to actions of tort is now of most frequent application; but we have been referred to no instance in which it has been held applicable to actions upon commercial paper, or even when the holder of such paper sues in tort for its conversion one who has innocently taken it upon a forged indorsement. Nothing could more completely unsettle commercial dealings than to extend that doctrine to suits brought by holders of negotiable paper against other parties thereto. If any change is to be made in the law, looking to the discouragement of negligence on the part of holders of such paper, and to the protection of parties who may be defrauded by the forgery of indorsements, it should be made by the legislature, as in the case of the English statutes as to indorsements of checks and bills upon bankers. See St. 16 & 17 Vict.

c. 59, § 19; 45 & 46 Vict. c. 61, § 60. We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly, without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so; and he is under no legal obligation either to the drawer of the check or to the public to see to it that the check is not put in circulation with a forged indorsement. *Combs v. Scott*, 12 Allen, 493, 497; *Belknap v. Bank*, 100 Mass. 376; *Bank v. Stowell*, 123 Mass. 196; *Mackintosh v. Bank*, Id. 393, 395; *Bank v. Gorham*, 169 Mass. 519, 521. 48 N. E. 341; *Cotton Co. v. Wilson*, 49 Law J. 713; *Societe Generale v. Metropolitan Bank*, 27 Law T. (N. S.) 849, 858; *Scholfield v. Londesborough* [1896] App. Cas. 514; *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. Cas. 389; *Ogden v. Benas*, L. R. 9 C. P. 513; *Fine Art Society v. Union Bank of London*, 17 Q. B. Div. 705; *Swan v. Australasian Co.*, 2 Hurl. & C. 175, 189; *Arnold v. Bank*, 1 C. P. Div. 578, 586, 588.

Such a holder of a negotiable check is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. If the check is stolen from him, and put in circulation, by means of the forgery of his indorsement, he is not answerable, as is one who intrusts to another his signature or indorsement in blank, with authority to use it in making or giving currency to negotiable paper. The doctrine of *Putnam v. Sullivan*, 4 Mass. 45, and of *Young v. Grote*, 4 Bing. 253, does not apply, and it cannot properly be extended to the case of a completed check already in circulation, and intrusted by the holder to a clerk for purposes which neither give nor imply any authority to pass it on to another holder, nor give the clerk any power to do so without the commission of a crime.

It is not necessary now to determine whether the debts for which the checks were given were extinguished. If the checks were taken by the plaintiff in absolute extinguishment of the debts, that circumstance could not relieve the drawer from his legal obligations as drawer. While the drawer has done his duty, and it is through no fault of his that the payee does not get his money if the check is stolen from him and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should re-

main upon the payee, rather than the drawer. The check was received in payment, and the debt extinguished only in consideration of the drawer's obligation as drawer, and of the payee's rights as holder, which included the right of recourse to the drawer if, upon proper indorsement and due demand, the check should not be paid by the drawee. Although there are intimations in support of the theory that cases like the present are instances in which, as to two innocent parties, losses are to be left where they fall, we think the rights of the present parties must be worked out by considering the usual rights of the drawer and drawee of a check given in a commercial transaction. See *Thompson v. Bank*, 82 N. Y. 8; *Morse, Banks*, § 395.

The fact that the defendant had been in the habit of buying goods of the plaintiff for 10 years, and of making payment by checks, imposed no liability upon the plaintiff as to the methods in which its own business should be conducted, or as to what clerks it should employ. So far as these checks are concerned, its obligations to the defendant were merely those defined by the law of negotiable paper, and did not include the duty of taking care that the checks should not be stolen or its indorsement forged.

Nor do we think that the plaintiff is to be charged with the knowledge that the checks had been stolen or embezzled and collected upon its forged indorsements, either because Fowle, its clerk, had that knowledge, or because the means of knowledge existed in the plaintiff's books of account, so that the plaintiff would have made the discovery if its monthly trial balances had been made by an honest clerk. The loss of the checks to the plaintiff was not in fact known to it until Fowle's arrest, on January 29, 1896, and, as to all other parties to the checks, they were never lost checks. One was paid in four days, and the other in nine days, after its date; and they were thenceforth in the custody of the drawee or drawer. Assuming that the owner of a check which he knows to be lost is under a duty to give to the public and to the parties to the check immediate notice of the loss, we see no reason for holding that one who has become the holder of a check is under a duty to give notice to the drawer and the drawee or to the public as of a lost check if the check is in fact stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly but honestly assumes that it has been collected in the regular course of his business. Unless the plaintiff was under a duty to give notice as of a lost check, there was no duty to any one connected with the checks which required the plaintiff to examine its books of account, or to make trial balances, or to discover by any means what had become of the checks. Assuming that, if such a duty towards other parties had rested upon the plaintiff, it would be chargeable

with the knowledge which Fowle had, or which would have been acquired by the making of the trial balances by an honest clerk, or by an examination of the plaintiff's books by its officers, as the depositor was chargeable with the knowledge of his dishonest clerk to whom he intrusted the examination of returned checks in *Dana v. Bank*, 132 Mass. 156, since no such duty to others rested upon the plaintiff, it is not to be charged with knowledge which it did not in fact have. Fowle was himself defrauding the plaintiff in forging the plaintiff's indorsement and collecting the checks for his own use, and therefore his own knowledge of the fraud acquired in its perpetration is not to be imputed to the plaintiff. *Bank v. Clark*, 166 Mass. 27, 43 N. E. 912, and cases cited. Nor is this contended. And, as the examinations of the books in making the trial balances were not made in the performance of a duty owed by the plaintiff to any other party, the knowledge of the agent who made those examinations is not to be imputed to the plaintiff, nor is it to be charged with the information which its means of knowledge disclosed, it not being willfully ignorant, nor having purposely neglected to use the means of knowledge within its power. *Combs v. Scott*, 12 Allen, 493, 497.

As the plaintiff cannot properly be charged with imputed knowledge that Fowle was indorsing with its name these checks or any of the other checks which he stole or embezzled and collected by forging its indorsement, we find nothing in what occurred until the plaintiff obtained actual knowledge of the frauds to work an actual or implied adoption or ratification of Fowle's acts in indorsing the checks with the plaintiff's name, or in collecting them. The want of actual knowledge is fatal. *Combs v. Scott*, 12 Allen, 493; *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634; *Dole Bros. Co. v. Cosmopolitan Preserving Co.*, 167 Mass. 481, 46 N. E. 105. The receipting of subsequent bills by the plaintiff without informing the defendant that the debts for which these checks were given had not been extinguished was not an act intended or designed to convey to the defendant any representation as to what had become of the checks in suit, and could not justify the defendant in his inference that the checks had been collected by the plaintiff, so as to estop the plaintiff from showing the truth. The receipting of subsequent bills without mention of the previous checks was not done with the intent to mislead the defendant, nor with any expectation or reason to believe that the defendant would, in consequence of it, do or omit to do anything with reference to the checks now in suit. *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 96; *Bank v. Rogers*, 167 Mass. 315, 321, 45 N. E. 923.

The remaining question is whether what occurred after the actual discovery of the frauds requires us to sustain the defendant's

exceptions. It is not necessary to consider whether the payee of a check which has been stolen from him, put in circulation by forgery, and paid by the drawee, upon ascertaining those facts should give notice to the maker, and to those who have taken the check as rightfully in circulation, of such facts within the payee's knowledge as are material to the rights and obligations of such persons growing out of their transactions with the check. A majority of the court is of the opinion that a payee who, under such circumstances, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is thereby estopped from maintaining an action against the drawer upon the check, and that for this reason the exceptions should be sustained and the finding for the plaintiff be set aside. It is true that it was found specially that the defendant's position had not been changed to his prejudice; but this finding must be disregarded, because evidence relevant and material to the question was offered by the defendant, and wrongfully excluded, even if the finding was correct upon the evidence admitted, which we do not decide. The evidence offered and excluded to show upon what footing and by what representations and assurances the plaintiff, through Gray, got the checks from the defendant, was material upon the questions whether the plaintiff was estopped, by its own acts done after its discovery of the forgeries, from collecting the checks, of the defendant, and whether the plaintiff had adopted as to him the forged indorsements. So, also, the evidence of the plaintiff's acts between its discovery of Fowle's frauds and its demand of the checks from the drawee on February 14th, was material in determining whether the defendant had been prejudiced in his rights to recover against the drawee. To say nothing of the plaintiff's omission to notify the defendant of its own purpose to treat the checks as unpaid checks, and to collect them of the defendant, the plaintiff's act in getting the checks from the defendant on January 29th as paid checks was intended by the plaintiff to change the defendant's position, and did change it, by depriving him of the possession of the checks. They had come to the defendant's hands honestly, and as vouchers for charges made against him by the drawee. Even if they had been demanded of him by the plaintiff as its property, the defendant could honestly refuse to give them up, and could honestly at once return them to the drawee, with notice of the facts, and thus save himself from loss by perfecting his right to recover from the drawee the amount of the unauthorized payments which the drawee had charged against him in account. See *Bank v. Smith*, 169 Mass. 281, 47 N. E. 1009. The enforcement of the defendant's rights

against the drawee was not so plain and easy for him without as with the possession of the checks, and the loss of possession itself might have been found a change in his position to his prejudice. Besides this, the plaintiff's act in getting the checks from the defendant as paid checks, without notifying him that the plaintiff claimed them as its own property, and intended to collect them, while at the same time giving the defendant information that the plaintiff's indorsements were forged, would naturally induce the defendant to omit to give information of the forgery to the drawee; and it does not appear that any information was given to the drawee until the checks were demanded again of it, on February 14th. The fact that the drawee has always been solvent, and remains solvent, is not the only factor in determining whether the defendant has lost his right against the drawee. See *Dana v. Bank*, 132 Mass. 156; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. 3. Without discussing that question, we think the evidence as to what was done by the plaintiff after it knew of the forgeries should have been admitted, and that if it appeared that the plaintiff got the checks from the defendant as paid checks, to be returned to him, and did not properly notify the defendant that the plaintiff claimed the checks as unpaid and as its own property, and that it intended to assert that ownership and collect the checks, a finding for the defendant would be warranted. Exceptions sustained.

(171 Mass. 534)

WINSLOW et al. v. EVERETT NAT. BANK.
(Supreme Judicial Court of Massachusetts.
Suffolk. June 29, 1898.)

BANKS—PAYMENTS ON FORGED CHECKS—LIABILITY OF DRAWER.

1. A payment by a bank to the holder of a check on which the name of the payee or indorsee is forged makes the bank liable to the depositor as if the pretended payment had not been made, since nothing but actual payment, accord and satisfaction, or a release under seal, is an answer to the depositor's demand.

2. It is immaterial, in so far as the liability of the bank to the depositor for the amount of such check is concerned, whether or not its delivery to the payee was for the purpose of payment.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by George S. Winslow and others against the Everett National Bank. There was a judgment for plaintiffs, and defendant excepts. Exceptions overruled.

W. C. Loring and Clapp & Glover, for plaintiffs. Lincoln & Badger and W. M. Noble, for defendant.

HOLMES, J. This is an action in the name of a depositor in the defendant bank to recover a sum deposited with it, with a count for refusing to honor a check for the same

amount. The check was given by the plaintiff to the Shepard & Morse Lumber Company, and was abstracted by Fowle, and used in the way explained in the previous case. *Lumber Co. v. Eldridge*, 51 N. E. 9. The defendant paid a holder under an indorsement forged by Fowle, and refused to pay the holder under a true indorsement made at a later time, after the forgery had been discovered. This action is brought by the lumber company, in the name of the plaintiff, by virtue of an assignment from the latter. The defendant sets up as defenses the alleged negligence of the lumber company in giving Fowle a chance to commit his fraud, and that the nominal plaintiff's debt to the lumber company has been satisfied, either by the check or by the subsequent assignment, and, therefore, that the nominal plaintiff has suffered only nominal damages.

The defense based on the carelessness of the lumber company is disposed of in the last case, and it is unnecessary, therefore to ask how, if a contract is good as to the contractor, or a debt is due to a creditor, it can be invalidated by being assigned.

The other defense is *res inter alios*. The bank becomes the plaintiff's debtor for the money had and received. Nothing but payment, accord and satisfaction, or a release under seal, is an answer to the plaintiff's demand. *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 34, 9 Sup. Ct. 3. It is no concern of the bank whether the plaintiff owes the lumber company or not. But, further, the plaintiff's debt is not paid if the check is not paid, as it has not been; or, at most, the plaintiff's liability is only changed to a liability on the check,—a change which would be a curious reason for holding the bank exonerated from paying the check.

Whether a depositor whose check has been paid upon a forged indorsement, and returned to and held by him as a voucher in the account between himself and his bank, and who again puts the check in circulation by redelivering it to the payee, whose indorsement has been forged, can maintain an action against the bank for refusing to honor the check upon its second presentation, without notifying the bank, before such second presentation, that its payment of the check was unauthorized, and that he has again put the check in circulation, was not raised at the trial, and was not argued in this court; and upon that question we express no opinion.

Exceptions overruled.

(171 Mass. 492)

McDONALD v. SARGENT et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 24, 1898.)

CONTRACT OF INFANT—EVIDENCE—PLEADING.

1. A written agreement by a minor to work as an apprentice for a stated compensation, and

under which he continued to serve after attaining majority, though it be insufficient as an indenture of apprenticeship, because not executed in compliance with Pub. St. c. 149, relating to apprentices, is competent evidence, in connection with his acceptance of wages thereunder, and other acts, as tending to show a ratification and affirmance of the contract.

2. Pub. St. c. 167, § 22, providing that written instruments relied on in an answer shall be set out, or a copy attached, does not require that an answer by way of general denial and pleading payment to an action on a quantum meruit for services rendered by an infant shall set out a written contract, fixing their value, and ratified after he became of age, where such contract is relied on merely in proof of the allegation of payment.

Exceptions from superior court, Middlesex county; Edgar J. Sherman, Judge.

Action by one McDonald against one Sargent and others. There was a verdict for defendants, and plaintiff took exceptions. Exceptions overruled.

Frederick A. Fisher, for plaintiff. Jerome F. Manning, for defendants.

LATHROP, J. The plaintiff sues upon a quantum meruit to recover for his services from March 25, 1891, to June 13, 1893. On April 27, 1891, after the plaintiff had worked for the defendants about a month, he entered into a written agreement with them by which he agreed to work for the defendants for three years as an apprentice, for the purpose of learning the trade of a machinist. The amount to be paid was 75 cents a day for the first year, 85 cents a day for the second year, and 95 cents a day for the third year. At this time the plaintiff was a minor, not becoming of age until February 1, 1892. He continued to work for the defendants until June 13, 1893, receiving the amount agreed upon monthly, without objection. Then he left the defendants' employ, without notice. The jury found specially that the plaintiff, after he became of age, ratified and confirmed the written agreement, and that he was paid all that his services were reasonably and fairly worth, both during his minority and afterwards; and returned a general verdict for the defendants.

The principal question is whether the written agreement was admissible in evidence. Most of the objections made to it are that it did not comply with the provisions of Pub. St. c. 149, relating to the binding of apprentices, but it was not put in for this purpose, and the judge ruled that, as it was not in accordance with the statute, it did not bind the plaintiff, and that it could not affect the plaintiff's right to recover, unless the jury found that after the plaintiff became of age he ratified and confirmed it; that whether he ratified and confirmed it was a question of fact; and that the jury might consider his acts, after he became of age, in receiving the money, and all his other acts, as bearing upon that question. These rulings, we are of opinion, were correct. A written agreement made by a minor is not void, but void-

able only, and may be ratified after he becomes of age. *Boyden v. Boyden*, 9 Metc. 519; *Keegan v. Cox*, 116 Mass. 289. It was therefore, competent for the defendants to show, aside from the question of pleading, what the agreement was which had been ratified. As to the question of pleading, the answer contained a general denial, and alleged payment. The plaintiff contends that, as the agreement was not set forth in the answer (see Pub. St. c. 167, § 22), it was not admissible. A similar contention was made in *Warren v. Ferdinand*, 9 Allen, 357, where the plaintiff brought an action for use and occupation, and it was held that the defendant, under an answer containing a general denial only, might show that he held under a written lease, on the ground that the direct use of the evidence was to sustain the defendant's denial of the plaintiff's allegations, and not to set up a substantive fact in the nature of confession and avoidance. See, also, *Rodman v. Guilford*, 112 Mass. 405; *Philpps v. Mahon*, 141 Mass. 471, 473, 5 N. E. 835. We see no error in the admission of the agreement. Exceptions overruled.

(171 Mass. 481)

JOHNSON v. FIELD-THURBER CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 24, 1898.)

MASTER AND SERVANT — NEGLIGENCE — PROVINCE OF JURY.

1. In going through a dark passage in defendant's factory, an employé fell through an open trapdoor in the floor, and was injured. He had used this passage every day for four weeks, but testified he did not know of the trapdoor. When injured he was walking quickly, and without looking to see what was on the floor, or whether there were any obstructions. *Held*, that the question of his exercise of due care and of defendant's negligence was for the jury.

2. An employé in defendant's factory was injured by falling into the cellar through an unguarded trapdoor, left open by a fellow servant, who had opened it in the course of his employment. The door was used about three times a week, and left open from five to ten minutes at a time. It did not appear that defendant furnished any guards to protect the door while open. *Held*, that the question whether the injury was caused through the negligence of a fellow servant was for the jury.

Exceptions from superior court, Middlesex county; Albert Mason, Judge.

Action by one Johnson against the Field-Thurber Company. Verdict for defendant, and plaintiff brings exceptions. Sustained.

S. K. Hamilton and Moses S. Case, for plaintiff. John Lowell, for defendant.

LATHROP, J. The plaintiff was injured by falling through an open trapdoor in a passageway in the defendant's shoe factory. The negligence of the defendant alleged is in not informing the plaintiff of the existence of the trapdoor. There was evidence tending to show the following facts: The plaintiff was in the defendant's employ, and had charge of a

machine. On the morning of the accident he went to the defendant's factory, as usual, 15 minutes before the hour of beginning work, adjusted the belts of the machine, and started to oil it, but, finding his oil cup empty, took it in his hands, and started for the engine room to fill it. It did not appear that there was any supply of oil other than that kept in the engine room. To reach this room it was necessary for the plaintiff to go down a flight of stairs to the first floor of the factory, turn to the right, and pass through the main entrance and a passageway to the engine room door. Seven feet from the entrance to the passageway, and four feet from the door of the engine room, was a trapdoor in the floor of the passageway, four feet square. Below was the cellar. The plaintiff had been in the defendant's employ about four weeks, and had occasion every day to use the passageway. He testified that he did not know of the existence of the trapdoor before the accident. The plaintiff also testified that he went at a quick walk, and did not look to the right or left, or look to see what was on the floor, or whether there was any leather or obstructions of any kind in the passageway. The trapdoor was in a dark place, and the morning was dark. At the time the plaintiff was using the passageway the trapdoor was open, another employé of the defendant being in the cellar getting out some stock. The plaintiff fell through the opening, and was injured. There was also evidence that the power in the factory started at 7 o'clock, and that each employé was ordered to be at his machine, prepared to run it, when the power started.

We are of opinion that, while there was evidence in the case to contradict some of the evidence for the plaintiff, there was evidence on which the jury might have found that the plaintiff was in the exercise of due care, and that the defendant was negligent. The case resembles closely that of *Hogarth v. Manufacturing Co.*, 167 Mass. 225, 45 N. E. 629, and differs from that of *Young v. Miller*, 167 Mass. 224, 45 N. E. 628.

The defendant contends that the plaintiff, because he had worked in shoe factories for 30 years, ought to have known that there was a cellar beneath, and a trapdoor leading thereto somewhere in the basement. But there was no evidence either that such factories usually had basements, or that, if they had, it was customary to put the trapdoor in a dark passageway.

The defendant further contends that the leaving of the trapdoor open was the negligent unauthorized act of a fellow servant. Whether the act was unauthorized depended upon whether the jury believed a witness for the defendant, and the jury were not bound to believe him. A foreman of the defendant testified that the trapdoor was used on an average about three times a week, and from five to ten minutes at a time. The jury might, therefore, find that it was expected to be used.

As to the negligence of a fellow servant, it

cannot be said, as matter of law, that the servant was negligent in leaving the trapdoor open unguarded, if no guards were furnished by the defendant, and it does not appear that any were furnished.

Nor can it be said, on the evidence, that the plaintiff went where he had no business to go at that time in the morning. We have already recited the evidence on this point, and need not repeat it. Exceptions sustained.

(171 Mass. 481)

COMMONWEALTH MUT. FIRE INS. CO. v. WOOD.

(Supreme Judicial Court of Massachusetts. Suffolk. June 24, 1898.)

MUTUAL FIRE INSURANCE—ASSESSMENTS—NOTICE—AMOUNT—LIABILITY OF MEMBERS.

1. Under St. 1894, c. 522, § 49, providing that the auditor shall appoint a time and place to hear all parties interested in an assessment by a mutual fire insurance company, and shall give personal notice, so far as he is able, to all persons liable on the assessment, the action of the company in making an assessment is not void as against one to whom such notice was mailed, but who did not receive it.

2. Under St. 1894, c. 522, § 49, providing that the decree of the supreme judicial court confirming an assessment of a mutual fire insurance company shall be conclusive on all parties liable to the assessment, as to the amount thereof, a member cannot complain that the amount of an assessment so confirmed was larger than necessary.

3. The fact that a mutual fire insurance company was not licensed to do business in some of the states where losses occurred does not affect the liability of a member for an assessment.

Appeal from superior court, Suffolk county.

Action by the Commonwealth Mutual Fire Insurance Company against Cyrus G. Wood. There was a judgment for plaintiff, and defendant appeals. Affirmed.

B. W. Potter and C. M. Thayer, for appellant. W. R. Stevens, for appellee.

LATHROP, J. The defendant contends that he is not liable to pay the assessment levied upon him, for the reason that he did not receive notice of the hearing before the auditor. St. 1894, c. 522, § 49, provides that the auditor "shall appoint a time and place to hear all parties interested, and shall give personal notice thereof in writing to the insurance commissioner, and through the post-office, so far as he is able, to all persons liable upon said assessment or call." The auditor sent a notice, by mail, addressed to the defendant at the town where the property was situated; but he did not receive it, as he resided elsewhere. We are of opinion that the fact that the defendant did not receive notice affords him no ground of defense. The decrees of this court ordering and confirming the assessment were after due publication of notice, and this was sufficient notice to him; and the decree ratifying and establishing the assessment was, by

the terms of the statute, "final and conclusive upon the company and all parties liable to the assessment or call, as to the necessity of the same, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith." St. 1894, c. 522, § 49; Insurance Co. v. Parker, 11 Allen, 574.

The next contention of the defendant is that the amount of the entire assessment was larger than was necessary. But the decree of the court is, as we have just seen, conclusive on this point.

Finally, it is urged that the insurance company was not licensed to do business by some of the states in which it incurred losses. But the business of the company was conducted in this state, and the contracts were valid here. The policy holders became members of the company, and are liable to pay the assessment, whether it can be collected of them or not. Judgment affirmed.

(171 Mass. 613)

BELCHER v. SHEEHAN.

(Supreme Judicial Court of Massachusetts. Suffolk. June 25, 1898.)

ACTION ON JUDGMENT—IMPEACHMENT—LIABILITY OF CONSTABLES—VOID EXECUTIONS.

1. A domestic judgment is void, and can be impeached by plea and proof, where, at the time the suit was brought in which it was recovered, defendant was a nonresident of the state, and had no actual or constructive notice of its commencement or pendency.

2. A constable, when sued for failure to make an arrest on an execution, may show that the judgment and execution were in fact void, though the execution appeared regular and valid on its face.

Exceptions from superior court, Suffolk county; Henry N. Sheldon, Judge.

Action of tort by one Belcher against one Sheehan, as constable, for failure to arrest on an execution. There was a verdict for plaintiff, and defendant excepts. Exceptions sustained.

Charles E. Allen, for plaintiff. J. L. Powers and C. W. Cushing, for defendant.

FIELD, C. J. As Curtis, when the plaintiff brought the action against him, was a resident of the state of New York, and had no place of business, or last and usual place of abode, in this commonwealth, and was not served with process, and did not appear in the action, and as no attachment was made upon his property within the commonwealth, the judgment rendered against him is void; and Curtis, if sued on the judgment, could avoid it by plea and proof. *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; *Rand v. Hanson*, 154 Mass. 87, 23 N. E. 6; *Kimball v. Sweet*, 168 Mass. 105, 46 N. E. 400. As Curtis was described in the writ as "of Everett, in the county of Middlesex, having his usual place of business in said Boston," it may be that the execution de-

livered to the defendant appeared to be regular and valid on its face. A copy of the execution is not before us. The extent to which an officer is protected in the service of process which is regular and valid on its face has been recently considered in this court, in *Tellefsen v. Fee*, 168 Mass. 188, 48 N. E. 562. It is unnecessary to determine whether, if the defendant had arrested Curtis on the execution, the process would have protected him. The defendant neglected to arrest him, and in an action to recover damages for such neglect it is open to the defendant to prove that the judgment and execution were in fact absolutely void. *Albee v. Ward*, 8 Mass. 79, 86; *Hitchcock v. Baker*, 2 Allen, 431; 1 Freem. Ex'ns (2d Ed.) § 103. Exceptions sustained.

(171 Mass. 548)

DAVIS v. FORBES.

(Supreme Judicial Court of Massachusetts.
Suffolk. July 14, 1898.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES— MEDICAL ATTENDANCE.

1. An employer is not responsible for injuries to an employé resulting from the use of a defective stirrup strap furnished the employé, where the foreman tested it in the presence of the employé, and the employé was satisfied, after the test, that the strap was strong enough.

2. Where an employé is injured by using a defective stirrup strap, his employer is under no legal obligation to furnish him medical attendance, even where he is liable for the injury.

Knowlton, J., dissenting.

Exceptions from superior court, Suffolk county; Francis A. Gaskill, Judge.

Action by Alexander Davis against William H. Forbes to recover for injuries received while in the employ of defendant by the breaking of a stirrup strap used on a saddle furnished by defendant to plaintiff to ride a running horse in the course of his employment. A verdict was directed for defendant, and plaintiff excepts. Affirmed.

P. J. Doherty and E. W. Hamlen, for plaintiff. John Lowell and R. E. Forbes, for defendant.

MORTON, J. It is difficult to understand why it was a great deal safer, as the plaintiff testified that it was, to put the buckle in the hole where the strap broke than it was to put it in the hole next to it. But, assuming that it was as the plaintiff said, we think that the plaintiff took the risk of using the strap as he did in the condition in which it was. It does not appear what his age was, except that he was a minor. But he had been riding colts for two years before the accident, and, though a boy, it is fair to assume that he had become experienced in matters pertaining to saddles and riding tackle. According to his testimony, he noticed a bad place in the strap, and told Mr. Abbott that it did not look right. Then, as he testified, "Mr. Abbott took it out of his

hand, got hold of it, and pulled it; that he then put it on the floor, and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff till he got a new one." The plaintiff further testified "that he believed the straps were strong enough after Mr. Abbott tested them and told him they were strong enough." There seems to have been what amounted to a common examination of the straps by the plaintiff and Abbott, and, though the plaintiff relied to some extent, as was natural, on Abbott's judgment, he appears to have been satisfied himself, from the test that was made in his presence, that the strap was suitable for use, as he proposed to use it, in the condition in which it was. No complaint was made that the test was not a reasonable one, and not such as the plaintiff's practical experience commended. There is nothing to show that Abbott's declaration "that it had got to hold the plaintiff until he got a new one," and "Here is a pair of old stirrup straps hanging in the case that you will have to use," coerced the plaintiff into using a strap which he did not think fit, or led him to assume a risk which he would not otherwise have taken. On the contrary, he testified, as already observed, "that he believed the straps were strong enough after Mr. Abbott tested them and told him they were strong enough," and evidently used them relying on what his own senses had told him concerning the test to which they were subjected, corroborated as it was by Abbott's statement that they were strong enough. See *Williams v. Churchill*, 137 Mass. 243. The fact that the strap afterwards broke under a strain to which it was subjected, has, of course, no tendency to show that the plaintiff was coerced into using it, or did not assume the risk.

The defendant was under no legal obligation to furnish the plaintiff with medical attendance, even if he had been liable for the injury, and the ruling that the plaintiff could not recover under the second count was, therefore, correct. The case of a seaman injured on shipboard is different.

In the view which we have taken of the case it is unnecessary to consider whether there was any evidence of negligence on the part of the defendant. Exceptions overruled.

KNOWLTON, J. (dissenting). Because I consider the decision in this case wrong, as an invasion of the province of the jury, and because the opinion seems to me misleading in regard to the principles applicable to cases of this kind, I feel constrained to express my dissent. The fundamental questions upon which the rights of the parties depend in actions for negligence are whether the defendant was negligent, and whether the plaintiff was in the exercise of due care. In my opinion, the question whether the plaintiff assumed the risk is only important as it

bears upon one of these two questions. It does not affect the fundamental propositions on which the law of negligence rests. In its nature it is rather a collateral inquiry, the answer to which often easily decides the case in accordance with these fundamental propositions, without the necessity of considering either of them by itself. I do not remember ever having read or heard any exposition or argument to show that the doctrine of the assumption of the risk by a plaintiff has changed the rule of law that one who is himself without fault, and in the exercise of due care, and who suffers from the negligence of another, may recover the amount of his damages. The maxim, "*Volenti non fit injuria*," is applicable to actions for negligence, as it is to other cases. The doctrine of the assumption of the risk is merely a formal statement of this maxim in its application to concrete cases. If a plaintiff voluntarily assumes a risk, and afterwards sues for an injury that he has suffered which was within the risk, he cannot recover, because he encounters one or the other of two facts, either of which is fatal to his claim. In such a case it would appear in the last analysis, if the truth were ascertained, either that the plaintiff was negligent, or that the defendant was not negligent. In every case where the evidence warrants it, a defendant has a right to have this test applied. Sometimes each of the fundamental questions in the law of negligence would be difficult to answer upon the evidence, were it not easy to determine that the plaintiff voluntarily assumed the risk. In such a case the defendant prevails without a separate decision of either of the two questions whether he was negligent or whether the plaintiff was in the exercise of due care. Such a result, considered in reference to the law of negligence, is a decision that the plaintiff has failed to establish one or the other of the two propositions which must be established in every suit for negligence before there can be a recovery. The cases to which these principles are applied may be divided into two classes. The first is where the plaintiff, for a valuable consideration, voluntarily assumes the risk by virtue of a contract which expressly or impliedly includes the assumption of it. In ordinary cases, when one contracts to enter a business as employé he voluntarily agrees, for the wages to be paid him, to assume all the open and obvious risks of the business, "including the manifest dangers attendant upon the use of the ways, works, and machinery of a permanent character that are plainly intended to be retained as a part of the plant to which the contract for service relates." This may be called a contractual assumption of risk. In regard to the dangers covered by it, the employer owes the employé no duty, and he cannot be held guilty of negligence. The rights of the parties depend, not necessarily upon that which

the employé in fact understands and appreciates, but upon that which he ought to understand and appreciate in making such a contract for service, and upon that which the employer has a right to suppose that he understands and appreciates. *Murch v. Thomas Willson's Sons & Co.*, 168 Mass. 408, 47 N. E. 111; *Ladd v. Railroad Co.*, 119 Mass. 412; *Lovejoy v. Railroad Corp.*, 125 Mass. 79; *Coombs v. Railroad Co.*, 156 Mass. 200, 30 N. E. 1140; *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119; *Fisk v. Railroad Co.*, 158 Mass. 238, 33 N. E. 510; *Goodridge v. Mills Co.*, 160 Mass. 234, 35 N. E. 484; *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Feely v. Cordage Co.*, 161 Mass. 420, 37 N. E. 368; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500; *Austin v. Railroad Co.*, 164 Mass. 282, 41 N. E. 288; *Content v. Railroad Co.*, 165 Mass. 267, 43 N. E. 94; *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358; *Appel v. Railway*, 111 N. Y. 550, 19 N. E. 93; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Tuttle v. Railway*, 122 U. S. 189, 7 Sup. Ct. 1168. The second class of cases is where an employé has suffered from the negligent conduct of an employer in reference to some matter not included in his assumption of risks by virtue of the contract under which he is working at the time of the injury. As to these cases different considerations apply. The employer is under an implied contract or duty to provide safe and proper machinery, tools, and appliances for the employé. There is often evidence on which it is contended that he is guilty of negligence in this particular. In dealing with such a case, upon the question whether the plaintiff is precluded from recovery on the ground that he assumed the risk, it must be assumed that the jury properly might find the defendant guilty of negligence. The question is to be determined in reference to the possibility of a finding either way on that point. If, looking to the conduct of the defendant alone, the finding ought to be against him, on what ground can the plaintiff be cut off from his right to damages? Under the law of negligence it is only on the ground that he is himself in fault through failure to exercise proper care or otherwise. If the facts relied on to establish this defense are merely that he continued to work, knowing of the defect which afterwards caused his injury, and if the defect is so slight, viewed in reference to the defendant's duty to provide for his safety, that it is just a little outside of the line which separates due care on the part of the defendant from negligence, the question arises whether there was such a voluntary assumption of the risk on the plaintiff's part as to put him in the same category with the defendant in reference to the alleged negligence. It is the law of Massachusetts that if he knew and fully appreciated the risk, and continued to work without any special exigency constraining him so to do, his exposure to the risk must be deem-

ed to have been voluntary, and, if the condition of the defective part was such that to provide it, or keep it for his use, constituted negligence on the part of the defendant, who was under an obligation to have it safe, his continued use of it, knowing and appreciating the danger from it, equally constituted negligence which prevents him from recovering. This rule bears rather hard upon employes, for, *ex hypothesi*, the employer is primarily in the wrong, and practically the employe has no alternative but to abandon his contract, and quit the service, even though that might mean starvation for his family. His remedy by a suit upon his contract would be costly and uncertain, and the damages recoverable would be small. In England, and in some of the American states, continuing to work under such circumstances is not deemed, as matter of law, a voluntary assumption of the risk. *Smith v. Baker* [1891] App. Cas. 825; *Thruswell v. Handyside*, 20 Q. B. Div. 359; *Yarmouth v. France*, 19 Q. B. Div. 647. But the rule is established in Massachusetts, and I do not desire to depart from it.

It must be remembered that the rule is applicable only when the plaintiff understands and appreciates the risk. Nothing less than his full understanding and appreciation of it can make his exposure to the danger voluntary, and charge him with negligence whenever the employer is negligent. It is only when his knowledge of the danger is such as to make his conduct as culpable as that of the employer that he can be precluded from recovery on this ground. The question oftenest arises when it is difficult to tell whether there was sufficient danger properly to charge with negligence the employer, whose duty it was to know that his appliances were safe; and if the conditions are such that the conduct of the employer in procuring the defective appliance falls only a hair's breadth below the line of due care, nothing less than a full understanding of the danger can charge the employe with negligence in using it when it was provided for him. It will hardly be contended that a hired servant always works at his own risk when he continues in service after discovering that his employer's conduct in failing to repair machinery, or in introducing unsafe machinery, has somewhat increased the perils of his situation. So to hold would altogether deprive the employe of the benefit of the salutary provision of law which makes it the duty of the employer to provide proper tools and machinery with a view to his safety. It is often consistent with due care for him to continue in the service when he knows that the provision for his safety is not so good as it should be. He may think that the danger is not great enough reasonably to require him to refuse to work. That full knowledge and appreciation of the risk on the part of the plaintiff is essential to the maintenance of this defense in cases of this

kind has repeatedly been held, and I am not aware that any different doctrine has been enunciated. *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Tenant v. Manufacturing Co.*, 170 Mass. 323, 49 N. E. 654; *Ferren v. Railroad Co.*, 143 Mass. 197, 9 N. E. 608; *Thomas v. Telegraph Co.*, 100 Mass. 156; *Linnehan v. Sampson*, 126 Mass. 506; *Lawless v. Railroad Co.*, 136 Mass. 1; *Mahoney v. Railroad Co.*, 104 Mass. 73. That the danger is obvious is not necessarily enough to defeat the plaintiff on this ground, although it may warrant a finding by a jury against him. The danger may be so great and so obvious that in any possible view of the evidence the general judgment of common men would at once condemn his conduct in continuing to work as careless. In such a case it would be the duty of the court to order a verdict against him on the ground of a want of due care; but it would not necessarily follow that he voluntarily assumed the risk, so as to come within the doctrine, "*Volenti non fit injuria*." He might have been stupid, or inattentive, and merely careless, in not ascertaining the extent of the danger.

To decide against a plaintiff on this ground involves an affirmative finding of fact. The negligence which is fatal to his case is not merely an omission to take proper precautions. It is positive negligent action. It is a voluntary exposure to a well-understood danger, so great that due care requires him to avoid it. The defendant must establish the plaintiff's knowledge and appreciation of the risk, and voluntary assumption of it, if he would prevail, when, on other grounds, the plaintiff's case might be decided in his favor. When a fact is to be established by evidence, a court can seldom say as matter of law that it is proved. Where the plaintiff has the burden of proof to show the defendant's negligence or his own due care, the questions of law which commonly arise are different. There the court must determine as a matter of law, in the first instance, whether any evidence has been introduced in support of the propositions. As was said in *Osborne v. Railway*, 21 Q. B. Div. 220, of the discussions in *Yarmouth v. France*, 19 Q. B. Div. 47, and in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, "Those observations go far to make it hard for a defendant to succeed on such a defense as that relied on here, for it is probable that jurors would often find for plaintiffs on the ground that they had not full knowledge of the extent and nature of the risk; but that cannot be helped." In cases of contractual assumption of the risk it is often clear that the plaintiff has introduced no evidence of any danger which was not obvious, and so included in his implied contract, whether he actually understood it or not. But in regard to risks not assumed by the plaintiff in his contract for service, resulting from conduct of the defendant while the plaintiff is working

under his contract, I think it can seldom be said as a matter of law that the employé has lost his legal right to hold his employer for the consequences of his negligence on the ground of a voluntary assumption of the risk by continuing to work, unless his own conduct is such that, viewed independently, it furnishes no evidence of his due care.

In the present case it cannot be contended that there was a contractual assumption by the plaintiff of the risk of injury from the use of an unsafe and improper stirrup strap. No such risk was obvious when he entered the defendant's service. On the contrary, the defendant, by his contract, impliedly agreed to furnish safe and proper straps. There was no new contract nor any new consideration for a contract when the plaintiff obeyed the order of Abbott to use the strap which broke. The rights and obligations of both parties created by the contract of hiring remained unchanged. It may be that a jury would have found that the plaintiff was careless in consenting to use the strap; but certainly the court cannot say so as a matter of law, and the opinion does not put the decision on that ground. The ground of the decision is that the plaintiff assumed the risk. The opinion implies that it may be doubtful whether the defendant was negligent, although there can be no doubt of his duty to furnish safe and proper straps. If the jury found that the defendant was primarily responsible for the injury,—as the opinion assumes that they might find,—the plaintiff is cut off from recovery by a holding of the court, as matter of law, that his relation to the risk by reason of his consenting to use the strap under orders was such as necessarily to make him guilty of negligence. This seems to me to leave out of consideration the facts that the defendant was under a legal obligation to know that the strap was safe, while the plaintiff was under no such obligation, and that the plaintiff might rely to some extent upon the probable performance of duty by his employer, and upon the implied representation of his employer, as well as the express representations of Abbott, the foreman, that the strap was sufficiently strong. I think that there was evidence for the jury upon this point, but that the court could not properly say as matter of law that the proposition was established. Dealing with it as a matter of fact, I think the weight of the evidence was that he did not fully understand and appreciate the risk. He was undoubtedly influenced by the statements and representations of Abbott. He knew the strap was defective, but he did not know how strong it was. No one can accurately estimate the strength of a piece of old leather from the appearance of it. He saw Abbott pull upon it, but he did not know how much force was applied in pulling. Probably he thought it was stronger than it proved to be. If the strap was only just bad

enough to make the defendant liable for negligence in furnishing it, I do not think it follows as a matter of law that the plaintiff was negligent in not refusing to use it. I think the questions at issue were questions of fact for the consideration of the jury under proper instructions. Except in cases of contractual assumption of the risk, I think there is great danger of improper interference with the right of the plaintiff to a trial by jury upon questions of fact in holding as matter of law, even when the defendant might be found to be negligent, and even when it does not appear on other grounds that the plaintiff has failed to show his own due care, that the plaintiff has lost his right to recover by a voluntary assumption of the risk. I hope that this fashionable modern doctrine will not lead to a departure from the sound principles on which the law of negligence rests.

(156 N. Y. 413)

PEOPLE v. CARBONE

(Court of Appeals of New York. June 24, 1898.)

HOMICIDE—EVIDENCE—NEW TRIAL.

One C. was indicted for murder. On his trial it appeared that he was seen pursuing the deceased, and striking him with his fists, and that the deceased, who died from the effects of a stab in the abdomen, declared that C. stabbed him; but no weapon was found in C.'s possession, and the only weapon found near the scene of the crime, a small penknife, was shown by the people's witnesses to be incapable of inflicting the fatal wound. A witness also testified that he had seen one A. C. stab the deceased with a stiletto, as he ran. C. was convicted. On an appeal from the judgment of conviction, the court of appeals was informed by the district attorney that A. C. had been tried and convicted of murder in the second degree, for killing the deceased. *Held*, that in view of this circumstance, and the inconclusiveness of the testimony on defendant's trial, a new trial should be awarded, under Code Cr. Proc. § 522.

Appeal from supreme court, trial term, New York county.

Angelo Carbone was convicted of murder in the first degree, and appeals. Reversed.

Hal Bell and Ambrose H. Purdy, for appellant. James D. McClelland, for the People.

PER CURIAM. The defendant was charged in the indictment with the crime of murder in the first degree, committed upon one Natele Brogno, in the evening of September 12, 1897, in the city of New York. Upon his arraignment he pleaded not guilty. A trial being had, he was found guilty, as charged in the indictment, upon the verdict of a jury. The evidence adduced by the people showed that, upon the evening in question, the defendant was first seen pursuing the deceased upon Leonard street, in the direction of Center street. He was seen to strike at the deceased with his fist, and the latter fell to the ground upon his face. The de-

fendant then jumped upon his back with his feet, and, bending down, again struck him several times with his clenched hand. Several police officers came up, and the defendant was seized. The deceased, being raised from the ground, was seen to have been stabbed in the abdomen, and to have been cut upon one of his wrists. He died within a very few minutes after the occurrence. Prior to his death, upon being asked, in the presence of the defendant, if he was the man who stabbed him, the deceased answered, "Yes." When further asked what the defendant had stabbed him for, he had already become unconscious, and was unable to answer. The defendant was searched, but no weapon was found upon him. Some time afterwards, however, a small penknife, with an open blade, was found at or near the spot where the deceased had fallen. After the deceased had stated that it was the defendant who had stabbed him, the latter was asked why he had done so, and he replied, denying the stabbing, and denying that he had any knife. The examination of the body of the deceased, made by the ambulance surgeon and by the coroner's physician, who made the autopsy, showed the existence of two incised wounds, one upon the forearm, and the other in the abdomen, the latter of which was the cause of the death. On the part of the defense, a nephew of the defendant, a boy 12 years of age, testified that, upon the evening in question, he saw his uncle fighting with the deceased, and using his fists; that the latter ran away; and that, while he was so running, one Alexander Ciarmello came up with a knife in his hand, appearing to be a stiletto of six or seven inches in length, and, while the deceased was looking back over his shoulder, struck at him twice with the weapon. The witness said that Ciarmello then put the weapon in his pocket, and walked away, and that the deceased, after running some 200 or 300 feet further, with the defendant in pursuit, fell down. The coroner's physician, upon being recalled on behalf of the defense, testified, upon being shown the knife which was picked up at or near the place where the deceased fell, that it was absolutely impossible for it to have caused the wound in the abdomen; that it was too short. The district attorney states in his brief, and it was admitted by him in open court, with commendable fairness, to be the fact, that, since the trial and conviction of the defendant, Alexander Ciarmello was indicted and arrested for the killing of the deceased, and has been tried and convicted of murder in the second degree upon the charge, and has been sentenced to imprisonment for life.

We are satisfied that this is a case where justice requires a new trial, and that we should exercise the power conferred upon us for that purpose by section 528 of the Code of Criminal Procedure. While the pe-

culiar situation which is presented moves us to exercise this power, we also think that the case of the people cannot be said to have demonstrated the fact of the killing of the deceased by the defendant beyond a reasonable doubt. That fact and the fact of the death of the person alleged to have been killed are essential to be established by the people upon such an issue,—the latter by direct proof, and the former beyond a reasonable doubt. Pen. Code, § 181. None of the witnesses for the people saw a knife or any weapon in the hands of the defendant, and none was found as the result of a search upon his person; while the small knife which was found upon the spot could not possibly have inflicted the wound, according to the testimony of the people's witness, the coroner's physician, who performed the autopsy. There was nothing in the evidence adduced on behalf of the prosecution, showing what had occurred prior to the moment when the deceased was seen running in Leonard street, pursued by the defendant; and while, from the statement of the deceased and the other circumstances, an inference was possible that he had come to his death by a wound intentionally inflicted by the defendant, yet the evidence is not of such a nature as to preclude us from holding that it was lacking in conclusiveness. Therefore, under the circumstances, and in view of the admission of the district attorney, we think that the case is one for the exercise of our power to order a new trial, and that it is required in the interest of justice. The judgment of conviction should be reversed, and a new trial ordered. All concur, except O'BRIEN, J., absent. Judgment reversed, etc.

(156 N. Y. 399)

PAGET et al. v. MELCHER et al.

(Court of Appeals of New York. June 21, 1898.)

TRUST DEED—CONSTRUCTION—WILLS.

1. One S. conveyed certain real estate to a trustee, upon trust to pay the rents and profits to S.'s wife during her life, and upon the death of the survivor of S. and his wife to convey the land to the children of S. in fee,—the issue of any child who should have died, leaving issue, to take the share the parent would have taken if living,—and in default of issue of S., living at the time of the death of the survivor of himself and his wife, to convey the land to the heirs at law of S. *Held*, that the interests of the children of S. were not vested, but contingent, and upon the death of one of them, without issue, during the life of the widow of S., no interest passed under his will, or descended to his heirs at law.

2. By his will, S. left certain personal property to his wife for life, and provided that on her death the same should belong to his children,—the descendants of any deceased child to take the share the parent would have taken if living,—and, if no descendants of his should survive his wife, then the property should go to his residuary legatees. *Held*, that no interest in such personal property passed under the will of a child of S. who died without issue during the life of the widow.

Cross appeals from supreme court, appellate division, First department.

Action by Mary Paget and others against Ellen S. Melcher and others. From an interlocutory judgment (49 N. Y. Supp. 922) modifying the judgment entered on the decision of the special term, both parties appeal. Reversed.

Flamen B. Candler, for Mary Paget and William Jay. Wheeler H. Peckham, for Union Trust Co. George Hoadly and Ferdinand R. Minrath, for plaintiffs. John A. Lane, guardian ad litem. George Zabriskie, for defendant Melcher.

HAIGHT, J. This action was brought for the partition of real property, and for a division of certain personal property which Paran Stevens had bequeathed to his wife for life. With reference to the real estate sought to be partitioned, it appears that it was conveyed on the 29th day of April, 1863, by Paran Stevens to Charles G. Stevens, upon the trust, however, that Charles was to receive the rents and profits, and, after paying the taxes and repairs, "to pay over the balance to Marietta Stevens, wife of the said Paran Stevens, during her life, * * * and upon the death of the said Marietta Stevens, during the life of the said Paran Stevens, to pay over the balance of income thereof to the said Paran during his life, and upon the death of the survivor of said Paran Stevens and Marietta Stevens to convey the said lands and premises to the children of said Paran Stevens, in fee,—the issue of any child of said Paran who shall have died, leaving issue living at the death of the survivor of the said Paran and Marietta,—to take the same share that the parent would if living, and, in default of issue of the said Paran living at the time of decease of the survivor of the said Paran and Marietta, then to convey the same to the heirs at law of the said Paran Stevens." Paran Stevens died on the 25th day of April, 1872, leaving him surviving, his widow, Marietta Stevens, and three children,—Ellen S. Melcher, the wife of John L. Melcher, Mary Fiske Stevens, who afterwards intermarried with Arthur H. F. Paget, and is known in this action as Mary Paget, and Henry Leiden Stevens, who died on the 18th day of July, 1885, unmarried and leaving no issue, but leaving a last will and testament, in which he disposed of all his real and personal estate. Marietta Stevens departed this life on the 3d day of April, 1895.

The first question presented for our determination is as follows: "Upon the death of the widow (Marietta Stevens), did the devisees of the son (Henry Leiden Stevens) take an undivided third part of the said real property?" In answering this question, we shall not attempt an extended review of the authorities. Very much has been written upon the subject, and we have quite recently,

in several cases, discussed the legal propositions involved. *Townshend v. Frommer*, 125 N. Y. 446, 28 N. E. 806; *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811; *In re Baer*, 147 N. Y. 348, 41 N. E. 702; *In re Brown*, 154 N. Y. 313, 48 N. E. 537; *In re Young*, 145 N. Y. 535, 40 N. E. 226; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890. The opinion below, delivered by Rumsey, J., is in accord with our views, and we shall only supplement it with an additional point.

The contention on one side is that under the deed of trust the children of Paran Stevens took a vested remainder. On the other side it is claimed that the future estate was contingent. Under the Revised Statutes, "future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain." 1 Rev. St. p. 723, § 13. If the estate is vested, it is descendible, devisable, and alienable in the same manner as an estate in possession. *Id.* p. 725, § 35. Upon referring to the deed, it will be observed that there is no provision in which the estate is granted to the children of Paran Stevens. It only contains a direction to the trustee to convey the premises to the children or their descendants upon the termination of the lives of the persons for whose benefit the trust was created. Upon the happening of that event the trustee is directed to convey the premises to the children in fee; the issue of any child who shall have died leaving issue at the death of the survivor of Paran and Marietta to take the same share the parent would if living. Had the provisions of the deed stopped at this point, there might possibly be found some ground for the contention that a vested remainder was intended, notwithstanding the absence of a provision expressly granting the estate to the children; but that which follows we regard as decisive against that contention,—“and, in default of issue of the said Paran living at the time of decease of the survivor of the said Paran and Marietta, then to convey the same to the heirs at law of the said Paran Stevens.” Here we have an express provision in the deed disposing of the fee to the heirs at law of Paran Stevens in case none of his children, or of their issue, survive himself and his wife. If each of his children took a vested remainder in one-third of the real estate, as it is contended, then such estate would have been descendible and devisable, and, upon the death of a child, it would pass under his will, or, in default thereof, descend to his heirs at law. It could not pass to the heirs at law of Paran Stevens. We consequently conclude that the provisions of the deed direct-

ing the trustee to convey to the heirs at law of Paran Stevens in case none of his children or of their issue survive, of necessity, indicate that it was not intended that the children should take a vested remainder. It follows that their estates were contingent. Henry Leiden having died during the pendency of the trust, leaving no issue him surviving, no interest in the real estate in question passed under his will, or descended to his heirs at law, and upon the death of Mrs. Stevens the entire real estate passed to the surviving daughters.

Paran Stevens died, leaving a last will and testament, which has been proved and admitted to probate. In it he gave and bequeathed to his wife, during her natural life, the use of a large quantity of personal property, which he specifically described, and then provided: "Upon the decease of my said wife, the property by this and the preceding clause devised shall belong to my children,—the descendants of any deceased child to take the share their parent would have taken if living; and, if no descendants of mine survive my said wife, then said property shall belong, and be delivered over by my executors, to the same persons named as residuary legatees in case of such failure of descendants in the next clause of this will, and in the same proportion." The same contention is made with reference to the construction of this clause that was made with reference to the provisions of the deed. The question certified is as follows: "Upon the death of the widow, did the personal representatives of the son take an undivided third part of the personal property bequeathed by the third and fourth clauses of the will of Paran Stevens?" It is claimed that one-third of this property vested in Henry Leiden Stevens, and that it, upon his death, passed under his will to his personal representatives. We, however, are of the opinion that this construction cannot be sustained. If it belonged to the children of Paran Stevens, subject only to the life use of their mother, or if their interest in the estate had vested, then upon their death it would go to their legatees, or, in default of a will, to their next of kin. It could not possibly go to the residuary legatees named in the will of their father. It is therefore apparent that the concluding clause of the will of the father, providing that, if no descendants of his survive his wife, the property shall belong, and be delivered over by his executors, to the persons named by him, of necessity shows that he did not intend that his children should have such a vested interest in the property during the lifetime of his wife as to make it pass under their wills, or go to their next of kin. We therefore conclude that none of this property passed under the will of Henry Leiden Stevens, but that upon the death of Mrs. Stevens it passed to the surviving daughters of the testator, in equal shares. The judgment of the appellate di-

vision, so far as it reverses and modifies the judgment of the special term, should be reversed, and that of the special term affirmed, and the questions certified answered in the negative, with costs of this appeal to abide the final award of costs upon the application for final judgment herein. All concur (BARTLETT, J., in result). Judgment accordingly.

(58 Ohio St. 426)

**LAKE SHORE & M. S. RY. CO. v.
ANDREWS.**

(Supreme Court of Ohio. May 10, 1898.)

**INJURY TO EMPLOYE — NEGLIGENCE OF MASTER —
EVIDENCE.**

In the absence of direct evidence in its support, an allegation that one sustained injuries by reason of the negligence of the defendant is not sustained by proof of circumstances from which the fact that his injuries were so sustained is not a more natural inference than any other.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

Action by Andrews, administrator, against the Lake Shore & Michigan Southern Railway Company. A judgment for plaintiff was affirmed, and defendant brings error. Reversed.

This is a petition in error to reverse a judgment of the circuit court affirming a judgment of the court of common pleas awarding damages to Andrews, as administrator, for negligently causing the death of his intestate. The substance of the original petition of the administrator is that Barton was a brakeman in the service of the company, and upon the night of his death was head brakeman on a freight train; that it was his duty to be upon the front end of the train, or in the cab, and from that position to keep a constant lookout for the rear end of the train during the passing of a grade which the train had just completed; that the night was dark and stormy, and that the observation of the light, at the rear end of the train, was rendered more difficult because, in making up the train, passenger cars of greater width than the freight cars had been placed between the locomotive and the caboose; that while, in the discharge of his duty, he was leaning out of the gangway between the engine and tender, to see the lights on the side of the caboose, his head struck the casing of the bridge which the company negligently maintained at a height of eight or nine feet above the level of the bridge, and so near to the train as to be a source of danger, of which the deceased had no knowledge. The answer admitted that the deceased sustained fatal injuries at the time and place alleged, but denied all allegations of negligence, and averred that the injuries were sustained by reason of the want of care on the part of the decedent. The allegation that the deceased was negligent was denied by reply. The facts clearly established by the evidence are

that the bridge was in no respect out of repair, but was in the condition in which it had been from the time of its erection, about eight years before. The train on which Barton was head brakeman passed over it very rapidly, and while it was passing he came in collision with the casing which inclosed the truss, receiving injuries which were immediately fatal. The fact of such collision was shown by marks upon the casing commencing near the end at which the train entered the bridge, and about two feet from the top of the casing, the marks descending from that point to the further end of the bridge, near which the body was found. Barton had been employed by the company as brakeman about six months on this and another division, and had passed over the bridge something over 20 times. On the night of his death the engineer and fireman saw him standing in the gangway between the locomotive and tender shortly before they reached the bridge, but he was not seen by any one thereafter until he was found dead. The casing was something more than two feet from the train. At the conclusion of the plaintiff's evidence the court was requested to direct a verdict for the company, which was denied. After a verdict in favor of the administrator, the company moved for a new trial, on the ground, among others, that the verdict was not sustained by the evidence, and was contrary to law, and this motion was overruled.

Potter & Emery, for plaintiff in error.
George B. Boone and J. K. Hamilton, for defendant in error.

SHAUCK, J. (after stating the facts). It is not believed to be necessary to repeat here the familiar rules of law concerning liability for negligence. The case is susceptible of clear solution by the application of one of those rules to the evidence in the record. To reach at once the point on which our decision is to be based, it is assumed that the company was negligent in maintaining the bridge with the casing so near the train, and that the deceased did not, with knowledge, acquiesce in such negligence so as to defeat the action. The theory presented in the original petition and in the argument of counsel is that Barton was in the discharge of his duty to watch the rear end of the train to see if it had parted while descending the grade, and while so engaged was leaning from the side of the tender, looking for the light on the side of the caboose, in the rear of the wider coaches, and while so engaged he was killed. The theory is not supported by any evidence whatever. Barton was last seen alive shortly before the locomotive reached the bridge, when he was standing on the gangway or platform between the engine and tender, with his lantern on the floor by his side. After the train had passed the bridge it was noticed, that,

while his lantern was still there, he had disappeared. No one saw him leaning over the engine or make any effort to see the rear of the train. No other evidence in the case suggests the manner of his death except the marks on the casing. Certainly an allegation of fact may be established by circumstantial evidence, but the circumstances, to have that effect, must be such as to make the fact alleged appear more probable than any other. The fact in issue must be the most natural inference from the facts proved. Not only did the circumstances here disclosed fail to make it appear that Barton's death occurred in the manner alleged, but, since the point at which his head struck the casing was certainly not more—it seems to have been less—than two feet above the level of the platform upon which he was standing when last seen, the natural inference is that he fell from the train. The circumstances fail to show that the death of Barton was due to the negligence alleged against the company. A recovery upon such evidence cannot be sustained while it is held that the employer is not the insurer of the safety of the employé. A verdict for the defendant should have been directed as requested. Judgments of the circuit court and court of common pleas reversed.

(58 Ohio St. 347)

FIRST NAT. BANK OF FINDLAY v. TROUT
et al.

(Supreme Court of Ohio. April 19, 1898.)

PROMISSORY NOTE—WARRANT OF ATTORNEY—CONFESSION OF JUDGMENT—FAILURE TO FILL
BLANKS—JURISDICTION.

A promissory note with warrant of attorney to confess judgment thereon should be so interpreted as to give effect to the intention of the parties; and a judgment thereon confessed against the makers is not void for want of jurisdiction of their persons if the terms of the warrant indicate an intention to authorize it, notwithstanding a failure to fill blanks intended to be filled with words giving fuller expression to that intention.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

The First National Bank of Findlay brought suit in the court of common pleas to subject real estate of J. S. Trout, in Hancock county, to the payment of liens. The Farmers' National Bank filed cross petition. The cause was appealed to the circuit court, where it was tried upon issues joined by the several pleadings of the plaintiff in error and Laura D. Trout. In its cross petition the plaintiff in error asserted the lien of two judgments rendered by the common pleas court of said county in its favor, and against John S. Trout and one I. N. Smith, on the 15th day of June, 1893, each for the sum of \$218 and costs, and of another judgment rendered by said court in its favor, and against J. S. Trout, December 18, 1893, for \$288 and costs. Laura D. Trout asserted the lien of a mortgage ex-

ecuted to her by J. S. Trout, September 23, 1893, to secure the payment of a promissory note of that date, for \$1,872; and she denied the validity of the judgments in favor of the plaintiff in error, because they were rendered without jurisdiction of the person of J. S. Trout. The only evidence offered upon the trial was the complete records of the causes in which the two judgments of June 15, 1893, were rendered. From the records it appears that the judgments were rendered upon confession by an attorney acting upon warrants attached to the notes, the following being a copy of the notes and warrants:

"\$200.00. Findlay, O., June 11, 1892. One year after date, for value received, I promise to pay, to the order of Will E. Heck, two hundred dollars, with interest at the rate of eight per centum per annum at —, and — hereby authorize any attorney at law to appear in any court of record in the United States after the above obligation becomes due, and waive the issuing and service of process and confess a judgment against —, in favor of the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal. I. N. Smith. J. S. Trout.

"Waiving demand and notice. Will E. Heck."

Upon this evidence the circuit court found that the judgments were not valid liens upon the premises, and ordered distribution of the proceeds of sale to the mortgagee.

J. A. & E. V. Bope, for plaintiff in error.
John Poe, for defendants in error.

SHAUCK, J. (after stating the facts). Upon the question presented, no consideration is due the suggestion of counsel for the mortgagee that judgment notes are dangerous instruments. Their use in this state is inveterate, and it is not to be discontinued by violence to the rules of interpretation. Does the language used in these instruments show that the makers intended to authorize an attorney to appear for them, waive summons, and confess judgment against them, and in favor of the holder of the note? That the power was to be exercised in favor of the holder of the note could not have been made clearer.

Notwithstanding the use of the singular pronoun in the obligatory part of the instrument, it is settled that it is the promise of both makers, their obligation being several as well as joint. *Wallace v. Jewell*, 21 Ohio St. 163. No reason appears why the use of that number should limit the authority conferred by the warrant any more than the obligation to pay. Nor does any substantial defect in the warrant result from the omission to fill the blanks. By the terms of the instrument, the makers of the note are the donors of the power which is

conferred. Their relation to the instrument and the use of the copulative conjunction sufficiently indicated the persons against whom judgment should be rendered. The instruments as executed express elliptically what would have been expressed more fully if the blanks had been filled. The language actually employed in the power suggests "we" and "us" as the only words which could, with propriety, be inserted in the blanks. *Sweesey v. Kitchen*, 80 Pa. St. 160; *Packer v. Roberts*, 140 Ill. 9, 29 N. E. 668. Judgment of the circuit court reversed, and judgment for plaintiff in error.

(58 Ohio St. 430)

MARKLEY v. VILLAGE OF MINERAL CITY.

(Supreme Court of Ohio. May 10, 1898.)

MUNICIPAL CORPORATION—ACQUISITION OF LAND
—DONATION FOR MANUFACTURING PLANT—
VALIDITY OF GIFT.

1. A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality.

2. Corporate funds paid out in the attempted purchase of land for such purpose are unlawfully expended, and a deed purporting to convey such land is without legal effect.

3. And where, for the purpose stated, a village has undertaken to purchase and acquire title to land, and to convey it to a person on consideration that he will build and operate manufacturing plants within the village, and afterwards brings its action against such person to set aside the conveyance and obtain a reconveyance of the property, with possession thereof, a court of equity will not lend its aid to either party, but will leave them where they have placed themselves.

(Syllabus by the Court.)

Error to circuit court, Tuscarawas county.

Suit by the village of Mineral City against George J. Markley. A decree for defendant was reversed, and defendant brings error. Reversed.

The cause of the village of Mineral City against George J. Markley was tried in the circuit court of Tuscarawas county, on appeal from the common pleas; and it is to the judgment of the circuit court that error is prosecuted here by Markley. The purpose of the suit was to obtain a decree setting aside a deed of three acres of land, which had been made by the village to Markley; to require him to reconvey the premises to the village; and for possession of the property. In its petition the village alleged, in substance: That on the 1st day of March, 1893, it was seized of the land in question. That on that day the council attempted to pass a resolution to convey the real estate to Markley. That on that day the village mayor and the clerk executed and delivered a deed for the premises to him, which was then delivered to the county recorder, and recorded. The resolution was not properly passed. The defendant paid no consideration for the land, but it was attempted to be

conveyed to him as a donation to procure him to construct and operate manufacturing plants, in accordance with an agreement to that effect of that date, a copy of which is attached to the petition. That the defendant has violated his contract, in this: that he has not constructed and operated such plants as agreed, and has thus forfeited any rights that he otherwise might have had. The mayor and the clerk were never legally authorized to convey the land. No ordinance was passed giving such authority, nor were any of the necessary legal steps taken to make such attempted conveyance effective. The agreement and alleged deed are illegal and void, and of no effect, and plaintiff is entitled to a reconveyance. Markley's answer contained four defenses: The first admitted the passage of the resolution, and execution, delivery, and recording of the deed; admitted the purpose of the deed; admitted the making of the agreement set up in the petition; but denied every other allegation. The second averred actual possession of the land in defendant on and ever since March 1, 1896; denied that the village was ever seised of the land, or the owner of it; averred that it took from the heirs of one George Lechner, deceased, who were seised in fee simple, a deed of the land, and purchased the same for the sole purpose and with the sole intent of donating the same to some person, corporation, or association, to induce them to construct and operate manufacturing plants within the village, and not for the legitimate use of the village, all of which was in violation of the constitution and laws of Ohio, and was ultra vires, and the deed to the village is void and of no effect. The third averred, in terms, a compliance with his contract, and alleged that before the commencement of the suit, with full knowledge and acquiescence of the village, he had expended other large sums (in all, \$38,000) in manufacturing plants, and was then operating them within the village, and that plaintiff should be barred and estopped of its action. The fourth set up that since the commencement of the action the heirs of George Lechner, deceased (naming them), being the same persons from whom the village obtained its supposed title to the land, have conveyed to the defendant, by their duly-executed quitclaim deeds, all their right, title, interest, and estate, legal and equitable, in and to the real estate, and that by virtue of said deeds defendant is the owner in fee of the real estate, and is still in the occupancy and possession thereof.

To the second, third, and fourth defenses, respectively, a demurrer was interposed and sustained. The cause was then tried on the issues made by the petition and first defense, which resulted in a finding and judgment as follows: "And the court, being fully advised in the premises, and on consideration whereof, finds its conclusions of fact, separate from its conclusions of law, to be

as follows: That prior to the 1st day of March, A. D. 1893, and before and at the date of the deed to the defendant for the real estate described in the plaintiff's petition, the plaintiff had purchased, and then held, said real estate, from the heirs of one George Lechner, deceased, who conveyed the same to the plaintiff, in fee simple, by their deed duly executed and delivered; that said conveyance to the plaintiff was for a valuable consideration; and that said purchase and conveyance by and to the plaintiff from the said Lechner's heirs were made for the sole purpose and with the sole intent, on the part of the plaintiff, to donate said real estate to some person, corporation, or association of persons, to induce the same to build and operate certain manufacturing plants within said village. And the court further find that said premises are described as follows, to wit: [Here follows description of premises.] And the court further find that the plaintiff is a municipal corporation duly organized under the laws of Ohio. And the court further find that on said 1st day of March, 1893, said village of Mineral City, without authority of law thereto, executed and delivered to the defendant an alleged deed of conveyance for the aforesaid premises, and that said conveyance was without lawful consideration. And, as conclusions of law, it is considered by the court that the said pretended deed of conveyance, in the petition described, from the said the incorporated village of Mineral City to said George J. Markley, be, and the same is hereby, set aside, vacated, and declared to be of no force and effect, in law, to effect or convey the title of said premises to the defendant, and that the title of the said plaintiff to said premises be, and the same is hereby, confirmed; and it is ordered that a writ issue to the sheriff of Tuscarawas county to put the plaintiff in possession of said premises. And the court further consider that the plaintiff recover of the defendant its costs herein expended. To all and to each of which conclusions of law, orders, judgments, and decrees, the defendant excepts."

A. W. Patrick and Neeley & Patrick, for plaintiff in error. E. S. Souers, for defendant in error.

SPEAR, C. J. (after stating the facts). The pleadings and findings of fact present this question: Had the village power, by deed of purchase, to legally acquire title to and hold real estate, for the sole purpose and with the sole intent of donating the same to procure the construction and operation of manufacturing plants within its limits? Two sections of the constitution seem to bear upon the subject. One (section 6 of article 13) makes it the duty of the general assembly, in providing for the organization of municipalities, to restrict their power of

contracting debts and loaning their credit, so as to prevent the abuse of such power. The other (section 6 of article 8) expressly denies to the assembly power to authorize any such corporation to become a stockholder in any joint-stock company, corporation, or association whatever, or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association. And that this interdict applies as well to the case of an individual as to the aggregations named, is without question. It is intended to prevent the union of public and private capital in any enterprise whatever. In considering the attitude of the village in this controversy, we must look at the entire scheme that was proposed to be accomplished. The first step was to pay out money of the municipality in the purchase of land. The next was a donation of the land so acquired to some one willing to contract, and that person, in turn, to construct and operate the manufacturing plants for the supposed benefit of the people. The village was not to share as a partner in the enterprise, nor to loan its credit for that purpose, nor did it do so; but it did propose, by the wrongful use of corporate funds, to make a purchase, intending thereafter to make a gift of the property so to be acquired, both of which things it undertook to do. It cannot be doubted that the scheme, taken as a whole, was clearly violative of the spirit of the sections of the constitution cited. And, notwithstanding this, the proposition of the village is that a court of equity should aid it in recovering that which it has undertaken to acquire by a scheme forbidden by law, and has parted with in compliance with a contract which it had no power to make. It is to be borne in mind that we are dealing with the status and capacity, not of a natural person, but of a corporate one; a mere creature of the law; an artificial entity, which, having no natural rights or powers, exists and operates only by virtue of the law of its creation. And we suppose it to be settled that our municipalities have such capacities and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those which are expressly granted, and that doubtful claims to power are resolved against the corporation. *Cooley, Const. Lim.* 231, 232; *Minturn v. Larue*, 23 How. 435; *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197; 1 Dill. Mun. Corp. §§ 89, 457; 2 Dill. Mun. Corp. § 936; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445. So that, the question resolves itself into this: Has the power been clearly granted to villages to accept title to land for the express purpose of donating it for the encouragement of local improvements? If not, is such power to be implied, as essential to carry into effect other clearly-granted powers? The right of a municipality to acquire property, is given by

paragraph 34 of section 1692, Rev. St., in these words: "To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, * * * for the use of the corporation, and to sell or lease the same." Here is specific mention of the purpose for which land may be acquired. The controlling idea is that the property must be for the use of the corporation. This idea of use implies power to hold. It implies, beyond this, a *jus disponendi*,—a power to deal with the property. If such power does not exist, then its attempted acquisition would be an idle performance. The two ideas are inseparable. If the municipality is without power to hold and dispose of the property, then, by the same token, it is without power to acquire. And we are necessarily confined, in treating of the purpose of acquisition, to the express purpose, viz. "the use of the corporation"; for, applying the maxim, "*Expressio unius est exclusio alterius*," all other purposes are excluded. It would follow, therefore, that if the land be for the use of the municipality, for some legitimate corporate purpose, then power is given, by the clause quoted, to acquire it, and necessarily power to hold and dispose of it. But, if it be not for the use of the corporation (that is, for a use to which the corporation may lawfully devote it), then this clause gives no capacity to receive, or power to hold. Another paragraph of the same section gives power to accept bequests, but that is not involved here, and, so far as we are aware, there is no general power given to acquire real estate, except by the paragraph quoted. Not only, therefore, is there no clear expression of a purpose to give power to acquire and hold real estate for speculative purposes, but the provisions upon the subject, statutory and constitutional, clearly establish that no such power is intended. The chief function of a municipality being to regulate local governmental affairs, because they may be dealt with better by the people interested than by a distant central power, we cannot assume a purpose to invest such corporation with the powers or capacities of individuals, or of private corporations, for objects not pertaining to municipal rule, since that would be to pervert the institution from its legitimate ends, and to require of it duties which it is not adapted satisfactorily to execute, and which are not necessary to enable it to discharge the appropriate functions and duties of local administration. It follows that no such power is to be implied, as essential to carry into effect the power which is in terms given.

If we are right in these conclusions, then it results that the attempted purchase by the village from the Lechner heirs gave to the municipality no title to the land, either legal or equitable. This being the situation, how does it leave the parties? Markley is in possession. The attempted deed of the vil-

lage gave him no title, but, on the other hand, the village has no title to be restored. It cannot prevail except through the medium and with the aid of the illegal transaction to which it was a party, and hence it can have no standing in a court of equity, because it asks affirmative relief under circumstances showing that it is itself in the wrong. The defendant is equally in pari delicto. The court will therefore refuse aid to either, but leave them where by their illegal acts they have placed themselves. *Thomas v. Cronise*, 16 Ohio, 54; *State v. Butties*, 3 Ohio St. 309; *Commissioners v. Andrews*, 18 Ohio St. 49; *Board of Education v. Thompson*, 33 Ohio St. 321; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

It is insisted that Markley, having taken a deed from the village, is estopped to deny the title of his grantor. But Markley does not attempt to stand on that title. He distinctly repudiates it. But, if he did, the contract which the plaintiff itself pleads, and the finding of the circuit court, disclose fully the illegal character of the transaction.

Attention is called to section 21, Rev. St., and the proposition is advanced that the attempt of the village to convey to Markley may be treated as an illegal loan or deposit of the property of the village, which, by this section, it is authorized to recover back. The section cannot apply. We have already found that the land in question was not the property of the village. The spirit, if not the letter, of this statute, was violated by the act of the municipal officers in unlawfully paying the money of the village to the Lechner heirs, not in their futile attempt to convey what the village did not own. The case of the village seems to rest upon the proposition that the municipality, while it is not bound by the illegal acts of its officers, nevertheless may affirm in part what they did, and thus reap whatever benefit may result from their acts. The proposition is not tenable. Its weakness lies in the unfounded assumption that the illegality of the transaction consists wholly in the unauthorized acts of the agents. We have already found that the scheme could have no legal basis, because of the inherent incapacity of the municipality to enter into it. But it is insisted that to deny the relief sought by the village would be to put it in the power of village authorities to make wrongful use of corporate funds, and then refuse relief to the wronged corporation. We think not; at least, not necessarily so. If the vendors, at the time of the attempted conveyance to the village, and the receipt by them of the alleged purchase money, were aware of the purpose of the village authorities in their attempt to acquire the property, no reason is perceived why an action may not be maintained to recover of them the money thus illegally appropriated; and, failing that remedy, it is not impossible that the village officers who thus undertook to make unauthorized use of the village funds may be lia-

ble. Of course, however, we do not undertake to decide these questions. They are not involved in this controversy, nor are the proper parties before us. Judgment of the circuit court reversed, and petition below dismissed. Reversed.

(68 Ohio St. 517)

CHASE v. BRUNDAGE.

(Supreme Court of Ohio. June 21, 1898.)

PARTNERSHIP LIABILITY—DISSOLUTION OF BANKING CO-PARTNERSHIP—CERTIFICATE OF DEPOSIT—RENEWAL—PAYMENT OF FORMER FIRM DEBT—PROOF OF AGREEMENT—NOTICE OF DISSOLUTION.

1. A time certificate of deposit, issued, after the dissolution of a banking co-partnership, by a member who had become the owner and was carrying on the business of the bank, in the place of a like certificate of the firm, is not a payment of the firm debt, unless the creditor agrees to so receive it.

2. The agreement need not be express, but may be implied from the circumstances of the transaction and conduct of the parties, and no higher degree or greater certainty of proof is necessary to establish the agreement than is ordinarily required to prove any other fact in civil cases. A preponderance of the evidence is sufficient.

3. The surrender of the firm certificate when that of the partner is received, with knowledge that the firm had been dissolved, and that payment of its liabilities had been assumed by the partner, is evidence from which an agreement to receive it in satisfaction of the firm liability may be inferred, but is not conclusive.

4. It is the province of the jury, and not of the court, to determine whether there was such agreement, which must be done from all the evidence; but error in the failure to submit that question to the jury by the general charge of the court, or refusal to charge, is cured where it is submitted, at the request of a party, by interrogatories calling for a special finding of the fact, and is determined by such special finding, returned by the jury, consistent with the general verdict.

(Syllabus by the Court.)

Error to circuit court, Morrow county.

Action by William Brundage against Reuben F. Chase and another. A verdict for defendant Chase was reversed by the circuit court, and defendant brings error. Reversed.

Action against a banking firm for money left on deposit. Defense by one partner that he withdrew from the firm under an agreement that his co-partner should retain the assets and pay the liabilities, and that thereafter the plaintiff, with notice of the dissolution and agreement, accepted, in satisfaction of his claim against the firm, a time certificate of deposit, at interest, from the co-partner. The original action was brought by William Brundage against William G. Beatty and Reuben F. Chase, late partners under the firm name of the Cardington Banking Company. The petition contains three causes of action, which are as follows: "The plaintiff, for his first cause of action, says that the defendants at the dates hereinafter stated were partners in the banking business in the village of Cardington, Morrow county,

Ohio, by name and style of Cardington Banking Company, with whom, while they were so engaged in the said banking business by said firm name, he had made deposits, with, and done business with, as such partners, prior to the dates hereinafter mentioned. On or about the 12th day of February, 1890, at the request of the said defendants, he deposited and delivered to the said defendants, as such partners, at their said banking house, the sum of one thousand dollars in cash; and he also says that the same has not been paid, nor any part thereof, except the interest thereon to the 12th day of February, 1893, and that there is now due to him from the said defendants on account thereof the sum of one thousand dollars, with interest thereon from the 12th day of February, 1893. And, for a further and second cause of action, plaintiff says that on or about the 12th day of August, 1890, he delivered to and deposited with the said defendants, as such partners, and as such bankers, at their said banking house in the said village of Cardington, the further sum of four hundred and seventy-five dollars in cash; that the same has not been paid, nor any part thereof, except the interest thereon to the 12th of February, 1893, and that there is now due to him from the said defendants on account thereof the sum of four hundred and seventy-five dollars, with interest thereon from the 12th day of February, 1893. And plaintiff, for a further and third cause of action, says that on the 2d day of June, 1893, he delivered to and deposited with the said defendants, as such partners, and at their said banking house in the said village of Cardington, the further sum of one hundred dollars in cash; that the same has not been paid, nor any part thereof; and that there is now due to him from the said defendants on account thereof the sum of one hundred dollars, with interest thereon from the 2d day of June, 1893. Plaintiff therefore asks judgment against the said defendants for one thousand five hundred and seventy-five dollars, with interest on one thousand four hundred and seventy-five dollars from the 12th day of February, 1893, and on one hundred dollars from the 3d day of June, 1893, and for costs." Beatty made no defense. Chase answered, in substance, that his connection with the firm ceased on the 1st day of September, 1892, when he transferred his interest to Beatty, who assumed the payment of the liabilities of the firm; that the business was thereafter carried on by Beatty in his own behalf; and that the plaintiff, with knowledge of these facts, on the 12th day of February, 1893, received and accepted in satisfaction of his claims against the firm, which are set up in his first and second causes of action, certificates of deposit issued by Beatty, payable in six months, and bearing interest until maturity. And, as to the money claimed in the third cause of action, he avers that was originally deposited after

Beatty became the sole owner of the bank, and with notice that Chase was not then a member of the firm. A verdict was returned in Chase's favor on a trial of the issues joined by a denial of the allegations of his answer. Judgment rendered on the verdict was reversed in the circuit court for error in the charge to the jury, in refusing instructions requested by the plaintiff, and in not requiring more specific answers to interrogatories submitted to the jury. The case is brought here to obtain a reversal of the circuit court, and an affirmance of the common pleas. A further statement of the facts and of the alleged errors will be found in the opinion.

Theodore S. White and James Dickey, for plaintiff in error. Olds & Olds, for defendant in error.

WILLIAMS, J. (after stating the facts). It is not contended here that there is any ground upon which Chase can be held liable for the money deposited by the plaintiff on the 2d day of June, 1893. The errors for which the judgment of the trial court was reversed concern his liability upon the first and second causes of action, for the money deposited while he was a partner in the bank. It appears from the record that the banking co-partnership between Beatty and Chase was formed in 1888, and continued until September 1, 1892, when it was dissolved by agreement, under which Beatty took its assets, and assumed the payment of its liabilities. Beatty thereafter continued the business in the name of the Cardington Bank until August 16, 1893, when he failed. The plaintiff left on deposit with the firm on the 12th day of February, 1890, the sum of \$1,000, and on the 12th day of August, 1890, the further sum of \$475; and upon these two deposits his first and second causes of action are founded. For each of these sums the firm issued to the plaintiff, at the time the money was left with it, a certificate of deposit payable six months thereafter, with a special rate of interest for that period only. These certificates were surrendered by the plaintiff at maturity, when the interest was paid, and new ones issued to him, in like form, for another period of six months; and thereafter renewals were made in the same way every six months so long as the firm continued to exist. Each of the certificates bore the names, "R. F. Chase, President," and "Wm. G. Beatty, Cashier," printed at the top, and was signed, "F. A. Bayer, a Cashier." On the 27th day of October, 1892,—being in the month following the dissolution of the firm,—the plaintiff made a new deposit in the bank, of \$125, and then received a certificate of deposit for the amount, in the same form as those which had been previously issued by the firm, except that the name of "Chase, President," was erased by lines of red ink drawn over it. After that, on the 12th day of February, 1893, the plaintiff surrendered to the bank the last renewal certificates is-

sued to him for the \$1,000 and the \$475 while Chase was connected with the bank, received the interest then due on them, and accepted new certificates for corresponding amounts, payable six months from that time, and bearing a like rate of interest until their maturity. The name of Chase did not appear on these last certificates, as president, or otherwise. The evidence tended to prove that, when the plaintiff accepted them, he knew that Chase had withdrawn from the firm; that Beatty had assumed payment of its liabilities, and was then the sole owner of the bank; and that the plaintiff had made inquiries concerning Beatty's solvency and responsibility.

The court, in its general charge, instructed the jury, in substance, that the agreement made between the defendants on the dissolution of the firm would not affect Chase's liability to the plaintiff unless the latter consented to the arrangement, or acquiesced in it, but if, with knowledge of the agreement, he surrendered the certificates issued to him while Chase was a member of the firm, and received in place of them certificates issued by Beatty, with Chase's name omitted therefrom, calling for the same or a greater rate of interest for a specified time, that would release Chase. The instruction requested, which the court declined to give, was, in effect, that Chase would not be released from liability unless the plaintiff agreed to accept the new certificates in payment of the indebtedness of the firm, or intended, in accepting them, to take Beatty for the debt, and release Chase. The instruction requested is in accordance with the rule established in this state. In *Merrick v. Boury*, 4 Ohio St. 60, it is held that a note given for a precedent debt of the maker will not be regarded as a payment of the debt unless the creditor agree to so receive it. And in *Leach v. Church*, 15 Ohio St. 169, the same rule was applied in a case where, after the dissolution of a partnership, a note was given for a debt of the firm by one of the partners, who had agreed to pay its liabilities. It is a question of fact for the jury to determine, in such cases, whether the creditor agreed or intended to receive the note or other obligation of the partner in payment. In the cases cited it is said that the agreement or intention to so receive it must be clearly shown; but that, we apprehend, is a consideration addressed to the judgment of the jury, rather than a rule of evidence. The agreement or intention need not be express, but may be implied from the circumstances of the transaction and conduct of the parties; and no higher degree or greater certainty of proof is necessary to establish the agreement than is ordinarily required to prove any other fact in civil cases. A preponderance of the evidence is sufficient. The new certificates of deposit issued to the plaintiff after the dissolution of the banking firm were the individual obligations of Beatty. They imposed

no liability on Chase. And their substitution for the old ones then surrendered, in satisfaction of the firm debt, and discharge of Chase from liability, being in accordance with the agreement of dissolution, Beatty's intention to thus pay the firm debt with his individual obligation would be sufficiently obvious; and the plaintiff's intention to so receive them might be inferred from the fact that he surrendered the firm certificates, and accepted, and has since retained, the new ones, knowing them to be the individual obligations of Beatty, who was bound by his agreement with Chase to pay the firm debts. The plaintiff might reasonably understand that in the transaction Beatty was acting in pursuance of his agreement to pay the debts of the firm, and be willing to rely on his individual responsibility in order to secure the continuance of the money at interest for a definite future period. These facts, however, are evidential, merely; and it was the province of the jury, and not of the court, to draw the proper inferences, and from them, in connection with all the evidence in the case, determine whether there was an agreement or intention to accept the certificates in payment of the firm debt.

But, while the court failed in its general charge to properly submit this question to the jury, it was so submitted upon the written requests of the plaintiff for special findings. In pertinent and sufficiently certain responses to these requests, the jury found and returned, in addition to the general verdict, that, when the plaintiff received the certificates of deposit issued to him after the dissolution of the banking firm, he had knowledge of its dissolution, and of the agreement between the partners by which Beatty was to pay the indebtedness of the firm, and that he then consented to release Chase, and take Beatty alone for the payment of his debt against the firm, and intended to do so. The special findings are consistent with the general verdict, and cured the error in the general charge of the court, and in its refusal of the instruction requested. They find the essential facts which fix the legal rights of the parties, and cover the questions that the plaintiff desired to have submitted to the jury by the instructions which were refused. The findings cannot be regarded as any the less impartial or decisive than if the jury had been instructed concerning the effect they should have on the general verdict. A new trial with those instructions could only result in a resubmission of the same questions of fact to another jury. And, though that jury might find differently, it could only do so because it might take a different view of the weight of the evidence. There being nothing in the record to show that the findings already made are erroneous, the plaintiff in error is entitled to the judgment which he recovered in the trial court. Judgment of the circuit court reversed, and that of the common pleas affirmed.

(58 Ohio St. 410)

WASTENEY v. SCHOTT, Treasurer.

(Supreme Court of Ohio. May 10, 1898.)

STATUTE OF LIMITATIONS—EFFECT ON STATE—COLLECTION OF TAXES.

1. The rule that statutes of limitation do not run against the state unless it is expressly so provided is applicable in actions where the state, though not a party to the record, is the real party in interest.

2. While actions, under section 2859 of the Revised Statutes, for the collection of personal taxes, are required to be brought in the name of the county treasurer, they are prosecuted in the interest and for the benefit of the state, and the plea of the statute of limitations is not available. *Hartman v. Hunter*, 46 N. E. 577, 56 Ohio St. 175, distinguished.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

On the 17th day of July, 1895, Leo Schott, as treasurer of Hamilton county, brought suit before a magistrate of that county against F. W. and C. A. Wastenev, partners as Wastenev Bros., to recover \$224.93, the amount of the personal taxes with which the defendants were charged on the tax duplicate of that county for the year 1894. The defendants pleaded the statute of limitations; the taxes having been due, as shown by the duplicate, for more than six years before the commencement of the action. On the trial, as appears from the bill of exceptions, the duplicate was the only evidence offered; and, notwithstanding it showed the taxes had accrued more than six years before suit was brought, judgment was rendered in favor of the plaintiff. That judgment was reversed by the court of common pleas for error of the magistrate's court in disregarding the plea of the statute of limitations. The judgment of the common pleas was reversed by the circuit court, where final judgment was rendered in favor of the treasurer for the full amount of the taxes and penalty. Error is prosecuted here to the judgment of the circuit court. Affirmed.

Gustavus H. Wald and Charles B. Wilby, for plaintiffs in error. Rendigs, Foraker & Dinsmore, County Sols., for defendant in error.

WILLIAMS, J. (after stating the facts). The original action was brought under section 2859 of the Revised Statutes, which provides that: "When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law, for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby authorized and empowered to enforce the collection by civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; * * * and the judgment debtor shall not be entitled to the benefit of the laws for the

stay of execution or exemption of home-
stead, or any other property, from levy or sale on execution in the enforcement of any such judgment." That the cause of action accrued more than six years before the commencement of the suit is satisfactorily established by the tax duplicate, which was the only evidence introduced on the trial; and it is the contention of the plaintiffs in error that the action was founded on a liability created by statute, and therefore barred under section 4981 of the Revised Statutes, which limits the time for the commencement of actions so arising to six years after the cause of action accrues. On the other hand, it is claimed the action was not barred, because it was one prosecuted in behalf of the state, to enforce an obligation due to the state, against which the statute does not run. We find nothing in the statute creating the right of action in such cases that fixes any limit of time within which the action may be brought, or from which it may be fairly inferred any limitation was intended. On the contrary, some of its provisions, and others of our tax laws, afford strong grounds for presuming a different legislative intention. The remedy for enforcing the collection of personal taxes by distraint is not limited in point of time, but may be employed at all times until the taxes are paid. By section 2838, for all taxes charged against real property the state is given a lien upon it which continues until the taxes, with any penalty thereon, shall be paid; and by section 1104 the additional remedy for the enforcement of the lien by civil action is provided, in language similar to that of section 2859. These remedies by suit are declared to be, in both classes of cases, in addition to all other remedies for the collection of taxes, and were evidently created because it was expected they would prove more effectual in the enforcement of their collection; and it is but a natural and reasonable presumption that the additional remedies were designed to be not less comprehensive than those in the aid of which they were adopted, and, like them, unaffected by the lapse of time. The obligation of the citizen to pay his taxes is regarded as a continuing public duty, which is discharged only by their payment.

It is not claimed that our statute of limitations is, in terms, made applicable to the state; and the rule is universal that, in the absence of such provision, statutes of limitation do not run against the state, for the reason that laches cannot be imputed to it, and its rights cannot be prejudiced by the neglect of its officers. The proper application of the rule, in an action, is controlled, however, by the nature of the rights involved, and the real parties in interest, rather than by the form of the action and names of the parties as they appear on the record. When the action, though brought in the name of the state, is prosecuted for the

enforcement of some private or individual right, and the state has no substantial interest in the litigation, the plea of the statute may be interposed. On the other hand, if the state is the real party in interest the plea of the statute is not available, though the action be not prosecuted in its name; and actions under section 2859 of the Revised Statutes, for the recovery of personal taxes, are, we think, of that character, and not subject to the bar of the statute, notwithstanding they are required to be brought in the name of the county treasurer. Revenues are essential to the maintenance of the state, and the execution of its governmental functions. Taxation is a recognized, constitutional, and lawful means of raising such revenues, for most, if not all, public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state, for its disbursement in the administration of public affairs, and are in part disbursed, in the due course of local administration, by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state; and, while it was probably deemed impracticable to create a lien on personal property for the taxes laid against it, the fund derived from them is expended in common with that arising from real estate taxes, and for the same purposes. Local assessments (those made on abutting or contiguous property for local improvements, according to special benefits resulting from such improvements) may stand on a different footing. While these are improvements of a public nature, the assessment goes to the contractor who furnishes the labor and material for their construction. The assessments may be assigned directly to the contractor, in which case their collection may be enforced by suit for his use. Provision is also made for placing them on the tax duplicate, and for their collection by the county treasurer. But, in whichever mode their collection is sought, the remedy is in fact for the benefit of the contractor, and the interest of the state in them is nominal

and remote. Upon this ground, *Hartman v. Hunter*, 56 Ohio St. 175, 46 N. E. 577, is distinguished. Judgment affirmed.

(58 Ohio St. 538)

FREDERICK v. CITY OF COLUMBUS.

(Supreme Court of Ohio. June 21, 1898.)

NEGLIGENCE OF FIRE DEPARTMENT—LIABILITY OF CITY.

A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department or any of its members; nor is it liable for negligence in omitting to inform the members of its fire department of defects in the apparatus of the department, known to itself, nor for neglecting to instruct its fire department in the proper use and management of such apparatus.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by Ella Frederick, administratrix, against the city of Columbus. A judgment sustaining a demurrer to the petition was affirmed by the circuit court, and plaintiff brings error. Affirmed.

J. T. Holmes, F. A. Davis, and Cyrus Huling, for plaintiff in error. Barger & Irvine, for defendant in error.

MINSHALL, J. The city of Columbus having purchased a certain apparatus for the extinguishment of fires, called a "fire tower," its fire department was engaged on June 24, 1894, in a practice drill on one of its principal streets, when, by the negligent management of the members of the department, it fell, and caused the death of the plaintiff's husband. He was at the time sitting in his buggy near by, and was without fault on his part in any way contributing to the result. Whereupon his wife, having been appointed his administratrix, brought suit against the city to recover damages for the wrongful causing of his death. She charged negligence against the members of the department in managing the tower; also, that the tower was defective, to the knowledge of the city, and that it was negligent in not communicating this fact to the members of its fire department; and that the latter were inexperienced in the use of the tower; and that the city was negligent in not having properly instructed them in its management and use. The city demurred to the petition. The demurrer was sustained, and the petition dismissed. On error, the judgment was affirmed by the circuit court.

The record presents the simple question whether a municipal corporation is liable in damages to one injured by the negligent acts of the members of its fire department engaged in the use of its apparatus, whether in the extinguishment of fires or otherwise. The question has generally, if not universally, been answered in the negative. The ground on which the nonliability of municipal corporations is placed in such cases is

that the power conferred on them to establish a department for the protection of the property of its citizens from fire is of a public or governmental nature, and liability for negligence in its performance does not attach to the municipality, unless imposed by statute. The nonliability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers, and they are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens. "It is obvious," says Gholson, J., in *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375, 377, "that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect person and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the state, —discharging the duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegation of power; as to the second, the rules which govern the responsibility of individuals are properly applicable." In this case it was sought to make the city of Cleveland liable for having neglected its duty in not preventing the destruction of the property of the plaintiff by a riotous assemblage of persons. But in the subsequent case of *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, the suit was for the recovery of damages against the city for having neglected to make proper provision for the extinguishment of fires, whereby the plaintiff's property was destroyed. The court, however, held that the duty of the city in this regard fell within the category of the public duties of the city, and that there was no liability. Speaking of the powers conferred on municipal corporations for the extinguishment of fires, the court said: "The powers thus conferred are in their nature legislative and governmental. The extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or

nonfeasance of an officer or agent charged with the performance of the duty."

That the case just noticed is not in all respects like the one before us may be admitted. In it the city was charged with neglect in not making proper provisions for the extinguishment of fires. Here it is charged with neglect in the management of an apparatus for the extinguishment of fires. But the cases uniformly hold that the principle on which municipal corporations are absolved from liability for negligence in the management of their fire departments applies in the one case as well as in the other. In *Hayes v. City of Oshkosh*, 33 Wis. 314, the action was for property destroyed by a fire caused by negligence in working a steam fire engine. Dixon, C. J., in disposing of the case, said: "The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been." Then, after citing certain cases from Massachusetts, he proceeds: "The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the fire department, although appointed by the corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be made liable, but they act rather as public officers of the city, charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city; and hence the maxim *respondet superior* has no application." The decision in this case is fully supported by the authorities, and the decisions in the other states of the Union. There is, in fact, a remarkable unanimity on the subject. *Dill Mun. Corp.* §§ 976, 974; *Jones, Neg. Mun. Corp.* § 31; *Shear. & R. Neg.* § 264; *Goddard v. Harpswell (Me.)* 30 Am. St. Rep. 388, note (s. c. 24 Atl. 958); *Hill v. City of Boston*, 122 Mass. 344 (a leading case); and numerous other cases cited in brief of counsel, from the principal states of the Union. In *Tiedeman on Municipal Corporations* (section 333) it is stated that: "Municipal corporations are not liable for the negligence of their firemen—although they may be appointed and removed by the city, and the performance of the duties are wholly subject to its control—where a person is run over by a horse carriage on its way to a fire; for injuries caused by the bursting of a hose; for damage by fire caused by the negligence of the city's firemen; for neglect in cutting off water, by which the fire might have been sooner extinguished; by the bursting of the mains; be-

cause a horse is frightened by steam from an engine left in the street; or for any similar lack of care or skill." The cases in which it has been so held in these several instances are cited in a note to the section. A case very much in point here is that of *Thompson v. Mayor, etc.*, of New York, 52 N. Y. Super. Ct. 427, as there the injury for which the suit was brought occurred while the employes of the fire department were engaged in testing a certain apparatus (i. e. a fire tower) prior to its purchase by the city; and, on the ground above stated, the city was held not liable. See, also, *Edgerly v. Concord*, 59 N. H. 78. It is not always a simple matter to determine to which class of the duties of a municipal corporation a given case belongs. *Okey, J.*, in *Robinson v. Greenville*, 42 Ohio St. 629. But as observed in *Lloyd v. Mayor, etc.*, of City of New York, 5 N. Y. 374: "When the line is ascertained, it is not difficult to determine the rights of the parties; for the rules of law are clear and explicit which establish the rights, immunities, and liabilities of the city when in the exercise of each class of powers. All that can be done, probably, with safety, is, to determine in each case, as it arises, under which class it falls." This, however, has been fully determined by the decisions as to cases arising out of the neglect of the fire department of a city or any of its members. The duties violated are, in such cases regarded as governmental in character, and no liability attaches to the city to compensate persons injured thereby.

The charge that the tower was defective, to the knowledge of the city, and that it was negligent in not communicating this fact to the members of its fire department, and that the latter were inexperienced in the use of the tower, and that the city was negligent in not having properly instructed them in its management, so clearly fall within omissions of a governmental character as to need no further notice.

But it is claimed that the question of the city's liability in this case is settled in this state by the case of *Newark v. Frey*. This is an unreported case, referred to by *Okey, J.*, in delivering the opinion in *Robinson v. Greenville*, 42 Ohio St. 625, 629. It is not there referred to as an authority supporting the decision in that case, for there the city was held not liable to a person injured by the discharge of a cannon in its streets by an assemblage of disorderly persons, on the ground that the neglect of a city to prevent such assemblages is simply the neglect of a governmental duty. *Newark v. Frey* was referred to as a case falling within the rule of municipal liability for the acts of its agents. The act complained of was, as in this case, the testing of an apparatus for the extinguishment of fires, at which members of the city council were present. There was an explosion from some very inflammable materials used to make a fire, which caused the

injury complained of, and the city was held liable. What consideration was given the case, we do not know. It is not supported by any of the authorities referred to, and is so plainly contrary to the settled law upon the subject, as shown by the authorities, that we do not feel bound by it. Judgment affirmed.

(58 Ohio St. 527)

BENEDICT v. PETERS et al.

(Supreme Court of Ohio. June 21, 1898.)

CHATTEL MORTGAGE—OATH OF MORTGAGEE.

The statement under oath required of the mortgagee under section 4154, Rev. St., of the amount of his claim, and that it is just and unpaid, must be made on the mortgage, and authenticated by the signature of the officer administering the oath; and where this is not done the mortgage is of no effect as a lien against a creditor of the mortgagor, who has caused an execution to be levied upon the property.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by David B. Peters and another against Levi Benedict. Plaintiffs had judgment, and defendant brings error. Reversed.

D. T. Ramsey and J. V. Lee, for plaintiff in error. Walter B. Page, for defendants in error.

MINSHALL, J. Levi Benedict, having obtained a judgment against Malon A. Peters before a justice of the peace, caused an execution to issue and be levied upon certain personal property of the debtor. Shortly afterwards David and Wilson Peters replevined the property from the constable, claiming it under a certain chattel mortgage that had been made to them by the debtor to secure an indebtedness to themselves. Benedict was duly substituted for the constable, and the case was tried on an answer denying the averments of the petition. The finding was for the plaintiff, and damages one cent, and judgment rendered on the verdict for the plaintiff after a motion for a new trial had been made and overruled. A bill of exceptions was taken, and made a part of the record, setting forth all the evidence. The only question arising upon the record is as to the validity of the chattel mortgage under which the plaintiffs claimed the property as against the levy made upon the property by Benedict under his judgment, the levy being subsequent in time to the mortgage. The mortgage was regular in all respects, except that the statement thereon under oath, required by section 4154, Rev. St., to be made by the mortgagee, his agent or attorney, as to the amount of his claim, and that it is just and unpaid, was not certified to by the officer as having been administered by him; that is, his signature was omitted. From aught that appeared, the affidavit may simply have been written on the mortgage, signed by the mortgagee, with the usual jurat in blank, and

without its having been sworn to by him before any officer. Evidence was offered and received against the objection of the defendant, and to which he excepted at the time, that the oath had in fact been made before the notary, but he had inadvertently omitted to sign his name to the certificate. And the question now arises whether this omission invalidates the mortgage as against a judgment creditor of the mortgagor, who has levied on the property. It is well settled that, if the mortgage is defective as a lien against third persons, it is of no avail against the subsequent levy of an execution by a creditor, without regard to his knowledge of the improperly filed mortgage. *Houk v. Condon*, 40 Ohio St. 569. The requirement of good faith, to acquire a preference over it, applies only to subsequent purchasers and mortgagees. Instruments whereby one creditor is to obtain a lien upon the property of a debtor as against others must be construed strictly in the observance of those requirements necessary to the creation of the lien, and particularly is this so as to those things required as notice to third persons of the existence of the lien. The mischief intended to be remedied by the provisions of section 4154, was the giving of colorable mortgages by debtors for the purpose of covering up their property and hindering and delaying honest creditors in the pursuit of their legal remedies against them. The statement required by this section to be made under oath by the mortgagee on the mortgage, as to the amount of his claim, and that it is just and unpaid, is vital to the spirit of the statute in the light of the mischief it was intended to prevent. It subjects the conscience of the party to the severe test of an oath as to the amount and justice of his claim to be secured by the mortgage. It is, however, argued with a good deal of force that if the oath has been in fact taken, the mischief will be as effectually avoided as if the fact were certified on the mortgage by the officer administering it. This would certainly be so in the cases where it is shown to have been done by parol testimony. But would this be so in all cases? Certainly not in those cases where the oath has not been administered; and, as this cannot be known from the mortgage itself, it certainly opens the door to the making and filing of fraudulent mortgages. Such mortgages may be made and filed, and, while the fraud may or may not be discovered and exposed by the creditors, it will serve, for the time being, or maybe for all time, the fraudulent purpose of the parties. In such way the creditor may be hindered and delayed by the fraudulent practice, and no other consequences will result to the parties than the exposure of their fraud, and the loss of what was to be gained thereby. But where the oath is in fact taken and certified by the officer on the mortgage, the affiant may, in addition to the exposure of his fraud, be prosecuted for perjury. I am not to be understood as implying

that, where a false oath has been made, no prosecution for perjury could be had, in the absence of a certificate signed by the officer. The point is that, where the fact may be shown by parol, a certificate in due form may be fraudulently indorsed on the mortgage, and the taking of the oath omitted, for the purpose of hindering and delaying creditors, with no other consequences to the party than the exposure of his fraud. In this view of the case we think the court erred in permitting the plaintiff to show by parol that the oath had in fact been taken, though there was no certificate signed by the officer administering it to that effect on the mortgage. The mortgage, as against the judgment creditor who had levied on the property, was of no effect (*Houk v. Condon*, *supra*), and judgment should have been rendered in his favor. Creditors examining the records for such liens, are not required to go beyond the record for the purpose of learning whether an instrument on which there is no duly-certified sworn statement required by the statute can be shown to have been properly executed in this regard. All that is required to make it a mortgage as against creditors must appear upon the instrument filed as such. It cannot be helped out by parol. *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295.

We do not think that the cases of *Ashley v. Wright*, 19 Ohio St. 291, and *Stock Co. v. Weber*, 41 Ohio St. 689, are opposed to this view. In *Ashley v. Wright* the instrument showed on its face that the statement had been properly sworn to. The notary administering the oath had signed the certificate, but had omitted his seal. The court held that the attaching of the seal was not necessary, the seal being only required in the authentication of purely notarial acts, as in the protesting of commercial paper for dishonor. In *Stock Co. v. Weber* the statement was not signed by the mortgagee. This the court held is not necessary where, as in that case, the taking of the oath was duly authenticated by the notary. Quite a number of cases are cited where, in attachment proceedings, affidavits on which writs of attachment were issued, were not authenticated by the officer administering the oath, and the omission was not regarded as fatal to the affidavit, the evidence of the fact being supplied by parol. We do not regard these cases as of controlling effect here. An affidavit in an attachment proceeding is given for the protection of the debtor. And if it has been in fact taken it affords the same protection to him as if duly certified by the officer administering it. The lien of the attachment does not depend upon the sufficiency of the affidavit, but upon the taking of the property under the writ; and, if the defects in the affidavit are waived by the debtor, third persons cannot take advantage of them. Nor is the affidavit designed as notice to third persons of the existence of the lien, that

is accomplished by the seizure of the property. For these reasons the cases cited, and similar ones, are not relative to the question here. The general rule is that an affidavit must appear on its face to have been taken before the proper officer, and in compliance with all legal requisitions. *Glaug. Notary's Man.* § 32. A paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit. *Morris v. State*, 2 Tex. App. 502; *Cantwell v. State*, 27 Ind. 505; *Bank v. Hinchcliffe*, 4 Ark. 444; *Glaug. Notary's Man.* § 34. In the latter case the sufficiency of an affidavit for an appeal was presented, and the court said: "In the transcript before us the clerk has copied a writing purporting to be the affidavit of the attorney of the appellant, containing all the requisites prescribed by law, except the essential one that the individual purporting to make the affidavit does not appear to have been sworn, or to have made the affidavit before any authority competent to take it. It is true that this statement appears immediately under the writing purporting to be an affidavit, 'sworn to and subscribed in open court December 22, 1841'; but this attestation is not subscribed or certified, either by the clerk, the judge, or the court, and therefore it can only be regarded as the mere draft of an affidavit, never sworn to by the person by whom it purports to have been made; and therefore, as the record shows no affidavit, as required by law, the appeal must be considered as having been illegally granted." And, the same being true in this case, the mortgage relied on by the plaintiffs below must be regarded in law as having no sworn statement upon it, required by statute to make it valid as against creditors. Judgment of the circuit court and of the common pleas reversed, and cause remanded to the latter court for further proceedings.

(58 Ohio St. 480)

COONS v. CLIFFORD.

(Supreme Court of Ohio. June 7, 1898.)

INDEPENDENT NOTES—DIFFERENT PAYEES AND DIFFERENT DATES OF EXECUTION—MORTGAGE SECURITY—DISTRIBUTION OF PROCEEDS.

On foreclosure of a mortgage executed by a principal debtor to his sureties for their indemnity with respect to independent notes previously executed to different payees, and having different dates of execution and maturity, the payees of such notes are entitled, by subrogation, to participate in the proceeds of the sale in proportion to the sums respectively due them; there being no priority of lien incident to the note of earlier maturity.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

Action between Vincent H. Coons and Isabella Clifford to determine priority of right to collateral security. From a judgment of the circuit court denying Coons' claim to priority, he brings error. Affirmed.

This cause, having been appealed from the common pleas court to the circuit court, was

tried on the pleadings and the evidence. The facts appearing therefrom, and from the findings of the court, are as follows: L. C. Smith and William McKinnis, with their wives, executed to A. L. Davis, J. G. Mills, and C. F. Gruel their mortgage on lot No. 1272 in Findlay, to indemnify the mortgagees as sureties for the mortgagors on two promissory notes previously executed,—one held by Vincent H. Coons, plaintiff in error, on which Davis and Gruel were sureties, which became due May 3, 1891; the other, on which Davis and Mills were sureties, being held by Isabella Clifford, the defendant in error, which became due August 14, 1891. The parties herein, as holders of the notes, claim to be entitled to resort to the indemnity given by the principal debtors to their sureties; and the mortgaged premises having been sold, and the proceeds of sale, after satisfying prior liens, found to be insufficient to pay the amount of the two notes in full, it was claimed on behalf of Coons that he was entitled to be paid in full before distribution to Mrs. Clifford. Other facts appearing in the record are not material to the point decided. In the circuit court it was adjudged that the parties here were entitled to resort to the mortgage given by the principal debtors to their sureties upon the notes, and that the holders thereof were entitled to the proceeds of sale in proportion to the amounts respectively due them. To this, Coons excepted. He now seeks such modification of the judgment as shall accord to his claim priority to that of Mrs. Clifford.

Mehan & Coons, for plaintiff in error. A. Zugschwert, for defendant in error.

SHAUCK, J. (after stating the facts). The only question deemed entitled to consideration in this report relates to the soundness of the contention of the plaintiff in error that, because of the earlier maturity of the note held by him, he is entitled to full payment out of the proceeds of the sale of the property mortgaged to indemnify the sureties of the mortgagors, before Mrs. Clifford is entitled to any portion thereof. The proposition is said to be supported by the decisions of this court in *Bank v. Covert*, 13 Ohio, 240, and *Winters v. Bank*, 33 Ohio St. 250. These cases should be regarded as placing it beyond controversy in this state that where a single indebtedness is made the consideration for several notes from the debtor to the creditor, maturing at different dates, and secured by the same mortgage, and the notes are held by different persons at the time of foreclosure, priority of lien belongs to the note first maturing, unless a different intention is expressed by the parties. The statement of the rule shows that it arises from a consideration of the intention of the parties, as it may be inferred from the transaction. It seems to have no other foundation. While the rule thus defined should be adhered to

as a rule of property, it should not be extended to cases not within its reason. The mortgage in the case before us was given to secure conditional liabilities, upon wholly distinct debts, due originally to different parties, and contracted at different times; and we are not able to infer from the transaction any intention that priority of lien should exist in favor of the holder of the note first maturing. The rule established in the cases above cited is followed in Indiana, but in that state its application to a single mortgage, given to secure obligations to different parties, maturing at different dates, has been denied. *Shaw v. Newsom*, 78 Ind. 335. Judgment affirmed.

(58 Ohio St. 417)

STATE v. JOHNSON.

(Supreme Court of Ohio: May 10, 1898.)

"MAIM" AND "MAYHEM" AT COMMON LAW—BITING OF AN EAR NOT MAIMING—ASSAULT AND BATTERY.

1. "Maim" and "mayhem" are, at common law, equivalent words, and mean the same thing. Therefore, a count in an indictment charging the defendant with maliciously biting the ear of another with intent to maim cannot be supported as to the particular intent charged, as the biting of an ear does not, in law, constitute a maiming.

2. Nor can a conviction be had on such a count for biting the ear with intent to disfigure, under section 7316, Rev. St., permitting a conviction of an inferior degree of the offense charged, as a biting with intent to disfigure is not inferior to a biting with intent to maim, under section 6819. Both offenses are of the same degree. *Barber v. State*, 39 Ohio St. 660.

3. Under an indictment charging an injury to the person of another with intent to maim or disfigure, the party may be convicted of an assault and battery, under the provisions of section 7316, Rev. St.; the offense charged being simply an aggravated assault and battery.

(Syllabus by the Court.)

Exceptions from court of common pleas, Perry county.

David Johnson was indicted, in two counts, for mayhem. He was acquitted on one count, and a demurrer sustained to the other. The state brings exceptions to the ruling on the demurrer. Exceptions sustained.

J. B. Williams, Pros. Atty., for plaintiff in error. Maurice H. Donahue, counsel appointed by the court to argue exceptions. Thos. B. Williams, Pros. Atty., for the State.

MINSHALL, J. David Johnson was prosecuted on an indictment presented by the grand jury of the county, framed on the provisions of section 6819, Rev. St. The section, so far as it is applicable to this case, is as follows: "Whoever with malicious intent to maim or disfigure, cuts, bites, or slits the nose, ear or lip, cuts or disables the tongue, puts out or destroys an eye, cuts off or disables a limb or any member of another person," is declared guilty of an offense punishable by imprisonment in the penitentiary. The indictment contained two counts. In the first it was charged that he

maliciously "did bite the ear of one Reuben Mitchell with intent to disfigure"; and in the second, that he maliciously "did bite the ear of one Reuben Mitchell with intent to maim." A demurrer was sustained to the second count, and, on a plea of not guilty, he was acquitted on the first count. The prosecuting attorney took a bill of exceptions to the ruling on the demurrer to the second count, and prosecutes the same here, under the provisions of the statute in that regard, to test the accuracy of the ruling.

The demurrer presents the question whether the malicious biting of the ear of another can be charged as done with intent to maim. There is no question, we think, but that "maim" (as a noun) and "mayhem" are equivalent words, or that "maim" is but a newer form of the word "mayhem"; the difference being in the orthography, and not in the sense. *Webst. Dict.* "Maim" (as a noun) is there defined the same as "mayhem": "The privation of the use of a limb or member of the body, by which one is rendered unable to defend himself, or to annoy his adversary." This is the definition of "mayhem" at common law. 1 East, P. O. 393; 1 Whart. Cr. Law, § 581. Hence the verb "to maim" is accurately defined in *Anderson's Law Dictionary* as follows: "To commit mayhem." So, at common law, whatever the injury to any member of the body might be, if it did not permanently affect the physical ability of the person to defend himself, or annoy his adversary, it did not amount to mayhem. Neither the biting of an ear, nor the slitting of the nose, was regarded as an injury of this character. *Clark, Cr. Law*, 182; 3 Bl. Comm. 121. The outrage upon Sir John Coventry, who had been set upon in the street, and his nose slit, for words spoken in parliament, led to the adoption of what is known as the "Coventry Act." 22 & 23 Car. II. This act made it a felony, without benefit of clergy, where any one unlawfully cut out or disabled the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disabled any limb or member of any other person, with intent to maim or disfigure him. 4 Bl. Comm. 206. Our statute is substantially the same. Any of the injuries there named, done with the intent "to maim or disfigure," is punishable by imprisonment in the penitentiary. Whether it be the biting of an ear, or the putting out of an eye, or the cutting off of a hand, each is alike regarded as a crime, and punished the same way; or, in other words, each is of the same degree of criminality. Rev. St. § 6819.

The question in the case is whether the second count in the indictment charges an offense against the laws of the state. It does not, for reasons stated, charge a maiming. Then does it charge the offense of biting the ear with intent to disfigure? Such intent is not averred in the count; and, unless the intent to maim includes the intent

to disfigure, there can be no conviction on the second count for such an offense. Evidence of an intention to disfigure would be a fatal variance from the intent laid in the count. The intent in this case must depend upon the nature of the injury, in connection with the character of the member on which it is inflicted. If the member be not one of use to the person in defending himself, an injury to it cannot be said to have been done with intent to maim. It is provided, among other things, in section 7818, Rev. St., that, "when the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree." In *Barber v. State*, 39 Ohio St. 660, it was held that the offense of cutting with intent to kill, and that of cutting with intent to wound, are offenses of the same degree, under the provisions of section 6820, Rev. St., making it an offense for any one to cut another person "with intent to kill, wound or maim." The indictment charged a cutting with intent to kill. The verdict of the jury was, "Guilty of cutting with intent to wound." The court held that the indictment was not supported by the verdict, for the reason that the offense of cutting with intent to wound is not an offense inferior in degree to that of cutting with intent to kill. By a parity of reasoning, it follows that the unlawful biting of the ear with intent to disfigure is not an offense inferior to that of biting it with intent to maim; and an indictment charging the biting to have been done with intent to maim would not be supported by evidence of an intent to disfigure. There would, in such case, be a material variance between the proof and the allegation.

But this does not exhaust the inquiry, for the question remains, does the count charge any offense against the laws of the state? If so, the court erred in sustaining a demurrer to it. Now, it seems apparent that the malicious biting of the ear of another, whether to maim or disfigure, amounts to an assault and battery,—an offense inferior in degree to an assault with intent to maim or disfigure; the offense charged being simply an aggravated form of assault and battery, of which the defendant could have been convicted on the count demurred to, on proof of such an offense. *Heller v. State*, 23 Ohio St. 582; *Barber v. State*, supra; 3 Bl. Comm. 121. For this reason the court erred in sustaining a demurrer to it. Exceptions sustained.

(58 Ohio St. 463)

CITY OF GREENVILLE v. ANDERSON et al.

(Supreme Court of Ohio. June 7, 1898.)

OFFICERS—CITY CLERKS—MISAPPROPRIATIONS—
NEGLECT—LIABILITY OF SURETIES.

1. It is a violation of the official duties of a city clerk to draw his warrant on the treasury for the payment of any claim that has not

been allowed by the council, or for a larger amount than has been so allowed, obtain the money thereon, and appropriate it, or part of it, to his own use; or to draw his warrant for a valid claim that has been allowed, payable to the creditor or bearer, and then, instead of delivering it to the creditor, present it himself for payment, obtain the money and convert it to his own use; and, for any loss sustained by the city in consequence of such malfeasance of the clerk, the sureties on his official bond are liable.

2. Negligence on the part of the treasurer in paying such warrants does not excuse the official misconduct of the clerk, nor relieve his sureties from liability.

(Syllabus by the Court.)

Error to circuit court, Darke county.

Suit was brought by the city of Greenville on the official bond of Charles B. Elliott, as clerk of that city, to recover damages for alleged breaches of the bond. The amended petition contains thirteen causes of action, each of which charges the clerk with a misappropriation of the funds of the city, and a violation of his official duty in obtaining the same. Elliott failed to plead, and judgment was rendered against him for the amount claimed. His sureties, L. C. Anderson and Thomas E. Teal, filed general demurrers to the several causes of action, but afterwards withdrew those to the third, twelfth, and thirteenth, and allowed judgment to be taken thereon against them. The demurrers to the other causes of action were sustained, and final judgment rendered in favor of the sureties. That judgment having been affirmed by the circuit court, error is prosecuted by the city to this court. Reversed.

The breaches of the bond alleged in the first, second, fifth, and seventh causes of action relate to transactions of the same nature, and are charged in substantially the same way; so that a decision upon the sufficiency of any one of them will determine the questions arising upon the others. The first cause of action is as follows: "The said plaintiff, the city of Greenville, is a municipal corporation, duly organized under the laws of the state of Ohio, and is situate in the county of Darke, in said state. The said Charles B. Elliott, one of the defendants above named, was duly elected clerk of said city of Greenville, Ohio, and was duly elected such clerk by the council of said city of Greenville, Ohio, on the 17th day of April, A. D. 1893; and, as such clerk, said Charles B. Elliott did, on the 20th day of April, A. D. 1893, enter into a bond to the said plaintiff, the city of Greenville, Ohio, in the sum of one thousand dollars, with said defendants Thomas E. Teal and L. C. Anderson as sureties, which bond and the sureties thereon were duly approved by the mayor of said city of Greenville, Ohio, on the 20th day of April, A. D. 1893, and was duly filed and recorded as required by law. And the defendant Charles B. Elliott took the oath of office as such clerk of said city, and entered upon the discharge of the duties of said office on said 20th day of April, A. D. 1893, and con-

tinued in the occupancy of said office from said date until the 21st day of May, A. D. 1894. A copy of said bond is filed in this case, and marked 'Exhibit A.' Said bond was conditioned that 'whereas, the said Charles B. Elliott was, on the 17th day of April, A. D. 1893, duly elected and qualified as clerk of said city of Greenville, Ohio, for the period of two years, and until his successor is duly elected and qualified: Now, if the said Charles B. Elliott shall well and faithfully perform the duties of the office of said clerk of the said city of Greenville, Ohio, during his continuance in said office for said term, then this obligation will be void; otherwise, it will be and remain in full force and effect.' The said plaintiff says: That the said defendant Charles B. Elliott, while acting as such clerk, failed, neglected, and refused to do and perform the duties of his said office, in this: That on or about the 28th day of August, A. D. 1893, he, the said C. B. Elliott, as said city clerk, without any authority, knowingly and willfully issued a warrant or order upon the city treasurer of said city of Greenville, being warrant No. 4,045, payable to the Variety Iron Co. or bearer, out of the waterworks fund, in the sum of \$1,696.27. That said order or warrant was indorsed, 'C. B. Elliott.' That said C. B. Elliott presented said warrant or order, so indorsed, and received from the treasurer of said city the said sum of \$1,696.27; and that, of said amount, he sent to the said Variety Iron Company the sum of \$1,476.27, and appropriated to his own use the sum of \$220. The council of said city of Greenville, Ohio, had shortly before said August 28th, A. D. 1893, passed an ordinance ordering the payment to said the Variety Iron Company of the sum of \$1,476.27, and had directed said city clerk to issue a warrant on the city treasurer for said sum, payable to said the Variety Iron Company, which sum of \$1,476.27 was the amount then due and owing from said city of Greenville to said the Variety Iron Company, upon a contract theretofore made by said city and said the Variety Iron Company. That said city council did not order the said clerk to issue an order or warrant on the city treasurer of said city payable to said the Variety Iron Company, for any other sum at said date than said \$1,476.27. That said C. B. Elliott did not deliver said warrant, so drawn in favor of the Variety Iron Company, to it or to any one else for it, and did not deliver any warrant for the payment of said sum of \$1,476.27 to said the Variety Iron Company, as it was his duty to do. That by reason of the failure and neglect of the said Charles B. Elliott, as such city clerk, faithfully and properly to perform his said duties as such clerk, the said city of Greenville suffered loss and damage in the sum of \$220." In the fourth cause of action it is alleged that the clerk, in his official character, drew an order on the city treasurer for

an amount actually due to a creditor of the city, payable to the creditor or bearer, but, instead of delivering it to the creditor, presented it for payment, received the money on it, and appropriated it to his own use; the sixth cause of action charges him with having made the same use of an order which he drew payable to a company, or bearer, to which the city was not indebted. The eighth, ninth, tenth, and eleventh causes of action charge the clerk with having wrongfully inserted various claims in ordinances passed by the city council, making appropriations for the payment of claims, after the ordinances were passed, and fraudulently concealing his action by omitting to read over the claims so inserted, and thereafter drawing warrants on the treasurer for such claims, payable to bearer, receiving payment himself, and converting the money to his own use. These various transactions are set forth in detail, but it is not deemed necessary to state them here with more particularity.

H. G. Dershem, George A. Jobs, and A. C. Robeson, for plaintiff in error. Anderson & Bowman, for defendants in error.

WILLIAMS, J. (after stating the facts as above). The condition of the bond sued on is, as required by statute, that the clerk shall faithfully perform the duties of his office during the term for which he was chosen; and in order to ascertain whether there has been a breach of that condition, rendering the sureties liable for the damages claimed, it is necessary to inquire into the duties of the officer, and determine whether a violation of them, resulting in such damages, is shown in either of the causes of action in question. These duties, which are prescribed in various provisions of the statutes, may, so far as they are relevant to the case, be summarized as follows: In cities having no auditor (and there appears to be no provision for such an officer in cities of the grade and class to which the plaintiff belongs) the duties of that officer are devolved on the clerk, who is thus required to keep separate accounts of the several funds of the municipality, the amounts belonging to each, the unpaid claims against each fund, and the balance standing to its credit, and not to allow any fund to be overdrawn, or drawn upon except for the specific use for which it is appropriated. He is moreover required to examine all vouchers presented for the purpose of obtaining warrants on the treasury, and in case there is no fund out of which a voucher can be lawfully paid, or if, for any cause, it should not be approved, it is made his duty to give immediate notice of the fact to the proper authority for the allowance of claims against the city; and, if he shall approve any voucher which should not be paid, the statute provides that "he and his sureties shall be individually liable."

Rev. St. §§ 1762, 1765. By section 1768 the city treasurer is made the custodian of the municipal funds, and he is required to disburse the same on the order of such officer as may be authorized by law or ordinance to issue orders therefor; and, by a provision of section 2690, no claim against the corporation can be paid by the treasurer except upon the warrant of the clerk or auditor. Appropriations of the municipal funds can only be made by ordinance which must contain an explicit statement of the purpose for which the appropriation is made; and the clerk is charged with the duty of making and keeping accurate records of the proceedings of the council, and of all resolutions and ordinances passed by it. He is given the custody of the books, records, and ordinances, and required to keep and preserve them in his office. Rev. St. §§ 1693, 1755, 1762.

It will thus be seen that the law designed to make the office of city clerk a substantial safeguard against encroachments on the treasury of the city, and any misappropriation of the public moneys. No claim can properly reach the treasury for payment except through the city clerk, and with his official sanction; and he is charged with the important duty of protecting the city from the payment, out of its public funds, of any but just and valid claims for whose payment the council has made the necessary appropriation and allowance. It is a palpable violation of his official trust to aid in the procurement of those funds in any other way, or for any other use. His sureties stand for his official integrity in this respect, and are liable for losses resulting from his official dishonesty. When, therefore, the defendant Elliott drew fraudulent warrants on the plaintiff's treasury for amounts greater than were due to the creditors in whose favor they were drawn, and greater than had been authorized by the council, obtained from the treasury the whole amount represented by the warrants, and appropriated the excess to his own use, he grossly misused his official position to perpetrate frauds on the city, whose loss so occasioned is within the obligation of his bond. It was manifest unfaithfulness to official duty, against the consequences of which the sureties undertook to indemnify the plaintiff. So, also, were the fraudulent alterations of the claim ordinances passed by the council, thus falsifying the records, which it was his duty to carefully and accurately keep and preserve, by inserting unauthorized claims, and thereafter drawing warrants therefor on the treasury, receiving the money on them, and converting it to his own use.

It is argued in support of the demurrers that the grounds of complaint made in the petition are the alleged failures of Elliott to properly account for and pay over the moneys he wrongfully obtained from the treas-

ury, which, it is urged, were his individual delinquences, and not official defaults for which his sureties are answerable, because neither the receipt nor disbursement of the moneys pertained to his office. And cases are cited which hold that sureties on official bonds, conditioned that the principal should faithfully account for and pay over all moneys received by him, are not liable for any misappropriation of money which came to his hands otherwise than by virtue of his office. The principle is elementary. The obligation of sureties must be found in the instrument by which they are bound, and cannot be enlarged beyond its terms. But there was no failure of Elliott to account for and pay over the moneys he wrongfully received, except his failure to cover them back into the treasury. His wrong was in the means employed to obtain the money; and, while these were violations of law, they were nevertheless official acts. If the acts of an officer are to be regarded as unofficial whenever they are illegal, an official bond could serve no useful purpose, for there can be no breach so long as he performs his duties according to law. It is only when some duty has been omitted or disregarded or improperly or illegally performed that a liability can arise. The drawing of warrants on the treasury for the payment of claims out of the public funds was in the line of Elliott's duties as city clerk. His authority and duty was to draw only such warrants as were for valid claims which had been allowed by the city council; and, as has already been seen, it was equally his duty to withhold his official approval from all other classes of claims. These duties he violated when he drew and signed, in his official character, the unauthorized and fictitious warrants upon which he received the money. These warrants were issued under color of his office, bore his official authentication, purported to be legal and valid vouchers, and were presented and paid as such. They were the means by which he obtained the money; and the object of his bond was to afford indemnity against such official misconduct.

It is said, however, that the treasurer was at fault in paying the warrants to Elliott; that, though payable to bearer, they were nonnegotiable except by indorsement of the payee; and that the treasurer was negligent in not requiring such indorsement. Conceding that the treasurer was misled by the form of the warrants, they were so drawn by the clerk to enable him to obtain the money on them. His fault was none the less if the device succeeded. And, if the treasurer was negligent in paying them in that form, his negligence was but a contributing cause of the loss suffered by the city, the primary wrong which brought it about being their fraudulent issues by the clerk. No excuse can be found in the negligence of the treasurer for the malfeasance of the clerk, nor can it affect the liability of the sureties

on his official bond. *Cricket v. State*, 18 Ohio St. 9; *Campbell v. People*, 154 Ill. 595, 39 N. E. 578; *People v. Treadway*, 17 Mich. 480. We are of opinion that the plaintiff is entitled to recover upon each of the causes of action stated in the amended petition, not exceeding in the aggregate the penalty of the bond; and the courts below erred in sustaining the demurrers. Judgment reversed.

(58 Ohio St. 443)

STRAMAN v. RECHTINE et al.

(Supreme Court of Ohio. June 7, 1898.)

MORTGAGES—ACKNOWLEDGMENT—REFORMATION—RECORDATION—RELEASE—SUBROGATION—PRIORITIES—DOWER.

1. Where money is loaned under an agreement that it shall be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who so loans the money shall have a first mortgage lien on the same lands to secure his money, and through some defect in the new mortgage, or oversight as to other liens, the money cannot be made on the last mortgage, the mortgagee has a right to be subrogated to the lien which was paid by the money so by him loaned, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released, but not as against a bona fide lienholder who acquired his lien after the release of the old mortgage, without notice of such agreement and payment.

2. R. having made a mortgage on his real estate to an insurance company, his heir, after his death, borrowed money from B., and paid the mortgage money to the insurance company, and gave B. a mortgage on the same lands to secure his money. In borrowing the money, the heir assured B. that the money should be used to pay the insurance company's mortgage, and it was so used. The heir also assured B. that all the debts of his father had been paid, and that there were no other liens upon the lands, which B. believed to be true. Other debts of R. having come to light, an administrator was appointed on his estate, who filed a petition to sell said lands to pay debts. *Held*, that B. is entitled to be subrogated to the mortgage of the insurance company, and to have the release thereof set aside for his benefit and protection.

3. R. and wife made a mortgage to M., and duly acknowledged the same before a notary public, who duly certified the acknowledgment of the wife, but by mistake omitted to certify the acknowledgment of the husband, and, R. having died intestate and insolvent before the mistake was discovered, and M. having, after the death of R., accepted a new mortgage for her debt from the heir, and released the mortgage from R. and wife, to enable the heir to give a first mortgage to another party for borrowed money, and an administrator on the estate of R. having thereafter been appointed, who filed a petition to sell the lands to pay the debts of R., *held*, that M. was entitled to have her mortgage reformed as to R., and to have the release thereof on the record set aside; but that said mortgage, when so reformed, is subject to the lien of general creditors of R. on the lands, and does not have priority over them. *Held*, further, that such mortgage is a valid charge in equity upon the dower interest of the widow in said lands, and that the balance due on the debt to M. after receiving her dividend as a general creditor from the administrator should be paid out of the money value of the dower of the widow of R., and the re-

mainder of such money value should be paid over to such widow.

(Syllabus by the Court.)

Error to circuit court, Putnam county.

Petition by John H. Straman, administrator, against Elizabeth Rechtime and others, to sell lands. The decree rendered was affirmed by the circuit court, and plaintiff brings error. Reversed.

Anton Rechtime, being the owner of 60 acres of land in Putnam county, executed and delivered his mortgage deed (his wife joining with him) to the Northwestern Mutual Life Insurance Company, of Milwaukee, Wis., of the date of April 23, 1889, for the sum of \$1,600, which mortgage was duly recorded. Afterwards, on the 21st day of June, 1889, he and his wife undertook to execute and deliver their mortgage deed of that date to Mary H. Moe for the sum of \$500, which was also duly recorded, but by mistake the notary public failed to certify that Anton Rechtime had signed and acknowledged the said mortgage, and that the same was his free act and deed; but the acknowledgment of his wife was duly certified by the notary. Thereafter, on the 16th day of January, 1894, Anton Rechtime died intestate, leaving Elizabeth Rechtime, his widow, and four sons and three daughters, all of full age, his only heirs at law. The widow and six children conveyed the lands by deed to Ferdinand Rechtime, one of the sons; he agreeing to support his mother during her lifetime, and to pay his brothers and sisters certain sums after her death. About a year after the death of the intestate, John H. Straman was duly appointed administrator of his estate, and in April, 1895, filed his petition in the court of common pleas of Putnam county to sell the 60 acres of land of which Anton Rechtime died seised. After the conveyance to Ferdinand, and before the appointment of the administrator, the insurance company began to clamor for the payment of the money then due on its mortgage, and threatened foreclosure. Thereupon Ferdinand borrowed \$1,600 from William F. Brunning, with which money he paid off the mortgage held by the insurance company, and procured the same to be released of record, and stated to Mr. Brunning that there were no debts of the estate unpaid, and no further liens upon the lands, except the mortgage of \$500 to Mrs. Moe; and he procured Mrs. Moe to release her mortgage of record, and take a new mortgage from him (Ferdinand) for the same sum on the same lands, subsequent to the mortgage given to Mr. Brunning, and for the sole purpose of allowing the Brunning mortgage to be the first lien. So that, as Mr. Brunning understood and believed, his mortgage for \$1,600 was the first and best lien on the lands. Mr. Brunning, being made a defendant to the petition of the administrator to sell lands, filed his answer and cross

petition, giving a minute and detailed statement of the facts as above given, and prayed to be subrogated to the lien and rights which the insurance company had in its mortgage before its release, and that the release of that mortgage might be set aside, and the full force and effect of the mortgage restored for his protection. Mrs. Moe was also made a party defendant, and in her cross petition stated the facts as to her mortgage, and prayed that the old released mortgage be reformed and corrected so as to have the certificate of the notary public show a due execution and acknowledgment of the mortgage made to her by Anton Rechtime and wife, and that the release of the same be set aside, and the full force and effect of the mortgage, when reformed, restored for her protection. The administrator averred in his petition that the widow was entitled to dower in the lands, and prayed that it be set off and assigned to her or her assigns; and the widow, by answer and cross petition, prayed that the deed of conveyance be set aside, and that dower be assigned to her. The case was tried upon the issues made in the pleadings, the testimony, and the argument of counsel, and the court made no separate findings of fact, but found generally that the facts stated in the said cross petitions of Mr. Brunning, Mrs. Moe, and the widow were true, and gave judgment that the lands be sold by the administrator according to law; that Mr. Brunning be subrogated to the lien of the insurance company, and have the first and best lien; that the mortgage of Mrs. Moe be reformed as prayed for, and be the second lien; and that the value of the widow's dower in the lands be ascertained, and paid to her in money next after the payment of the two mortgages; and for the payment of taxes, costs, etc. The administrator filed motions for a new trial, one ground being that the findings, orders, judgment, and decree are each and all contrary to law. The motions for a new trial were overruled, and exceptions taken. The circuit court affirmed the judgment. Thereupon the administrator filed his petition in this court, seeking to reverse the judgments of both the circuit court and the court of common pleas.

George Fritz, for plaintiff in error. Watts & Moore, for defendant in error William F. Brunning. Bailey & Bailey and Handy & Ogden, for defendant in error Mrs. Moe's administrator.

BURKET, J. (after stating the facts). It is urged by plaintiff in error that Mr. Brunning has no right to be subrogated to the lien which the mortgage to the insurance company had before its release of record. The material facts contained in the cross petition of Mr. Brunning, and found to be true by the court of common pleas, are that after the death of Anton Rechtime, and af-

ter his debts had become liens upon his real estate in favor of his creditors, and after his son Ferdinand had received a conveyance of the lands from the widow and children, subject to the mortgage liens, the insurance company urged payment of its mortgage, and threatened foreclosure; that Ferdinand Rechtime thereupon requested Mr. Brunning to loan him \$1,600 with which to pay off the insurance company's mortgage, and agreed to give Mr. Brunning a first mortgage on the same lands to secure the loan, and assured him that all of his father's debts had been paid, and that there was no other lien upon the lands, except the mortgage to Mrs. Moe for \$500, and he agreed to obtain a release of that mortgage so that the mortgage to Mr. Brunning should be the first and best lien. Mr. Brunning agreed to these terms, and made the loan of \$1,600 to Ferdinand Rechtime, and the mortgage to the insurance company was paid off with the money, and was released of record. A mortgage for the \$1,600 was then made by Ferdinand Rechtime to Mr. Brunning on the same lands, and was duly recorded, the mortgage to Mrs. Moe being released of record, so that Mr. Brunning, as he understood and believed, had the first lien on the lands. Afterwards it was ascertained that the debts owing by Anton Rechtime at his death, and which were a lien on those same lands, had not been paid, and therefore an administrator was appointed on his estate, and a petition filed in the court of common pleas to sell the lands. As the lien of the creditors of Anton Rechtime attached to the lands immediately upon his death, and as the lien of Mr. Brunning's mortgage attached long after the death of Anton Rechtime, the proceeds of the sale of the lands would have to be applied to the payment of general creditors, and Mr. Brunning would get only such surplus as might be coming to Ferdinand after the settlement of the estate of his father. This would be compelling Mr. Brunning to contribute \$1,600 of his own money, without consideration, for the benefit of the general creditors of Anton Rechtime. This would be wrong, and should be avoided if it can be done without injuring the legal rights of others. As matters stood after the death of Anton Rechtime, and up to the payment of the insurance company's mortgage with the money of Mr. Brunning, the creditors were legally entitled to receive only the surplus after payment of the insurance mortgage. They contributed nothing towards paying that mortgage, and they are not entitled to be benefited by the payment made with the money supplied by Mr. Brunning for that purpose. To subrogate him to the lien of the insurance mortgage before its release, and to set aside that release, and restore its full force for his benefit, will protect him from loss, and will not put the general creditors into a worse condition than they were before Mr. Brunning loaned his money. Such subrogation will

add no new burdens to the creditors. When their liens on the lands accrued, the lands were bound for the payment of the mortgage lien of \$1,800, and it can make no difference to the creditors whether payment is made to the insurance company or to Mr. Brunning. Where money is loaned under an agreement to be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who loans the money shall have a first mortgage lien on the same lands to secure his money, and through some defect in the new mortgage or oversight as to other liens the money cannot be made on the last mortgage, the mortgagee has a right to be subrogated to the lien which the money supplied by him has paid, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released. Mr. Brunning was, therefore, clearly entitled to be subrogated, and there was no error in so ordering. *Sidener v. Pavey*, 77 Ind. 241; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31; *Johnson v. Barrett*, 117 Ind. 551, 19 N. E. 199; *Gilbert v. Gilbert*, 39 Iowa, 657; *Marsh v. Rice*, 1 N. H. 167; *Har. Subr. §§ 736, 793*; *Carr v. Caldwell*, 10 Cal. 380; *Sheld. Subr. §§ 736, 793*; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900.

A more difficult question arises as to the rights of the parties in the matter of the mortgage to Mrs. Mary H. Moe for the sum of \$500. Mrs. Moe released her first mortgage for the purpose of allowing the mortgage to Mr. Brunning to have priority, and as to him she is conclusively bound by her release, but as to all other parties she is free to assert and enforce whatever rights she may have. The mortgage from Anton Rechtime and Elizabeth Rechtime, his wife, to Mrs. Moe, was perfect as to the wife, but was defective as to the husband, because his name was left out of the certificate of acknowledgment by mistake of the notary public before whom the mortgage was in fact duly acknowledged by both husband and wife, as found by the court. This clearly entitled Mrs. Moe to have the mortgage reformed as to the husband, and as to his wife no reformation was necessary, as the notary correctly certified her acknowledgment. As to the wife, therefore, the mortgage was properly admitted to record, it being made after the passage of the statute allowing married women to execute deeds and mortgages without joining with their husbands, and the mortgage bound whatever interest Mrs. Rechtime had in the lands. As to Anton Rechtime, the mortgage not having been acknowledged, it was defective, and was not entitled to record, and the record thereof was a nullity, and was notice to no one and bound no one. What, then, was the legal effect of reforming the mortgage as to the husband after his death? In the case of

Van Thornlley v. Peters, 26 Ohio St. 471, this court held that "a defective mortgage, when reformed, will not affect the lien of a judgment rendered between the date of the execution and the reformation of the mortgage." It has also been held that a defective mortgage, when reformed, will not affect the rights which general creditors have acquired under an assignment of the mortgagor for the benefit of his creditors; and it has also been held that an unrecorded mortgage cannot affect the rights of general creditors in such assignment cases. Can the reformation of a defective mortgage, after the death of the mortgagor, affect the rights or liens which general creditors acquired at the death of the mortgagor? In the case of *Ramsdall v. Craighill*, 9 Ohio, 197, this court held that "the debts of a deceased person are a lien on the land of which he died seised, in default of personal assets, whether devised or cast by descent, which can only be removed by the payment of the debts, or the lapse of time." The rule of this case has been universally approved and followed ever since. *Sheldon v. Newton*, 3 Ohio St. 494; *Overturf v. Dugan*, 29 Ohio St. 230. The exact nature of this lien has never been determined, but that to creditors it is a valuable right, cannot be doubted. It is of the same character and nature as the lien or trust in favor of creditors in cases of assignments for their benefit. In assignment cases the title to property passes to the assignee by the act of the owner, the assignor; and in the case of deceased persons the title to the personal property passes to the administrator by operation of law upon the death of the owner, and the real estate vests in the heir, burdened with the debts of the ancestor, subject to be sold by the administrator for the payment of his debts; and the property is held by the assignee in the one case, and by the administrator in the other, in trust for the creditors; and the creditors in either case can only work out the payment of their claims through the said trustees. The process of execution to obtain payment of their claims is the action taken by the assignee or administrator under the statutes and orders of the court, while in cases of judgment liens the process is by the action of the sheriff under an execution placed in his hands. But in all cases of liens the creditors obtain their money by enforcing the lien, either by causing the trust to be executed or by execution at law. In *Kilbourne v. Fay*, 29 Ohio St. 264, it is said on page 279 that the rights of creditors can be asserted through an assignee for their benefit, as they can be by judgment and execution against the property; and on the next page it is said that the analogy between the duties of an assignee and an administrator of an insolvent estate is perfect. That being so, it follows that the rights of creditors can be asserted through an administrator as fully and effectually, but not always as speedily, as by judgment and

execution against property. This being so, the lien of creditors upon property of a deceased person is of as high a grade as the lien for the benefit of creditors in cases of assignment, or the lien of judgment creditors. While the process of enforcing such different liens is not the same in all cases, the liens themselves are equal in right, and one cannot shove aside or supersede the other.

It appears in the record that the estate of Anton Rechline is insolvent, and, his creditors having obtained a valid lien on his real estate at his death, by operation of law, and the mortgage to Mrs. Moe being then, and for more than a year thereafter, so defective as not to be entitled to record, it cannot now, upon being reformed, be made to take effect as against creditors so as to become prior in right to their lien. This inevitably follows from our recording acts. Section 4133, Rev. St., provides that mortgages "shall take effect from the time the same are delivered to the recorder of the proper county for record." This means that they shall so take effect as to third parties, including creditors. As between the parties to the mortgage no record is required, and as between them, when the mortgage is executed and delivered, the lien becomes perfect. In a careful review of the force and effect of our recording acts by Williams, C. J., in *Betz v. Snyder*, 48 Ohio St. 492, 23 N. E. 234, I find the following: "It has been held by this court, as often as the question has been presented, and it has been made in a variety of forms, as well as in numerous cases, that mortgages of real property have no effect, either at law or in equity, until they are delivered to the recorder of the proper county for record, as against third persons acquiring a legal interest in or lien upon the property. * * * It [the recording statute] was designed to protect the persons who might acquire legal interests in or liens upon the property." In the case at bar the creditors, at the death of Mr. Rechline, acquired a legal lien upon the lands in question, and the mortgage of Mrs. Moe, when reformed, could not displace that lien, and get in so as to obtain money which would otherwise go to the creditors.

It is urged that the doctrine of the case of *Gill v. Pinney*, 12 Ohio St. 38, which gave preference to a mortgage recorded shortly after the death of the mortgagor over his general creditors, would give the mortgage to Mrs. Moe, when reformed, a preference over general creditors. This does not logically follow. In the *Gill* Case the mortgage was perfect, and at common-law passed the legal title after condition broken, and upon which ejectment could have been maintained; but the Moe mortgage was not a completed instrument under our statutes requiring mortgages to be signed, attested, and duly acknowledged, and under such a defective mortgage the legal title would not pass, and ejectment could not be maintained

at common law upon such defective mortgage without the aid of a court of equity to first reform the mortgage. In the *Gill* Case the mortgagee could himself do all that was required simply by causing his mortgage to be recorded, while in the *Moe* case the mortgagee had to first call in the aid of a court of equity to reform her mortgage, and thereby give it legal force and effect, so as to incumber the legal title. While the lien in favor of creditors is usually said to be a general lien, this court held it to be a specific lien in *Sheldon v. Newton*, 3 Ohio St. 494. But, even if such lien is general, and that in favor of a mortgagee specific, it does not follow that a later specific lien can displace an earlier general lien. In the *Gill* Case it is said that the general lien of creditors "must be limited to the property which passes, and to that in the condition in which it passes. If the lands descend to the heir charged with an incumbrance created by the act of the ancestor, the lien of the general creditors must attach to it in the same condition." But in the case at bar there was no present subsisting lien on the lands in favor of Mrs. Moe at the time the general lien of the creditors attached. The defective mortgage had not then ripened into a subsisting lien on the lands. True, it amounted to a contract for a lien, but it was not a lien in and of itself. *Carr v. Williams*, 10 Ohio, 305; *White v. Denman*, 16 Ohio, 59; and *Williams v. Sprigg*, 6 Ohio St. 585. While it could be reformed, and thereby made a lien, it could not, when reformed, and made a lien, have priority over the earlier general lien of the creditors. Judge McIlvaine, in *Kilbourne v. Fay*, 29 Ohio St. 280, seems to doubt whether the same conclusion would have been reached in the *Gill* Case if our statute had declared unrecorded mortgages absolutely void as against creditors; and that doubt seems to be well founded. Section 8 of our deeds act has been materially changed since the decision of the *Gill* Case, and it was accordingly held in *Betz v. Snyder*, 48 Ohio St. 502, 23 N. E. 236, that a mortgage which has no effect is no better than a void one, for a void mortgage is simply without effect. If the *Gill* Case is still sound law under our present statutes, it must be confined to the exact facts of that case, and cannot be extended, because it already encroaches somewhat upon the logical construction of our recording acts. We therefore hold that the Moe mortgage, when reformed, acquired no preference over the general creditors, and that in the distribution of the fund arising from the sale of the interest of Anton Rechline in the lands at the time of his death Mrs. Moe must stand and be treated as a general creditor only, having no preference over other general creditors. After the death of Anton Rechline, Mrs. Moe held her mortgage, duly executed, acknowledged, and recorded, against the interest of Mrs. Rechline in the

lands of which her husband died seised; and if the lands had then been sold by the administrator to pay debts, her mortgage would have been a charge in equity against the dower interest of Mrs. Rechline. Black v. Kuhlman, 30 Ohio St. 196. Having released her mortgage to enable Mr. Brunning to have a first lien, and having received no consideration for such release, and Mrs. Rechline having paid nothing for such release, and her new mortgage proving worthless, owing to the mistake of all the parties as to the effect of the transactions among them, it is only just and right that Mrs. Moe should have the release of her first mortgage set aside, and that the full force and effect of that mortgage should be restored for her benefit and protection. This leaves Mrs. Rechline and Mrs. Moe where they stood at the death of Mr. Rechline, and does no injury to the legal rights of Mrs. Rechline,—in fact, places her where she placed herself when she executed the mortgage to Mrs. Moe,—and at the same time protects the legal and equitable rights of Mrs. Moe.

Upon the facts found to be true by the court of common pleas, that court did not render the proper order of distribution, and therein committed an error of law, and the circuit court erred in affirming the judgment. The distribution of the proceeds of the sale, after payment of costs, taxes, and expenses of sale, should be as follows: (1) Pay the \$1,600 and interest due to Mr. Brunning. (2) Ascertain and set aside the money value of the dower estate of Mrs. Rechline. (3) Distribute the remainder among the general creditors, including Mrs. Moe. Should there not be sufficient to pay Mrs. Moe in full, whatever may be due her after receiving her dividend from the administrator should be paid out of the money value set aside for Mrs. Rechline, and the balance of such money value then left should be paid over to Mrs. Rechline. The judgment of the circuit court will be reversed, and, proceeding to render such judgment as the circuit court should have rendered, the judgment of the court of common pleas will be so modified as to reach the result above indicated. Judgment reversed.

(58 Ohio St. 504)

STATE ex rel. MEADER et al. v. SULLIVAN et al.

(Supreme Court of Ohio. June 7, 1898.)

CITY SUPERVISORS—REMOVAL FROM OFFICE—PROCEDURE—SUPERVISORS OF EQUALIZATION—CHARGES OF UNDERVALUATION MUST BE DEFINITE.

1. The power of removal from office, conferred upon a mayor in these words: "For neglect of duty or misconduct in office, the mayor of such city may remove any member of said board" (Rev. St. 1897, § 2690m), is a special authority, and must be strictly pursued. Such power cannot be exercised arbitrarily, but only upon complaint, and after a hearing had in which the officer is afforded opportunity to refute the case made against him.

2. Nor has the mayor, in such case, authority to proceed to a hearing until charges have been preferred which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office, and of which the accused has had due notice. And, as a requisite to its validity, the finding and order of the mayor should be so definite as to show, on the face, that the power has been exercised according to law.

3. Where the statute imposes the duty upon a board of supervisors (acting as a board of equalization) to equalize returns of personal property only, a charge that the board has knowingly consented to an undervaluation of real and personal property in gross, but which fails to charge any undervaluation as to such personalty, is not sufficiently definite to support a finding of neglect of duty, and an order of removal from office.

Minshall, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Petition for writ of quo warranto by the state, on the relation of Meader and others, against John J. Sullivan and others. A demurrer to the answer was overruled, and the petition dismissed. Relators bring error. Affirmed.

The action below was in quo warranto, brought by the prosecuting attorney of the county of Hamilton against the defendant in error Sullivan and John Zumstien, Louis Werner, and George M. Roe. Its purpose was to oust respondents from the office of board of supervisors of the city of Cincinnati, and to induct the relators. The gravamen of the petition is that the respondents had been removed from office by the mayor of the city by virtue of section 2690m, Rev. St. 1897, after a hearing upon charges preferred, and yet respondents continued to intrude therein. Sullivan answered as follows:

"The defendant John J. Sullivan comes, and for answer herein says: That he, the said John J. Sullivan, was, on the 1st day of April, A. D. 1897, duly appointed and qualified as a member of the board of supervisors of the city of Cincinnati for the term of three years from said date; and that on the 10th day of April, A. D. 1897, he entered upon the duties of said office, and has ever since been, and is now, in possession of said office, and in the enjoyment of its emoluments; and that he has, during the whole period of his service under said appointment, at all times, and in all respects, fully, faithfully, and honestly discharged all his duties as such member of said board, according to law. Defendant further says that on or about the 3d day of September, A. D. 1897, there were filed with Gustav Tafel, mayor of Cincinnati, against this defendant, certain written charges. And on September 3, 1897, said Gustav Tafel, mayor, served upon this defendant a copy of the said charges, and notified this defendant that said charges would be for trial and hearing at 9 o'clock a. m., on September 7, 1897, at the office of said mayor, a copy of which charges is as follows, to wit:

"Hon. Gustav Tafel, Mayor of the City of Cincinnati—Sir: The undersigned citizens and taxpayers of Cincinnati hereby charge John J. Sullivan with neglect of duty as a member of the board of supervisors of Cincinnati, in this, to wit: (B) Said John J. Sullivan knew that the capital stock of the Cincinnati Street-Railway Company was about \$15,625,000, and that its market value was about \$19,000,000, and knew, or should have known, that the tangible property of said company, real and personal, owned by said company in the city of Cincinnati, and subject to taxation at the time the valuation of property for the current year was to be fixed was many millions of dollars, to wit, about \$10,000,000; nevertheless, about August, 1897, he did willfully, wrongfully, and to the great prejudice and loss of other taxpayers of the city of Cincinnati, consent to and approve as a member of said board of supervisors, a valuation of said personal property of said Cincinnati Street-Railway Co. for purposes of taxation for the current year at the sum of \$835,230, and realty at about \$350,000; that said valuation was a gross wrong upon other taxpayers of the city of Cincinnati; and that said John J. Sullivan knew the same to be grossly inadequate, as alleged, when he consented to and approved the same; and that by the exercise of ordinary care as a member of said board he would have known what the undersigned aver is a fact,—that the true value of said taxable property for purposes of taxation on the county duplicate was many millions of dollars, to wit, not less than about \$10,000,000; and that, although other property of citizens subject to taxation was uniformly valued by said John J. Sullivan for taxation at about 65 per cent. of its selling value, the property of said Cincinnati Street-Railway Co. was willfully and with intent to prefer, and be partial to, and to favor it, fixed at a valuation of about seven per cent. of its selling value. (C) Said John J. Sullivan knew that the capital stock of the Cincinnati Gaslight & Coke Company was about \$8,500,000, and that its market value was over \$17,000,000, and knew, or should have known, that the tangible property, real and personal, owned by said company in the city of Cincinnati, and subject to taxation, was at the time of valuation of property for the current year many millions of dollars, to wit, about \$10,000,000; nevertheless he did about August, 1897, wrongfully, willfully, and to the great prejudice of, and in gross wrong of, other taxpayers of the city of Cincinnati, consent to and approve as a member of said board of supervisors a valuation of said property for purposes of taxation for the current year at the sum of \$2,145,408, which was \$354,392 less than the valuation of the same property for the preceding year; that said valuation was a gross wrong upon other taxpayers of the city of Cincinnati, and that said John J.

Sullivan knew the same to be grossly inadequate when he consented to and approved the same, and that by the exercise of ordinary care, said member of said board would have known what the undersigned aver is a fact,—that the true taxable valuation of said property for the county duplicate was many millions of dollars, to wit, not less than about \$10,000,000. Wherefore the undersigned request your honor to give notice of these charges, to fix a day for hearing the same, and to take such further action as may be authorized by law. Respectfully, [Signed] Taxpayers' Ass'n of Hamilton Co. Jos. Lippert, Pres. Fred. Tuke, Sec'y,—and 65 other signatures.

"Defendant further says that at the time set for the trial and hearing of said charges, and before any action was taken thereon, this defendant presented to the said Gustav Tafel, mayor, an application and motion in writing, alleging the insufficiency of said charges, both as to substance and form, and objecting to a trial and hearing of them, and asking that they be dismissed by reason of such insufficiency; a copy of which application and motion is as follows, to wit: 'Before Hon. Gustav Tafel, mayor of Cincinnati, Ohio, in the matter of the charges against John J. Sullivan, as a member of the board of supervisors of the city of Cincinnati. The respondent, John J. Sullivan, denies each and every one of the charges and specifications above referred to, and now pending before the mayor of Cincinnati, and submits that he ought not to be required to answer them, or either of them, or to submit to any inquiry into, or trial of them, for reasons apparent on their face, as follows: First. Because neither of said charges and specifications contains a case either of neglect of duty or misconduct in office, or any other case requiring such answer, inquiry, or trial of said respondent. Second. Because the specifications set forth in said charges do not sustain either of said charges. Third. Because it appears that both the Cincinnati Street-Railway Company and the Cincinnati Gaslight & Coke Company were required to make tax returns under sections 2744 and 2737 of the Revised Statutes, and does not allege that either the county auditor, under sections 2781-2783, Id., nor any of the persons who signed said charges, nor any other person, ever informed this respondent or the board of supervisors, or made complaint under section 2807, Id., or otherwise, that the returns of either of said corporations were in any respect untrue or evasive, or that any item in either of said returns was returned too low either as to quantity or value, or that there was any wrongful apportionment thereof; nor do said charges allege that any evidence was ever presented or offered to said board of supervisors tending to show that said returns, or either of them, were in any respect too low, or that the apportionment was er-

roneous, without which evidence said board has no power to make any addition to any return made under oath as required by law. Wherefore, reiterating his denial of said charges and specifications, this respondent now asks a hearing of this application, and prays that your honor will dismiss the charges without inquiry or investigation. Wm. M. Ampt, E. W. Kittredge, for Respondent.'

"Defendant further says that the said mayor overruled said application and motion, and refused to dismiss said charges, and ordered said trial and hearing to proceed; to all of which the defendant then and there excepted. And thereupon this defendant filed his answer, under oath, denying the truth of the facts alleged in each of said charges; and thereupon the said mayor, against the objection of said defendant, entered upon the trial and hearing of said charges, and this defendant avers that not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced, or heard by said mayor; and that no statement or information of any personal or official knowledge of the mayor of any kind tending to substantiate or prove the facts alleged in said charges, or either of them, was made or communicated to this defendant. Yet, notwithstanding, on September 22, 1897, the said mayor made his certain order, and caused the same to be served upon this defendant, in the words and figures following, to wit: 'September 22, 1897. Office of the Mayor, City of Cincinnati. In the matter of the charges filed by Joseph Lippert, Fred. Tuke, J. B. Morsman, and others against John J. Sullivan, as a member of the board of supervisors of the city of Cincinnati, charging him with neglect of duty as a member of said board, I find from the evidence, and also from the facts within my personal knowledge, that the said John J. Sullivan has been guilty of neglect of duty in his official capacity as a member of said board of supervisors, and, therefore, by virtue of the authority vested in me, as mayor of the city of Cincinnati, I do hereby remove the said John J. Sullivan from his office as member of said board of supervisors of the city of Cincinnati. Gustav Tafel, Mayor. [Seal.]'

"Defendant further says that all the actions of the said mayor as to said hearing, order, and removal were wholly unwarranted by any facts alleged in said charge, or by any facts proven, or by the laws of the state of Ohio, and were all in fraud of defendant's right to remain in and continue to hold said office, and to perform his duties, and to receive the emoluments thereof. Defendant further avers that the mayor aforesaid was without jurisdiction by reason of anything alleged in said charges, or either of them, and that the order made by the said mayor on the 22d day of September, A. D. 1897, as aforesaid, was wholly null and void in law.

And this defendant, further answering, denies each and every allegation of fact in the petition herein set forth, not hereinbefore expressly admitted; and prays the court that the petition herein may be dismissed, and for all other proper relief."

To this answer a demurrer was interposed by relators, which being overruled, and they not desiring to plead further, the petition was dismissed, and respondents awarded judgment for costs. The question is, therefore, whether or not the answer states a defense.

Follett & Kelley and S. N. Maxwell, for plaintiffs in error. E. W. Kittredge and Wm. M. Ampt, for defendants in error.

SPEAR, C. J. (after stating the facts). Two questions are presented. One relates to the sufficiency of the charges; the other to the action of the mayor upon them. The holding of the circuit court is rested upon the former consideration. Section 2690m, Rev. St. 1897, gives authority to the mayor to appoint the board of supervisors, and also to remove. The latter authority is in these words: "For neglect of duty or misconduct in office, the mayor of such city may remove any member of said board." This language, taken by itself, may imply an arbitrary power of removal. But that the power is not wholly arbitrary is well settled in this state by the cases of *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228, and *State v. Bryson*, 44 Ohio St. 457, 8 N. E. 470. Nor can its exercise be lawfully attempted until substantial charges involving neglect of duty or official misconduct, have been preferred. It is held in the former case, as applicable to a removal by the governor, that the charges must embody facts which, in judgment of law, constitute official misconduct, and no reason is perceived why the same strict test should not apply in the case of removal by a mayor. While it is true that the holding of office is not compulsory, and the citizen is at liberty to accept or decline, as seems to him best, yet considerations of patriotism and public policy incline the disinterested citizen to accept, and it is manifestly for the interest of the state that men of character should be found willing to fill, public positions. Such citizens will be less likely to do so if they are to be subjected to arbitrary removal, or their reputations put in jeopardy by removal based upon insufficient charges. The public interests do not require action which shall be unjust to a worthy officer, or which will unfairly smirch a good character; and yet the public interests do require prompt action in case of established inefficiency or corruption. And so our statutes have provided remedies as to removals which, while they do not lodge power in the removing authority which is absolutely arbitrary, do give power which partakes of that character.

In a case under the statute in question

the mayor is the sole judge of the weight and sufficiency of the evidence given at the hearing. If he hears a complaint of neglect of duty or misconduct in office, upon adequate charges, and upon evidence tending to establish them, by him adjudged sufficient, removes the officer, his action is practically final, since no appeal lies, nor can error be prosecuted. Hence the necessity, in justice and common fairness, of his being authorized to proceed only when charges have been made which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office. As said by Mechem in his work on Public Officers (section 452): "The power of removal so conferred must be confined within the limits prescribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed." See, also, *Com. v. Slifer*, 25 Pa. St. 23. And, with equal propriety may it be added that the finding and order should be so definite as to show, upon the face of them, that the power has been exercised according to law. This for the reason, among others, that the power exercised by the mayor is not judicial power, and the presumptions which attach to the record of courts are not to be applied in the same liberal sense to the record of the mayor. In *McGreger v. Supervisors*, 37 Mich. 388, it is held by Cooley, C. J., that "the removal from public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record." The charges here are that Sullivan knew, or should have known, that the tangible property, real and personal, of the street-railway company, subject to taxation, was \$10,000,000. Yet he willfully consented to approve the valuation of personal property at \$835,230, and realty at \$350,000, when he knew that the value of the said taxable property was not less than \$10,000,000; with bad intent, etc. A similar allegation is made as to the property of the gas company. But the board, acting as a board of equalization, had, under the statutes, no duty to perform respecting real estate, its power of equalization being confined wholly to personal property; and why the confusing element as to real estate was incorporated in the charges must be left to conjecture. It so confuses the allegation that its meaning is fatally obscure. There is no statement that Sullivan or the board undervalued the personal property, for there is no language equivalent to an averment that the personalty of the railway company was in fact of higher value than \$835,230. The valuation in gross appears by the charges to have been much too low. But it may be, for anything that these charges show to the contrary, that the undervaluation was wholly on the real estate. So that, as conclusion, every word in the charges as made may have been true as therein alleged,

and yet no neglect of duty would be shown. The finding of the mayor is simply that "Sullivan has been guilty of neglect of duty." This finding, being general, cannot be extended by implication to involve a conclusion more comprehensive or specific than the language of the charges; and this, as we have found, means only that as to the whole property there was undervaluation. In other words, the legal meaning of the finding and order is that, in the judgment of the mayor, the defendant was guilty of neglect of duty because he had permitted undervaluation of the property in gross, and cannot be held equivalent to a finding that he had been so guilty with respect to that part only of the property of which the board had jurisdiction. It seems to us manifest that, considering the arbitrary character of the power brought into exercise in this case, the charges were too indefinite to justify a trial, and that, unaided by a specific finding showing in what the neglect of duty consisted, the entire record is not sufficient to support an order of removal.

Upon the other branch of the case it will be noted that the answer avers that at the trial "not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced or heard by said mayor, and that no statement or information of any personal or official knowledge of the mayor, of any kind, tending to substantiate or prove the facts alleged in said charges, or either of them, was made or communicated to this defendant." It will be further noted that in his order the mayor recites that, "I find from the evidence, and also from the facts within my personal knowledge," etc. As stated elsewhere, the power given the mayor is not judicial within the meaning of the constitution, yet, as already found, it is not to be exercised arbitrarily; that is, a hearing is to be given the accused, and he is to have the opportunity to refute what is adduced against him. So that it would not be a proper exercise of power for the mayor to determine the truth of a charge on his own personal knowledge without making that publicly known, and offering the opportunity above alluded to. If the averment that not a word of evidence tending to sustain the truth of the facts alleged was adduced or heard by the mayor, etc., is to be taken as an averment that no testimony at all was heard, but that the mayor's finding rested entirely on facts within his personal knowledge, uncommunicated,—and it is insisted by counsel for defendant in error that such is its meaning,—then clearly, upon this ground, also, should the mayor's order be held invalid. The majority of the court, at least, inclines to regard the legal effect of the averment as a conclusion of law merely; that is, that in the opinion of the pleader the evidence did not tend to sustain the truth of the charges, and that whatever statement the mayor may have

made of personal knowledge did not tend to substantiate the facts alleged. The decision, therefore, is rested upon the first proposition. Judgment affirmed.

MINSHALL, J., dissenting.

(58 Ohio St. 558)

CITY OF LANCASTER v. MILLER.

(Supreme Court of Ohio. June 21, 1898.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS
—CONTRACTS—FAILURE TO PERFORM
—PLEADING.

1. A contract entered into by a municipal corporation, by which, in its own behalf, it undertakes to pay for the construction of a sewer in one of its streets, the cost of which exceeds \$500, imposes no valid obligation on the corporation, unless it has advertised for bids according to the requirements of section 2303, Rev. St.

2. Nor will such contract impose on the corporation a valid obligation, even if bids were advertised for pursuant to said section 2303, unless the auditor or clerk of the corporation, as the case may be, "shall first certify that the money required for" that purpose "is in the treasury to the credit of the fund from which it is to be drawn," etc., as required by section 2702, Rev. St.

3. Where either of such requirements has been omitted, the municipality will not, by the acts of its officers, be estopped to set up such omission as a defense to an action brought against it on such contract.

4. Where, in an action founded on such contract, the petition does not set forth its terms, and a motion is interposed by the defendant to make the petition more definite and certain by stating those terms, an order overruling such motion constitutes error affecting a substantial right of the defendant.

(Syllabus by the Court.)

Error to circuit court, Fairfield county.

This action was brought in the court of common pleas of Fairfield county by the defendant in error, Miller, against the city of Lancaster, plaintiff in error, to recover a balance claimed to be due him from the city on account of the construction of part of a certain sewer, and certain catch-basins to be used in connection therewith, for the use of the city. The plaintiff had judgment in the court of common pleas, which was affirmed by the circuit court on error. Thereupon the defendant below (plaintiff in error) brought the cause to this court to obtain a reversal of the judgment of the circuit court. Reversed.

The facts necessary to an understanding of the questions decided will be found in the opinion of the court.

Frank M. Acton and A. I. Vorys, for plaintiff in error. Thomas H. Dolson and Brasee & Brasee, for defendant in error.

BRADBURY, J. This action was begun by the filing of the following petition: "In the month of —, A. D. 1891, the defendant, which is a municipal corporation, was engaged in improving Broad and Columbus streets, in said city of Lancaster, with a brick pavement; and at the same time the

plaintiff was engaged in performing his contract, duly made with the defendant, to put a 24-inch sewer across said Columbus and Broad streets at their intersection with Mill street, in said city, and connect them with, and build, eight sewer-pipe catch-basins, with McDonald tops, at the four corners of said streets, at their intersections, and one such catch-basin at an alley on Columbus street, near to said Mill street, and the performance of which contract required the use of the following materials, and for the same, and the necessary labor to dig the trenches, etc., and put said material in place, and fill said trenches, he was entitled by the terms of said contract to receive from defendant, and be paid, the following prices and sums, viz.: 200 feet 24-inch sewer pipe, at \$1.25, \$250; 240 feet 15-inch sewer pipe, at 65 cents, \$156; 220 feet 12-inch sewer pipe, at 55 cents, \$121; 23 ells of 15-inch 2 pa by G. Matt, at \$1.25, \$28.25; 9 tees of 24-inch sewer pipe, at \$3.50, \$31.50; 9 sewer inlets, \$108; 9 catch-basins, \$225. Said plaintiff had all his materials on the ground for the construction of said catch-basins, and had completed the one at said alley, and said work was being done under the direction and superintendence of the city engineer of said city and the committee on drainage of the council of said city; and thereupon said engineer and committee, being of opinion that said sewer-pipe catch-basins would not answer the purpose intended, directed the plaintiff, instead thereof, to construct at said eight corners cistern catch-basins, with McDonald tops, and agreed to pay him, for such change, and the necessary labor and materials to make the same, the sum of \$25 apiece, or together \$200. And the plaintiff says that, in pursuance of said direction and agreement, he completed said contract, and made said changes, and furnished all the necessary labor and material therefor, which was of the cost and value of \$25 apiece, or \$200, and the same was so done with the knowledge of said defendant and its officers and agents other than said engineer and said committee; and since the construction thereof said defendant has possessed and used, and still and now possesses and uses, said catch-basins; and by reason of the premises there became and was due to the plaintiff on account of said original contract, and said modifications and extras thereof as aforesaid, the sum of \$1,117.75; but said defendant, although often requested so to do, has hitherto failed and refused to pay plaintiff said sum, or any part thereof, except \$723, and the whole balance thereof, to wit, \$394.75, with interest thereon from the 1st day of January, A. D. 1892, is still due to him and unpaid, and for which he asks judgment against defendant. Wherefore the said plaintiff prays judgment against said defendant for said sum of \$394.75, together with interest thereon from the 1st day of January, A. D. 1892."

The petition does not disclose the terms of this contract, nor the circumstances under which it was made. Had this been done, the character of the contract—whether legal or illegal—would have appeared, and its validity could have been determined by a demurrer to the petition. Doubtless an apprehension of the result that might follow such a course was the moving cause that induced the able and experienced counsel for the contractor to refrain from setting forth more specifically the contract, and the manner in which it was made. A motion to require the plaintiff below to make his petition more definite and certain, by setting forth the terms of the contract, was made and overruled in the court of common pleas. The city then interposed a demurrer to the petition on the ground that it did not state a cause of action. The demurrer was overruled, and thereupon the city answered, denying the validity of the contract under which the work was alleged to have been done and the material furnished, and also denying that such work or material were of the value alleged. An inspection of the petition will show that the claim of the contractor exceeded \$1,100, \$200 of which accrued from work authorized by a modification of the original contract. The circumstances under which the modification of the original contract was made are set forth with reasonable clearness, but the petition is silent concerning the terms of the original and principal contract itself. The petition simply states that "the plaintiff was engaged in performing his contract, duly made with the defendant, to put in a 24-inch sewer across said Columbus and Broad streets at their intersection with Mill street," etc. This averment shows simply that at the time the contract was modified the plaintiff was performing a contract "duly made" with the city, but contains no word as to its terms. If it appeared that the plaintiff had been paid in full for all the work, etc., performed under the principal (original) contract, and was seeking only to recover what had accrued under the modification, the averment might have been sufficient, but this was not the case. His right rested on both. The existence and terms of the original contract were as necessary to his recovery as were those of the modification. The right of the city in this respect was to be advised as to the whole claim of the contractor. It was entitled to know just what, according to the plaintiff's version of the contract, he was to do, and what obligations it imposed on the city, that it might admit or take issue upon those terms according to its understanding of their truth or falsity. Certainly no principle of pleading is more firmly established than that one who founds his cause of action upon a contract must set forth that contract,—at least, in all cases where a quantum meruit will not lie. The amount involved in the contract in question exceeded

\$500, and, according to the principles hereafter to be announced, a special contract was indispensable to a recovery against the city. The motion should have been sustained.

In view of the principles hereinafter announced, doubts will at once arise respecting the sufficiency of the petition, and the correctness of the action of the court of common pleas in overruling the demurrer to it. But as the real question in the case is whether the contract under which recovery was sought was legal and valid, and as the answer controverts this validity, and as the circumstances upon which its validity depends are found in the bill of exceptions, that question will be determined according to the undisputed facts there disclosed, rather than by a review of the holding on the demurrer, which would confine us to such facts, or, rather, absence of facts, as may be found in the petition. Those undisputed facts show that the city of Lancaster was engaged in paving two of its streets,—Broad and Columbus streets; that these two streets ran parallel to each other, both crossing Mill street; that the latter street, at the two points where the two streets above named cross it, would be paved as parts of those streets; that the city of Lancaster was contemplating the construction at an early date of a sewer along Mill street, and to avoid tearing up the paving at its intersection with Broad and Columbus streets, which would become necessary if the city delayed the construction of the sewer in question until after the improvement of those two streets had been completed, the city determined to locate and construct at once the sewer at those intersections. The determination was reached by the drainage committee of the council, rather than by any formal action of the council itself, and this is also true of the letting of the contract for the construction of the sewer at these intersections. The city council took no action whatever, either to authorize the drainage committee to enter into the contract, or to ratify the contract after it was made, except what may be implied from its appropriating money to be applied in part payment of the work. No advertisement for bids was made as provided by section 2303, Rev. St.; nor does it appear that funds to pay for the work were in the city treasury, or that a certificate to that effect was made by the proper officer, as prescribed by section 2702, Rev. St. That the work was done according to the contract, and partly paid for, is not disputed. Did a contract thus made, and afterwards performed, impose a liability on the city? Doubtless it would do so but for the restrictive provisions of the sections of the statute before alluded to. Counsel for defendant in error cite authorities which strongly tend to establish the general doctrine that municipal bodies, as well as individuals, may be bound by implied con-

tracts, and that where work has been done or material supplied to municipal corporations for purposes within the scope of their powers, and has been accepted by them, they should be held to the payment of their reasonable value. Conceding the soundness of this rule as a general principle, to what extent has it been modified by the statutes of Ohio? The statutory provisions that chiefly bear upon this question are found in sections 1693, 2303, 2702, Rev. St.

Section 1693 provides: " * * * And no contract, agreement or obligation shall be entered into except by an ordinance or resolution of the council, nor any appropriation of money for any purpose be made except by an ordinance; every ordinance appropriating money shall contain an explicit statement of the uses and purposes for which the appropriation is made; the power or authority to make a contract, agreement or obligation to bind the corporation, or to make an appropriation, shall not be delegated; and every contract, agreement or obligation, and every appropriation of money made contrary to the provisions of this section shall be void as against the corporation, but binding on the person or persons making it."

"Sec. 2303. When the corporation makes an improvement or repair provided for in this chapter, the cost of which will exceed five hundred dollars, it shall proceed as follows: First. It shall advertise for bids for the period of two weeks * * * in two newspapers published in the corporation. * * *

"Sec. 2702. No contract, agreement, or obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded; and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section shall be void."

The provisions of one of these sections (2303) apply only to contracts for improvements, the cost of which exceeds \$500. Did the contract involved in this action contemplate an expenditure exceeding that sum? The contract related to two different and disconnected sections of the same sewer.

One section was to be constructed at the intersection of Mill street and Broad street; the other section, at the intersection of Mill and Columbus streets; each to be supplied with catch-basins. These two sections, however, were, in the end, to become component parts of a sewer extending along Mill street. When the balance of the sewer should be constructed, it would be joined to these two sections, and the whole compose a single sewer along that street. While a municipality in this state should not be allowed to divide an improvement, which is in fact single and entire, into separate parts, so as to make the cost of each part less than \$500, and contract separately for the construction of each part, thereby evading the provisions of section 2303, Rev. St., as to advertising for bids, nevertheless, if, in view of the circumstances under which the city was acting at the time this contract was made, it in good faith had elected to regard the construction of each section as a matter distinct and independent of the other, and had proceeded to contract separately for each section, neither would have originally involved an expenditure of \$500, and therefore it might not have fallen within the provisions of section 2303 as to advertising for bids. This was not done, however, but instead the two sections were treated as one, and their construction was provided for by a single contract, which involved an expenditure exceeding \$500. This section 2303, Rev. St., however, does not extend to every contract involving an expenditure exceeding \$500, but only to such contracts as relate to an improvement or repair provided for in chapter 4, div. 7, tit. 12, Rev. St. The circumstances under which the contract in question was made are peculiar. The municipal authorities were acting in advance of any established plan of improvement. How the fund was to be raised to pay the cost of the sewer upon its ultimate construction, does not appear. The scheme in this respect had not been developed when the contract was made. The usual course, where an improvement is made pursuant to the chapter above named, is to assess the cost of construction, or a material part of it, on the property to be benefited; but whether it was to be done in this way, or the expense placed upon the entire taxable property of the city, nevertheless the contract related to the construction of a sewer, and that is an improvement provided for in that chapter. Therefore we think the provisions of section 2303 are applicable, and that the advertisement for bids which it prescribes was indispensable to the validity of the contract. Section 2702, Rev. St., is also applicable to this contract. This section prohibits a municipality from entering into any contract * * * involving the expenditure of money unless the auditor or clerk, as the case may be, shall first certify that the money required for the contract is in the treasury. The provisions of section 1693, Rev. St., are equally

applicable and emphatic. That section provides that: "No contract * * * shall be entered into except by ordinance or resolution of the council. * * * The power or authority to make a contract * * * shall not be delegated; and every contract * * * made contrary to the provisions of this section shall be void as against the corporation."

The evils against which these restrictive statutes are directed are municipal extravagance, and the negligence and indifference of municipal officers. They were designed for the protection of municipal taxpayers generally, as well as to guard against excessive special assessments against property to pay for local improvements. The mischief arising from municipal prodigality, and the growth of municipal debts that attended thereon, called loudly for an efficient remedy. These restrictive statutes are the answer to that call. They embody that principle of sound public policy which seeks to enforce economy in the administration of public affairs. The judicial tribunals of the state should administer these laws so as to advance the purpose thus sought to be accomplished. Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required, at their peril, to take notice of limitations upon the powers of those bodies which these statutes impose. The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of them. It would be idle to enact those statutes, and afterwards permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effect should be given to such acts of municipal officers, it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice. It is possible that municipal bodies may secure benefits under a contract thus declared void, and refuse to make satisfaction. In the nature of things, however, these instances will be rare. Those who deal with public agencies intrusted with the management of municipal affairs, usually experience liberal treatment. Such agencies are not stimulated to acts of injustice by cupidity. Self-interest, that great motive to overreaching, is absent. If, however, cases of hardship occur, they should be attributed to the folly of him who entered into the invalid contract. The gateways of municipal prodigality should not be left wide open because an attempt to narrow them may cause an occasional instance of seeming hardship.

A few words may be added as to operation of section 1693, Rev. St., which declares a contract void, as to the municipality, if not "entered into by ordinance or resolution of the council." Notwithstanding this emphatic

declaration, yet, so far as this case is concerned, it may be conceded that a contract made in violation of this section is capable of subsequent ratification by the council. But whether a contract thus made may be ratified by the council or not, or, if capable of ratification, whether the act of the city council in appropriating money to be applied on the contract involved herein was a sufficient ratification, is immaterial to a decision of the case, and will not be considered further, because, however that may be, the contract, having been made in violation of sections 2303, 2702, Rev. St., is on that account clearly void, and imposed no liability on the city. Judgment reversed, and judgment for plaintiff in error on the undisputed facts.

(173 Ill. 439)

FARMERS' LOAN & TRUST CO. v. LAKE ST. EL. R. CO. et al.

(Supreme Court of Illinois. June 18, 1898.)

REMOVAL OF CAUSES—BOND—ACTIVE TRUST—REQUIREMENT OF TRUST COMPANY TO MAKE DEPOSIT—FOREIGN TRUST COMPANY—TRANSACTION OF BUSINESS IN ILLINOIS—ENJOINING FORECLOSURE OF TRUST DEED—PARTIES.

1. Act Cong. March 3, 1887, providing for removal of a cause to a federal court when "there shall be a controversy which is wholly between citizens of different states," provides that the petitioner "may make and file a petition," etc., and requires that he "shall make and file therewith a bond with good and sufficient surety," etc. *Held*, that where a petitioner filed a bond not executed by himself, but signed by strangers to the record, as principal and sureties, and no proof was offered as to the solvency of the sureties, and why petitioner did not sign, and why the strangers filed a bond in his stead, is unexplained, it cannot be regarded as even a substantial compliance with the act.

2. The imposition of active duties upon a trust company as trustee under a trust deed brings it within the prohibition of the act of 1887, as amended in 1889, regulating trust companies, making it unlawful for such a company to accept a trust before depositing with the auditor of public accounts, for the benefit of its creditors, the sum of \$200,000 in stocks of the United States, or municipal bonds of this state, etc.

3. A foreign trust company accepted an appointment as trustee under a deed of trust executed by a street-railroad company, executed and delivered a large amount of its bonds from time to time, and rendered to the railroad company bills for certifying bonds and accepting the deed of trust, and for services under the trust deed, which were paid by the railroad company. The trustee exercised constant supervision over the application of bonds as issued, and corresponded with the railroad company in regard to the issuance and delivery of bonds, and in regard to accounts and releases of the lien of the trust deed upon parts of the trust property which it was authorized to make. As authorized by the deed, it appointed an agent, who did a large amount of business in its behalf, which appointment was ratified and accepted by the railroad company. The agent frequently examined the books of the mortgagee, and looked after the issuance and application of the authorized bonds. He made reports as agent to his principal, and gave advice in reference to questions in dispute arising between his principal and the railroad company from time to time. *Held*, that the com-

pany did business in the state, within Act July 1, 1872, § 26, providing that "foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state," etc.

4. In a suit to enjoin the foreclosure of a trust deed made by a street-railroad company to secure its bonds, and to enjoin a certain trustee from acting under the deed, there is no error in entering a decree without first requiring all the bondholders to be made parties, where all the trustees, representing numerous bondholders, were made parties, and were by the bondholders expressly authorized to foreclose the trust deed, and vested with the exclusive right of action, whether at law or equity, under the trust deed.

Appeal from appellate court, First district.

Bill by the Lake Street Elevated Railroad Company against the Farmers' Loan & Trust Company and others for the appointment of a trustee and an injunction. From the affirmation of a decree for complainant by the appellate court (68 Ill. App. 666), the defendant the Farmers' Loan & Trust Company appeals. Affirmed.

This is an appeal from a judgment of the appellate court affirming a decree of the superior court of Cook county removing appellant as trustee under a deed of trust made by the appellee the Lake Street Elevated Railroad Company to appellant, the Farmers' Loan & Trust Company, and to appellee the American Trust & Savings Bank, as trustees, and enjoining appellant from taking any steps to foreclose, or otherwise act as trustee under, the trust deed. The bill was filed by the appellee the Lake Street Elevated Railroad Company on January 30, 1896, and made appellant, the Farmers' Loan & Trust Company, and the appellees the American Trust & Savings Bank and the Northern Trust Company, defendants. The bill alleges that on the 7th day of April, 1893, the complainant therein, the Lake Street Elevated Railroad Company, made a mortgage or trust deed to the defendants the American Trust & Savings Bank and the Farmers' Loan & Trust Company, as trustees, that the trust was accepted in writing by the trustees, and that the mortgage or deed of trust was duly recorded on May 16, 1893. A copy of the mortgage was made an exhibit to the bill. The bill further sets forth the incorporation of the railroad company under the laws of Illinois for the purpose of constructing railways, etc., with a capital stock of \$5,000,000, divided into 50,000 shares of \$100 each; that in April, 1893, its capital stock was duly increased to \$10,000,000, and consisted of 100,000 shares of \$100 each; that the Farmers' Loan & Trust Company was a corporation organized under the laws of New York, and had not, prior to the making of the trust deed, nor since, complied with the laws of Illinois, requiring a deposit with the auditor of public accounts of \$200,000 in stocks of the United States, or municipal bonds of this

state, or in mortgages on improved or productive real estate in Illinois, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; that the railroad company did not know that the Farmers' Company had not complied with the laws of Illinois as to making said deposit, and that the Farmers' Company was doing business in Illinois without having made the deposit; that the Farmers' Company had appointed an agent to represent the company, to enforce, on the part of the railroad company, a compliance with the trust reposed in the Farmers' Company under the trust deed; that under the trust deed there were certified and delivered by the trust companies the 6,500 bonds referred to therein; that, after the 6,500 bonds had been certified to, additional bonds were issued, which were also certified to by the trust companies, and disposed of under the direction of the agent for the Farmers' Company; that since the acceptance of the trust the Farmers' Company has transacted and done business through its said agent in connection with the trust under the trust deed, and was still claiming the right to do business by the execution of the trust assumed by it; that since the making of the trust deed the railroad company had built, and was then operating, a railroad in the city of Chicago for the carrying of passengers within said city; that it had been unable to earn sufficient money to pay the interest on its bonded indebtedness; that one William Ziegler, of New York City, conspiring with persons representing 610 bonds of the total issue of 7,574 bonds of \$1,000 each, had made a demand upon the trust companies that they proceed to foreclose and take possession of the railroad under the power in the trust deed; that a bill was filed in the circuit court of Cook county against Ziegler et al., in which an injunction was issued, enjoining them and the trustees from foreclosing the mortgage upon the demand of Ziegler et al., representing 605 of the 610 bonds; that the railroad company was informed by said agent of the Farmers' Company on January 28, 1896, that no other demand had been made upon the trustees, except that made by Ziegler and his associates, but that, although no other person was asking the Farmers' Company to take any action, they filed a bill to foreclose the mortgage for failure to pay the interest upon the bonded indebtedness; that said interest was paid up to January 1, 1895; that the Farmers' Company, in violation of its duty, and in order to injure and destroy the property and assets of the railroad company, intended to take possession of the property of the railroad company, or attempt to foreclose the trust deed, for a failure to pay the interest falling due on July 1, 1895, and January 1, 1896; that the holders of 6,574 of the bonds had requested the trustees to take no action with reference to the failure of the company to pay the coupons due July 1, 1895, and

January 1, 1896; that the American Trust & Savings Bank on January 28, 1896, refused to join the Farmers' Company to enforce the trust deed on account of such failure; that the holders of over 6,500 of the bonds issued under the trust deed desired that the Farmers' Company should be removed from its position as trustee for failure to comply with the law of Illinois requiring said deposit with the auditor of public accounts, and for assuming to take proceedings under the trust deed contrary to the request of the holders of a majority of the bonds issued under the trust deed. The bill prays that a new trustee may be appointed by the court under the trust deed in place of the Farmers' Company, that an injunction be issued enjoining the Farmers' Company from taking any proceedings under the deed of trust, and for such other and different relief as equity may require.

An injunction was granted and served on the agent of the Farmers' Company at 11:10 a. m. January 30, 1896. Summons was served on said agent on February 6, 1896. On January 31, 1896, the Farmers' Company filed a petition and bond in the superior court for the removal of the cause to the United States court. The petition was signed by the Farmers' Loan & Trust Company, by its solicitors. The bond, filed with the petition for removal, was executed only by William Burry and Rockwell King, as obligors, and was in the penal sum of \$500. On February 8, 1896, the superior court denied the motion to remove the cause to the federal court, and exception was taken thereto by the Farmers' Company. On March 17, 1896, the Northern Trust Company filed its answer, stating that it was informed that the Farmers' Company had not complied with the laws of Illinois in relation to trust companies, and that in its belief the Farmers' Company had been doing business in Illinois, without having made the deposits aforesaid. The answer admits substantially the allegations of the bill as made therein, and also sets forth that the Northern Trust Company is the holder of 6,592 of said bonds, and has not made any demand on either of said trustees to foreclose said trust deed. On March 18, 1896, the American Trust & Savings Bank filed its answer. On March 25, 1896, the Farmers' Loan & Trust Company filed its answer, denying substantially all the material allegations of the bill. On June 4, 1896, a final decree was entered by the superior court, finding that the allegations of the bill, as herein set forth, were true; further finding that the bill in the foreclosure case was filed at 10:35 o'clock on January 30, 1896, and that within 10 minutes after said filing a subpoena was issued and delivered to the solicitor of the Farmers' Company, and by him delivered to the United States marshal on February 18, 1896, and served on that date; further finding that the holders of 6,574 of the bonds specially re-

quested the American Trust & Savings Bank and the Farmers' Loan & Trust Company to take no action whatever under the trust deed. The decree also ordered that the Farmers' Company should be removed as trustee or co-trustee under the deed of trust, and be enjoined from prosecuting any suit to foreclose said trust deed, and that the American Trust & Savings Bank should, by an instrument in writing, appoint a co-trustee in place of the Farmers' Company, and that the Farmers' Company should execute an instrument of transfer to such new trustee of all its rights and powers, etc., and, in case of failure of the Farmers' Company to execute such instrument, that a master in chancery should do so, and that, upon the failure of the American Trust & Savings Bank to make the appointment within 30 days, the court thereby reserved the power to appoint a co-trustee.

Runnells & Burry and Herrick, Allen, Boyesen & Martin, for appellant. Knight & Brown, for appellee Lake Street El. R. Co. Moran, Kraus & Mayer, for appellee American Trust & Savings Bank. Dupee, Judah, Willard & Wolf, for appellee Northern Trust Co.

MAGRUDER, J. (after stating the facts).

1. It is claimed on the part of the appellant that the trial court erred in retaining jurisdiction of the cause after the filing of the petition and bond for its removal to the United States court. There was no error in this action of the trial court. The petition for the removal was signed by the appellant, the Farmers' Loan & Trust Company, one of the defendants in the court below, but the bond filed with such petition for removal was not signed by the appellant. This condition of the bond justified the court in denying the motion for the removal of the cause. In *Machine Co. v. Smith*, 71 Ill. 204, we said (page 207): "We think it a reasonable construction of the act [of congress] to hold that it was the duty of the petitioner to present a bond signed by itself, and sureties proven to the court to be sufficient. The petitioner filed a bond not executed by itself, but signed by George S. Thomas and A. S. Alexander as principals, and certain other parties as sureties. No proof was offered as to the solvency of those who had executed the instrument as sureties, and no explanation given why the petitioner did not sign the bond, or why strangers to the record were filing a bond, instead of the defendant in the cause. This cannot be regarded as even a substantial compliance with the act of congress." As, in the *Machine Co. Case*, the bond was signed by persons not parties to the record, so here the bond was signed by Burry and King, neither of whom was a party to the record. The case of *Machine Co. v. Smith*, supra, was approved in *Railway Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869, where the act of congress was referred

to, which provides that the petitioner "may make and file a petition," etc., and requires that he "shall make and file therewith a bond with good and sufficient surety," etc., and where we said: "The third objection was that the bond filed was not the bond of the defendant. Upon hearing and argument, the court held the objections to be good; and we think that its ruling was correct, upon the authority of the case of *Machine Co. v. Smith*, 71 Ill. 204." This disposes of the first error assigned by the appellant which we deem it necessary to notice.

2. It is further claimed by the appellant that the court below erred in decreeing that the appellant be removed as trustee. Whether or not the decree was correct in ordering such removal depends upon the solution of the question whether the appellant was bound to comply with the requirements of the act of 1887, as amended in 1889, regulating trust companies. Section 1 of said act as amended provides that "any corporation which has or shall be incorporated under the general incorporation laws of this state, being an act entitled 'An act concerning corporations,' and all amendments thereof, for the purpose of accepting and executing trusts, and any corporation now or hereafter authorized by law to accept or execute trusts may be appointed assignee or trustee by deed, and executor, guardian or trustee by will, and such appointment shall be of like force as in case of appointment of a natural person." Section 6 provides: "Each company, before accepting any such appointment or deposit, shall deposit with the auditor of public accounts for the benefit of the creditors of said company, the sum of \$200,000.00 in stocks of the United States, or municipal bonds of this state, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon," etc. Sess. Laws 1889, p. 99. Section 8 of the original act provides as follows: "It shall not be lawful for any such company to accept any trust or deposit as hereinbefore provided, after the passage of this act, without first procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with the requirements of this act in respect to such deposit." Sess. Laws 1887, p. 145. The act of 1887, and the amendments to it made in 1889, refer to corporations organized under the laws of Illinois. But section 26 of the act of July 1, 1872, concerning corporations, provides as follows: "Foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation established or main-

tained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." 1 Starr & C. Am. St. p. 619. The appellant, the Farmers' Loan & Trust Company, is a corporation organized under the laws of the state of New York for the purpose of accepting trusts, and for other purposes. The act of 1887, as amended in 1889, regulating trusts, is made, by section 26 of the general corporation act, to apply to foreign as well as domestic corporations which come within the terms of its provisions. So far as appellant stands related to the act of 1887, as amended in 1889, its position is not different from that of a domestic corporation. The inquiry then arises whether the appointment of the appellant as trustee under the trust deed sought to be foreclosed by the bill herein comes within the requirement of section 6 of said act of 1887, as amended in 1889. It is conceded that the appellant has never complied with said section 6, in the matter of depositing with the auditor of public accounts the sum of \$200,000 in stocks or bonds or mortgages, as specified in said section.

It is said that the taking of a mortgage by a corporation to secure a debt to it is not within the prohibition of the statute, and that, as a trust deed is the same as a mortgage, a trust under a trust deed is not within the purview of the statute. The rule, however, that the statute does not apply to a mortgage or trust deed which is a mere security for a debt, includes only such mortgages or trust deeds as contain no special powers involving active trusts. The trust instrument, however, in the present case, imposes trust duties of an active character. This will readily appear by reference to the trust deed executed by the railroad company to the appellant and the American Trust & Savings Bank. By the terms of the trust deed the trustees are required to certify the bonds to be issued, and to superintend their sale and application. Such action by the trustees under the mortgage or trust deed necessarily precedes the sale of the bonds to be issued, and the incurring of the indebtedness evidenced thereby. Interest does not commence to run, nor are payments to be made, until such certification takes place. It cannot be said, therefore, that the trust deed secures any indebtedness to the trustees, or any indebtedness actually existing to those represented by the trustees at the time of the execution of the trust deed. By the terms thereof the trustees are to certify and deliver 6,500 bonds, amounting in the aggregate to \$6,500,000, to be first issued. The bonds are to be issued, under the supervision of the trustees, as follows: 1,000 to retire 812 of the 6 per cent. bonds of the Lake Street Elevated Railway Company,—the old company. These bonds are to be reserved in the possession of the trustees, and delivered only upon the retirement and canceling of the old bonds. That is to say, when-

ever any of said 6 per cent. bonds outstanding are paid or retired, they are to be canceled, and the trustees are to certify and deliver to the railroad company, or its order, a proportionate number of the 1,000 thereby secured and reserved; 5,150 of the bonds are to be used in the acquisition of a right of way, and construction upon a designated route; 350 bonds are to be used for the lawful purposes of the company, in the discretion of the directors. The 5,500 bonds last mentioned are to be certified and delivered by the trustees. Additional bonds are authorized as follows: 850 bonds for each additional mile of double-track road, fully equipped, for building the same; for paying claims for damages from operation or construction; for procuring right of way; for paying interest on its bonds during the first two years of its operation; 500 bonds for each bridge built over the Chicago river. The bonds in addition to the 6,500 bonds are only to be issued by resolution or order of the board of directors of the railroad company; and the certificates of the president or vice president and chief engineer of the railroad as to the existence of the facts necessitating the issue of said additional bonds, together with certified copies of the resolution or order of the board of directors, are to be furnished to the trustee or trustees, and written orders, copies, resolutions, and certificates are made sufficient and conclusive evidence to the trustees to a statement therein contained, and are to protect them in respect to a certification and delivery of any of said bonds thereunder. To assure the performance of these provisions, the trust deed provides as follows: "The said trustees, if they deem proper to do so, may appoint an agent of known integrity and business capacity, with full power to dismiss him and appoint another in his stead at pleasure, who shall have the right to attend all meetings of the board of directors, have free access to, and from time to time examine, all books of account of the party of the first part [the railroad company] appertaining to the application and expenditure of said proceeds of the sale of all of said bonds issued in excess of said 6,500 bonds, and shall make full report thereof to the trustees every three months, and as much oftener as they may from time to time require for the information of the bondholders under this mortgage; and the railroad company shall pay said agent a reasonable compensation for his services during the time of the construction of said railroad, for which additional bonds are desired as aforesaid, not to exceed, however, \$1,000.00 per annum." The trust deed further provides that if default shall be made in the payment of the interest when the same becomes due, when demanded, whether the same shall have continued for the period of six months or not, the trustee may, upon request of the holders of a majority in interest of the bonds then outstanding, enter into and take full possession

of said railroad, and of all property thereby mortgaged, and hold, use, manage, maintain, and operate the same, and appoint such agents and managers as the trustees may see fit; collect and receive all revenues arising from such management, and apply the same to the expenses of the trustees in the performance of the trust. The power of entering may be exercised as often as occasion may arise in the judgment of the trustees pending the trust, and they may continue to exercise the power as they may deem expedient, until the holders of a majority shall otherwise request. The trust instrument further provides that the trustees shall permit such necessary changes to be made in the line of the railroad as may, in their judgment, be deemed advisable and advantageous. Insurance is to be effected, satisfactory to the trustees, and policies are to be delivered to and kept by the trustees, and to be made payable to them or to their successors. The mortgagor is to be allowed to sell parts of the mortgaged property upon consent of the trustees, who may release such property. The instrument provides, however, that no portion of the main line or branches of the railroad, or any part of the principal depots, stations, or terminal facilities, or other property, which in the judgment of the trustees may be essential to the due operation of the road, shall be released, unless replaced by property which, in the judgment of the trustees, is of equal value and benefit to the efficient operation of the road.

Section 1 of the act of 1887, as amended in 1889, provides that any corporation authorized by law to accept or execute trusts may be appointed trustee by deed. The charter of the appellant authorized it to accept and execute trusts, and it was appointed trustee by the deed now under consideration, for the purpose of performing the active duties hereinbefore specified. In *Stevens v. Pratt*, 101 Ill. 206, it was held that the purpose of section 26 of the general incorporation act, as above quoted, was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law. In *Insurance Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166, it was held that under a devise to the Pennsylvania Company, and to certain other parties as trustees, the Pennsylvania Company had no power to act in this state as such trustee without compliance with the statute in question, which requires the deposit of \$200,000 in stocks or other securities, etc. The facts in the case at bar bring it within the doctrine of the case of *Insurance Co. v. Bauerle*, supra. It is said, however, that section 26 of the general incorporation act refers only to foreign corporations "doing business in this state," and that the appellant was not doing business in this state. We do not think that the evidence bears out this contention. In *Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, it was held that receiving lands in this

state by devise, and asserting ownership over them in this state, was a sufficient doing of business in this state to bring a foreign corporation within the purview of the language of said section 26. So, also, in *Insurance Co. v. Bauerle*, supra, it was held that, where the Pennsylvania company, a foreign corporation, received land adjoining Chicago by devise, with power to sell and dispose of the same, and to lease it and collect the rents therefrom, and asserted in this state the ownership of said land, and assumed to sell and convey it, and brought suits in the courts of this state in respect to said lands and such alleged ownership, and for the enforcement of contracts in regard to the same, such company must be held to be doing business in this state, within the meaning of said section. In the present case the trustees, under the deed of trust executed by the Lake Street Elevated Railroad Company, certified and delivered 7,574 bonds of \$1,000 each. From time to time, in 1894 and 1895, the appellant rendered and mailed to the railroad company bills for certifying bonds and accepting the deed of trust, and for services in the matter of the trust deed, and for receiving subscriptions, etc., which bills were received and paid by the railroad company. The trustees exercised constant supervision over the application of the bonds as issued. Correspondence was carried on between the railroad company and the appellant in reference to questions arising in regard to the issuance and delivery of bonds, and in regard to releases and accounts. On August 7, 1894, the appellant appointed an agent under the trust deed, who did a large amount of business in behalf of the appellant in Chicago, as such agent. This appointment was ratified and accepted by the railroad company, by resolution of its board of directors. The agent accepted the agency, and frequently examined the books of the mortgagor, and looked after the issuance and application of the several lots of authorized bonds. He made reports as agent to the appellant, and to the American Trust & Savings Bank. He gave advice in reference to the questions in dispute which arose between the appellant and the railroad company from time to time. From these and other facts appearing in the record, which it is not necessary here to specify, it is manifest that the appellant was doing business in the state of Illinois, within the meaning of said section 26. We are of the opinion that the court below did not err in decreeing that the appellant company should be removed as trustee, upon the ground of its noncompliance with section 6 of the act of 1887, as amended in 1889, regulating trust companies. It is unnecessary to consider any of the other grounds mentioned as justifying the act of the court below in removing said trustee.

3. It is further contended on the part of the appellant that the court below erred in entering the decree appealed from without requiring all the bondholders to be made parties to the suit. We think that, under

the circumstances of this case, this contention is without force. It is true, as a general rule, that all parties interested in the subject-matter of the suit should be made parties, and that, when foreclosure is sought of a mortgage or deed of trust, the cestuis que trustent, as well as the trustee, should be made parties, but there are two well-established exceptions to this rule: The first is that, where the absent parties are properly represented, it is sufficient to make such representatives parties to the suit. In *Hale v. Hale*, 146 Ill. 257, 83 N. E. 867, we said: "When it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him." Jones on Corporate Bonds and Mortgages (section 398) says: "A trustee for bondholders represents their interests, and, when made a party to a suit affecting their interests, they are as much bound by the decree rendered in the suit as if they were individually made parties to the suit." Another exception to the rule is that, where the beneficiaries are very numerous, so that the delay and expenses of bringing them in become oppressive and burdensome, they will not be deemed necessary parties, where the trustee or trustees representing them are made parties. In *Land Co. v. Peck*, 112 Ill. 408, we said (page 435): "Objection is taken that there were other necessary parties not made parties to the several bills; that all the cestuis que trust, to wit, the bondholders under the Jewett trust deed, should have been made parties by name. The general rule is that all persons interested in the subject-matter of the suit are to be made parties, and that the cestuis que trust, as well as the trustee, should be made parties to a foreclosure proceeding; but there is an established exception to this rule where the beneficiaries are very numerous, and certain parties to the suit are entitled to be deemed their full representatives. It has been laid down by Lord Redesdale as a general rule, that, where any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or as defendants, without bringing before the court the creditors or legatees for whom they are trustees, which in many cases would be impossible. Indeed, the impracticability of making the other persons parties would seem of itself a sufficient ground for dispensing with them. Story, Eq. Pl. § 150. In *Van Vechten v. Terry*, 2 Johns. Ch. 197, where a demurrer was filed to a bill brought by trustees, without making the cestuis que trustent (two hundred and fifty in number) parties, Chancellor Kent, in overruling the demurrer, said: 'The trustees are sufficient for the purpose of this bill, which is for a sale of the pledge. It would be intolerably oppressive and burdensome to bring in all the cestuis que trustent. The

delay and the expense of such a proceeding would be a reflection on the justice of the court. This is one of those cases in which the general rule cannot and need not be enforced, for the trustees sufficiently represent all the interests concerned. They were selected by the association for that purpose, and we need not look beyond them.' And see *Shaw v. Railroad Co.*, 5 Gray, 162; *Story*, Eq. Pl. §§ 142, 216, 217. We regard the present as a clear case within the exception to the general rule of equity pleading, that all persons interested in the subject-matter of the suit must be made parties to the bill." In *Railroad Co. v. Kerr*, 153 Ill. 182, 38 N. E. 638, which was a suit to enforce a lien against a railroad company, and where the Central Trust Company of New York was made a defendant, it was insisted that the court was without jurisdiction to render a decree, because certain bondholders were not made parties defendant, but we there said (page 196, 153 Ill., and page 642, 38 N. E.): "It is a general rule in chancery that all persons interested in the subject-matter of the suit should be made parties, and that in the case of foreclosure of a deed of trust the cestuis que trust as well as the trustee should be made parties. But where the beneficiaries are very numerous, and they are represented by the trustee, and the bonds secured by the deed of trust are transferable by delivery only, they are not necessary parties. * * * The trust company assumed to act for the bondholders, and, if it desired them to be made parties, it was its duty to then have disclosed their names, and made the request to the circuit court. Not having done so, the presumption is that it had authority to act."

Applying the rules thus laid down to the facts of the present case, we find that the bondholders who were not made parties to the suit in person are properly represented, so as to insure a protection of their interests. The two trustees in the trust deed now under consideration, to wit, the appellant, the Farmers' Loan & Trust Company, and the appellee the American Trust & Savings Bank, are parties defendant to the suit. They represent the interests of all the absent bondholders, in a general way. It is to be remembered that by the terms of the trust deed in this case the trustees are authorized to foreclose the mortgage or trust deed. It is also provided in the trust deed that every holder of the bonds thereby secured accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, under the trust deed, is vested exclusively in the trustees; and it is further therein provided that under no circumstances shall the holder of any bonds or coupons, or any part of such holders, have any right to institute any action at law upon any coupon or coupons or otherwise, or any suit or proceedings in equity or otherwise, for the purpose of enforcing

payment, etc., or to foreclose said mortgage, except in case of refusal by the trustees to perform the duty imposed on them. In addition to this, it is conceded that, of the 7,574 bonds issued, the appellee the Northern Trust Company, one of the defendants below, is the holder of 6,594 of said bonds. The Northern Trust Company thus appears in the suit as the representative of a large majority of the bondholders. It also appears clearly from the evidence that one Ziegler and his associates, holding 610 of the bonds, are represented by the appellant, the Farmers' Loan & Trust Company, and by the counsel appearing for appellant in this case. As to the remaining 250 of the bondholders, they are represented by the trustees in the trust deed, who were defendants in the court below. Their number corresponds exactly with the number of the cestuis que trustent, to wit, 250, named in *Van Vechten v. Terry*, 2 Johns. Ch. 197, quoted in *Land Co. v. Peck*, supra, as to which number it was there said that the trustees were sufficient representatives thereof for the purposes of a bill asking a sale of the pledge or mortgaged property.

Some other points are urged against the correctness of the decree entered by the court below, but they are unimportant, and we do not deem it necessary to enter into a discussion of them. What is said above sufficiently disposes of the material opposition made by counsel to the decree of the trial court. The judgment of the appellate court and the decree of the superior court are affirmed. Judgment affirmed.

(173 Ill. 396)

LOMBARD et al. v. WITBECK et al.

(Supreme Court of Illinois. June 18, 1898.)

WILLS—CONSTRUCTION OF WILLS—LIMITATION OF TITLE—DESCENT AND DISTRIBUTION—ATTORNEYS' FEES—COSTS.

1. A testator devised a portion of his estate to his grandchildren; providing that, in case of the death of either without issue, his portion should descend to the survivors, and, in case of the death of all without issue, the entire portion devised to them should descend to his son. *Held*, that the devise over to the son limited the title of the grandchildren to a determinable fee or a life estate.

2. A testator provided that, in case of the death without issue of any one of his grandchildren to whom he devised a portion of his estate, his share should descend to the survivors, and, in case of the death of all without issue, their portion should descend to his son. *Held*, that the survivors would not take a fee-simple title in the deceased grandchildren's share, but such share would descend to the son, as provided in case of the survivors' original shares.

3. An estate consisting of real and personal property was bequeathed by will, specifying that all the residue of testator's estate, after making certain bequests, should go to his grandchildren, upon the death of one of whom his share should descend to the survivors, and, in case of the death of all, their shares should descend to his son. *Held*, that the personal property and real estate would descend in the same manner.

4. A testator, bequeathing property to his grandchildren, provided that it should be held in

trust, empowering his trustee to withhold the income of any one who should become intemperate or incompetent to manage his own interest, except so much as was necessary for his actual support, and that, upon the death of any one without issue, his share should descend to the survivors. *Held*, that the portion of any one so withheld should be divided equally between the survivors.

5. A will empowered trustees to withhold the income from property they held in trust, should the beneficiaries prove incompetent to manage it, which was to be turned into the principal fund. They withheld the income of a beneficiary, but did not place it with the principal, but kept it separate, as a matter of convenience. *Held* not a transfer to the beneficiary's individual estate.

6. Solicitor's fees in an action to determine the construction of a will are costs, and need not be specially claimed in the pleading.

7. The court will not interfere with attorney's fees allowed in the discretion of the trial court, in the absence of proof of abuse of discretion.

8. In an action to determine the construction of a will, the questions involved affected the rights of all the legatees, as well as those of a particular legatee. *Held*, that the costs should be paid out of the entire estate.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by Isaac A. Lombard and others, trustees under the will of Henry Witbeck, against Frank M. Witbeck and others, to determine the construction of the will. From the judgment, plaintiffs appeal. Reversed.

Appellants, as the legally constituted trustees under the will of Henry Witbeck, deceased, began this action in the circuit court of Cook county by bill in chancery, praying for a construction of the first, seventeenth, eighteenth, nineteenth, and twentieth clauses of the last will and testament of said Henry Witbeck. These clauses are in the following language:

"First, I give, devise, and bequeath all of my estate, of every name and nature, real, personal, and mixed, of which I shall die possessed, wherever the same may be situate, to my trustees hereinafter named, and to their successors in trust, vesting them with the fee thereof, to have and to hold the same for the purposes and uses hereinafter provided, excepting so much of my said estate as I may otherwise specifically devise herein."

"Seventeenth. All the rest and residue of my said estate not specifically hereinbefore devised, including my homestead after my said wife, Huldah, shall cease to have any interest therein, I direct that my said trustees and their successors in trust shall hold, manage, and control as in their judgment they shall deem best, for the use and benefit of my three grandchildren, Frank M. Witbeck, Gertrude H. Witbeck, and Henry J. Witbeck, children of my deceased son George Witbeck; my said trustees and their successors in trust to hold said last-named residue estate for the use and benefit of the last-named three grandchildren during their lifetime; the net income therefrom to be

divided into three equal parts, one part to be paid to each of said last-named grandchildren from time to time as my said trustees and their successors in trust shall, in their judgment, deem for the best interest of said grandchildren, subject to the restrictions and reservations hereinafter mentioned.

"Eighteenth. I further direct that my said trustees and their successors in trust shall care for and preserve the trust estate created herein, and shall manage the same as a prudent business man should manage it; and for that purpose I hereby empower and authorize my said trustees and their successors in trust to pay all taxes, make all necessary repairs on, or build on and improve, any realty belonging to said residue estate held for my said last-named three grandchildren; to insure, lease, and sell the same; giving my said trustees full power to lease, sell, convey, mortgage, or incumber any or all of my said last-named residue estate in such manner, in such sum or sums, and for such purposes as in their discretion they may deem best; and I empower and authorize them to reinvest in real estate or personal securities the proceeds of any accumulations, either from real estate or personal property, as they may deem for the best interests of the beneficiaries of my said residue estate; hereby empowering my said trustees and their successors in trust to make, execute, and deliver any and all deeds, conveyances, or other instruments in writing by them deemed necessary to carry out the spirit and intent of the provision herein, and the purchaser or purchasers of any of my said real estate shall not be obliged to see to the application of the purchase money paid to my said trustees.

"Nineteenth. I further provide and direct that in case of the death of either of my said three grandchildren, Frank M. Witbeck, Gertrude H. Witbeck, and Henry J. Witbeck, leaving issue or descendants of issue then surviving, and born in lawful wedlock, the one-third ($\frac{1}{3}$) share of all of my estate left for said last-named three grandchildren shall descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue to take per stirpes, and not per capita; and, in case any one or more of said last-named three grandchildren shall die without leaving any such issue or descendants of issue, then said one-third ($\frac{1}{3}$) share of my said residue estate shall go to the survivor or survivors of said last-named three grandchildren; and I further provide and direct that in case of the death of all three of said last-named grandchildren without either of them leaving such issue, or descendants of issue, then surviving, then all of said estate hereby provided for such last-named three grandchildren shall descend to my son John H. Witbeck and his heirs at law.

"Twentieth. I further direct and provide, and

hereby authorize and empower, my said trustees and their successors in trust to manage said estate for the best interests of the beneficiaries herein named, and for that purpose I invest my said trustees and their successors in trust with full discretionary power on their part, to be exercised on their sole discretion and judgment; and I authorize and empower my said trustees from time to time to make any advancement or advancements they may deem best from the personal estate hereby left to my three grandchildren, Frank M. Witbeck, Gertrude H. Witbeck, and Henry J. Witbeck, or any one of them; and, if they should deem it wise and prudent so to do, I hereby authorize them, in their sole discretion, to advance from said personal estate left for said last-named three grandchildren any sum or sums they may deem best, not to exceed one-third ($\frac{1}{3}$) of said personal estate to any one of said last-named grandchildren, to enable them to enter into and carry on any business that would be deemed by my said trustees and their successors in trust wise and proper; and in no case shall said trustees advance to any one of said last-named three grandchildren to exceed the one-third ($\frac{1}{3}$) share of the personal estate which shall be left by me for their use and benefit; and in no case shall any part of the real estate left by me for their use and benefit, or the proceeds thereof if sold, be advanced or conveyed to said grandchildren, or any one of them, during their lifetime; and any advancements made to any of said last-named grandchildren shall be charged to his or her interest, and upon the death of any such grandchild said advancement shall be deducted from the one-third ($\frac{1}{3}$) share of the personal estate which would go to the issue or descendants of issue of such deceased grandchild; and for the purpose of protecting said grandchildren and said estate from waste, or from the debts and obligations which any one of said last-named grandchildren may incur, I hereby authorize and empower my said trustees to withhold any or all of the income or principal of said estate held for them, or either of them, and retain the same in their sole possession and control for such time as they may deem for the best interest of said estate and such grandchild or grandchildren; and in case of the insolvency of any one or more of said last-named grandchildren, or in case of any attempt to establish a lien upon the income of such grandchild by any creditor or assignee, either voluntary or by operation of law, my said trustees and their successors in trust are hereby empowered, authorized, and directed to retain all of said income which would otherwise go to such insolvent, and to invest the same and make it a part of the principal sum from which said income is derived, to be held with said principal sum, and to be disposed of as a part of, and in the same manner as, the principal sum from which said income is derived; and in case

any one or more of said last-named grandchildren shall become intemperate, or otherwise incompetent to manage his or her estate, or shall be a spendthrift, or for any reason whereby my said trustees and their successors in trust shall deem it unsafe and insecure to turn over to the said grandchildren, or any one of them, the income from said residue estate set apart for them, or any of the principal thereof, then I authorize and empower my said trustees and their successors in trust, in their sole discretion, to withhold any or all of said income from such grandchild, and to add the same to the principal sum from which said income was derived, and to withhold such income for such period of time as my said trustees and their successors in trust shall, in their discretion, deem for the best interest of such grandchild; and, if any one or more of said last-named grandchildren shall continue for any of the above reasons to be incompetent to receive or manage said income or estate, my said trustees and their successors in trust are hereby authorized to retain, manage, and control said principal and the income therefrom, and to hold the same for the lifetime of said grandchild, except such portion thereof as may be necessary for their actual support, and upon his or her death the said principal and income so retained shall descend to the issue or descendants of issue born in lawful wedlock of such grandchild, if any; otherwise to the survivor or survivors of said last-named three grandchildren. I further provide that when any one of said last-named three grandchildren shall marry, and desire a homestead, my said trustees may purchase a suitable homestead for such grandchild out of the one-third ($\frac{1}{3}$) of the personal estate held for such grandchild, providing they shall have retained in their possession sufficient funds belonging to said one-third ($\frac{1}{3}$) share of said personal estate held for his or her benefit, using therefor not to exceed the sum of twenty-five thousand dollars (\$25,000); the title to said homestead to be taken in the name of my said trustees, and said homestead to be occupied by the grandchild for whom it is purchased free of rent, so long as he or she shall desire to occupy the same; and, in case of such grandchild abandoning the homestead, my said trustees may manage or sell the same, and the income therefrom shall be held for such grandchild, and in case of the sale of said homestead the proceeds thereof to revert to the personal estate for the use of said grandchild, as herein provided; and such grandchild, while he or she shall occupy said homestead, shall pay all taxes thereon, keep the same in good repair, and insure the same for the benefit of said trustees; this provision for a homestead not to interfere with the rights of said trustees and their successors in trust to make advancements to such grandchild from his or her one-third ($\frac{1}{3}$) of said personal estate, if, in their judgment,

they shall deem it wise, as hereinbefore provided."

The estate was duly probated in the Cook county probate court, and a final order there entered, directing the executors to turn over the trust estate to the trustees, on July 19, 1893. The real estate is of the value of \$500,000, and the personal estate, of every kind, of the value of about \$240,000. They kept an account with each of the three grandchildren, as follows: They divided the net income from the trust estate into three equal parts, and credited to the income trust account one part to each grandchild. This account was kept so that they might distribute it to the legatees as they thought advisable, as provided in the will. It was not intended as a distribution, but simply for convenience in bookkeeping. They kept another account with each of the legatees, denominated "Investment Trust Account," in which was credited that portion of the income trust account which was not paid over to the legatees. "This was done so that that which accrued might be held subject to a subsequent division." They also kept a third account with each of said grandchildren, called "Private Accounts," into which was put money taken from the income trust account to meet engagements necessary for personal expenses and liabilities, for the private use of the beneficiaries. The money placed in the private account was only done upon the unanimous vote of the trustees.

Frank M. Witbeck is married, but no child or children have been born to him. The sister, Gertrude H., intermarried with Charles L. Grice, of which marriage three children have been born, all infants of tender years. Henry J. Witbeck, the other grandchild, died June 16, 1896; never having been married, and leaving no issue or descendants of issue surviving him. Nathaniel M. Jones was regularly appointed his administrator, who duly qualified, and is now acting in that capacity. Frank M. Witbeck, Gertrude H. Grice (with her husband, Charles L. Grice, and their infant children), John H. Witbeck, Nathaniel M. Jones, administrator of Henry J. Witbeck, deceased, and the unknown heirs of Henry J., were made defendants to the bill. Frank M., Gertrude H., John H., and the administrator answered; the other defendants being defaulted. Upon the answers filed, and replications thereto, issues were formed as to what disposition should be made of the share of the real estate willed to Henry J.; also, as to what disposition should be made of the personal estate willed to him; also, to whom should the net income of the trust estate, which was payable to Henry J. in his lifetime, be distributed; and, finally, to whom should the income investment account, now amounting to \$20,375, be paid. Upon the hearing on the bill, answers, replications, and proofs reported by the master, the chancellor found and decreed that said share of the real estate should descend

to Frank M. Witbeck and Gertrude H. Grice, as tenants in common, in equal shares, in fee determinable upon the death of both of said tenants leaving no issue or descendants of issue; that said personal estate should descend to the same parties, absolutely, in equal parts or shares; that the net income payable to Henry J. Witbeck in his lifetime should also be paid to them absolutely; and that the \$20,375 should be paid over to the administrator, Nathaniel M. Jones. It was also decreed that the trustees should first pay to their solicitors the sum of \$2,500, as and for their fees in said cause, together with the costs of the litigation. Complainants below, the trustees, prosecute this appeal, and by their assignment of errors question the correctness of the decree as to the disposition of the real and personal estate, and distribution of the \$20,375. Appellee John H. Witbeck raises the same objections to the decree by the assignment of cross errors. Frank M. Witbeck and Gertrude H. Grice also assign cross errors on that part of the decree holding that they take the real estate by a determinable fee only, and not in fee simple; also, assigning as error the allowance of said solicitors' fee, upon the ground that no such fee should have been allowed, that the amount fixed is unreasonably large, and that whatever allowance is made should be paid out of the residue of the estate in the hands of the trustee, and not out of the particular fund here in question.

Millard & Abbey, for appellants. Smoot & Eyer, Jones & Strong, and Ludington & Jones, for appellees.

WILKIN, J. (after stating the facts). Under the several assignments of error, counsel for the respective parties present for our decision—First, under the provisions of the will of the ancestor, Henry Witbeck, deceased, what are the rights of the parties in the one-third share of the real estate devised to Henry J. Witbeck? Second, what are the rights of the parties in the one-third share of the personal estate bequeathed to him? Third, to whom should be paid the \$20,375, called "Income Investment Account"? And fourth, what disposition shall be made of the future income from said real and personal estate? It is agreed that these questions must be determined upon a construction of the first, seventeenth, nineteenth, and twentieth clauses of the will.

The first clause of the will vests the fee of the real estate, and the absolute title to the personal property, in the trustees, to hold for the uses and purposes provided in the subsequent clauses. The seventeenth clause gives to the three grandchildren the benefit of the estate during their lifetime, the net income therefrom to be divided into three equal parts, one part to be paid to each of the grandchildren from time to time, as the trustees and their successors in trust

shall, in their judgment, deem for the best interest of said grandchildren, subject to the restrictions and restraints thereafter mentioned. The nineteenth clause is devoted to the disposition of the respective shares of the beneficiaries in case of their death, and therefore is of controlling importance in the decision of the case. Whatever difficulties there are in arriving at a satisfactory conclusion as to how the testator intended the share or shares of one or more of the grandchildren dying without issue or descendants of issue to be disposed of, arise from the last provision in that clause. The preceding language, "then said one-third share of my residue estate shall go to the survivor or survivors of said last-named three grandchildren," would, under section 13 of chapter 80 of our statute entitled "Conveyances," vest the fee-simple title to the real estate in Frank M. and Gertrude H., were it not for the further provision, "And I further provide and direct that, in case of the death of all three of said last-named grandchildren without either of them leaving such issue or descendants of issue then surviving, then all of said estate hereby provided for such last three grandchildren shall descend to my son John H. Witbeck and his heirs at law." Three views are presented as to the title vesting in these parties as the surviving brother and sister of Henry J., deceased: First, as insisted upon by them, that they take the fee-simple title to the real estate, and absolute ownership of the personal property; second, as held by the circuit court, that they take a determinable fee in the realty, and an unqualified title to the personality; and, third, as contended by appellants and John H. Witbeck, that they take but a life estate or interest in both the realty and personality.

We see no escape from the conclusion that the devise over to John H. Witbeck and his heirs limits the estate which would otherwise vest in the survivors; cutting it down either to a base or determinable fee, or a mere life estate. In *Friedman v. Steiner*, 107 Ill. 125, the language of the will under consideration was: "I give and bequeath all the rest and residue of my said estate, real, personal, and mixed, * * * unto my beloved wife, Rebecca Steiner, and unto her heirs and assigns forever, to the total exclusion of any and all person or persons whatsoever: provided, however, upon the express condition hereby made by me, in case the said Rebecca Steiner, after my decease, shall die intestate and without leaving, her surviving, lawful issue, * * * that then and in such event all the rest and residue of my said estate so bequeathed and devised unto her * * * shall at once be converted into money," and paid over to certain persons named,—among them Pauline Friedman, who was the appellant. This was held to convey to Rebecca Steiner a determinable fee. In *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191, it was again held

that a will containing a bequest "to my youngest son, Westley Clark Smith, to have and to hold to my said son and his heirs forever," followed by the condition, "In case any of my sons to whom I have bequeathed property in this my last will and testament should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brothers or brother, and the personalty to all the other heirs, equally," vested in the son Westley Clark Smith a fee determinable. To the same effect is *Strain v. Sweeny*, 163 Ill. 603, 45 N. E. 201, and *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029. In another line of decisions, beginning with *Siegwald v. Siegwald*, 37 Ill. 431, in the construction of wills somewhat similar to those construed in the foregoing cases we have held that the first devisee took only a life estate. In the *Siegwald Case* the devise was as follows: "I give and bequeath unto my beloved wife, Antonia, all my real and personal estate, wheresoever situated, in fee simple and absolute forever; that is to say, that my said wife shall have all the benefits thereof until the expiration of her life, at which time my son, Anton, shall be the only heir of real and personal estate, what may be left." In the decision of the case it was said (page 436): "Wills, like all other instruments, must be so construed as to effectuate the intention of the testator, and that intention must be ascertained from the language employed in the instrument itself, and in arriving at the intention all of the language employed must be considered. It seems to be evident that the testator did not intend to devise to his widow a fee-simple absolute; otherwise he would not have added the limiting clause. Had that been the intention, he had fully accomplished the purpose without employing the latter clause; but, when he did so, it must have been to limit or qualify the estate already devised." See, also, *Bergan v. Cahill*, 55 Ill. 160; *Johnson v. Johnson*, 98 Ill. 564; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 536; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Healy v. Eastlake*, 152 Ill. 424, 39 N. E. 260; *Thomas v. Miller*, 161 Ill. 60, 43 N. E. 848.

Under either line of these decisions, it is clear that the language of the nineteenth clause of the will under consideration does not vest a fee-simple title of inheritance in the surviving brother and sister. Whether the title which they would take by the construction of the language, "then said one-third," etc., shall go to the survivor or survivors of said last-named three grandchildren, followed by the devise over to John H. Witbeck and his heirs, would be a fee determinable, or a mere life estate, is not, in the view we take of the case, important. Counsel for appellant err, however, in their contention that the ground of distinction between the determinable fee cases, and the life estate cases, above cited, is that in the former the devise to the first party named was accom-

panied with such words of inheritance as would at common law vest the fee, whereas in the latter the first gift was without such words. It is admitted that this distinction does not hold good in the case of *Smith v. Kimbell*, supra, but that case is criticised as being in conflict with the other life estate cases. The real ground of distinction between the two classes of decisions is misapprehended. In the determinable fee cases, no intention whatever is indicated by the testator to give only a life estate. The fee is given, and the only limitation is a condition attached, that the devisee shall die leaving heirs, issue, children, etc. There the will does not provide that the heir, issue, or children shall take the estate upon the death of the devisee, thereby indicating an intention to limit the first estate to one for life, but simply provides that the fee shall terminate upon the failure of the devisee to comply with the condition; and, the moment the condition is complied with, that which was before a base, conditional, or determinable fee becomes a fee simple absolute. It cannot be seriously contended that under the provisions of the will construed in *Smith v. Kimbell*, supra, Sarah Jane Spears took but a life estate. No such intention can by any possibility be attributed to the testator. She was, under the provisions of section 13, above referred to, vested with a fee-simple title, just as effectually as though there had been the common-law words of inheritance; but following that gift was the condition, "should the said Sarah Jane Spears die, leaving no heirs, I will," etc.; thereby meaning that if she did die, leaving heirs, the title in her should become a fee-simple title of inheritance, but, if not, the fee should terminate. One of the peculiarities of a fee determinable is that, upon the happening of the event or the performance of the condition named, the title is changed into a fee-simple title. *Friedman v. Steiner*, supra.

There is no conflict or inconsistency whatever between the case of *Smith v. Kimbell* and other decisions of this court, and ordinarily the language used in this will would lead to the conclusion that the surviving brother and sister took an estate in fee determinable upon both dying, leaving no issue or descendants of issue. We think, however, that, in the decision of each of the questions here raised, the testator must be held to have intended that the interest of the survivor or survivors, to accrue in a share or shares of one or more of the grandchildren dying without issue or descendants of issue, should be owned and enjoyed subject to the same restrictions and conditions upon which the original shares are given. We see no other way to give practical effect to the clearly-expressed intention that, in case of the death of all three without either of them leaving such issue or descendants of issue them surviving, then all of said estate thereby provided for such last-named three grandchildren should

descend to the son John H. Witbeck, and his heirs at law. And this view seems to be well supported by authority. It is said in *Theobald on Wills* (page 516): "Clauses in a will, disposing of the shares of devisees and legatees dying before a given period or event do not, without a positive indication of intention, extend to shares which have once accrued under these clauses, so as to pass them a second time. Accrued shares will go with the original shares if there is an intention expressed that they should do so,"—and, in classifying those conditions which will pass accrued shares as a fifth class, says: "And a gift over of the whole is convincing evidence of the same intention." In such a case, "share" must have meant every interest accruing, as well as original, for otherwise the estate would go away from the issue piecemeal, whereas it is obvious nothing was intended to go over, but that all should go over at once on failure of issue of all the children, as if all but one had died without issue, who was intended to take all. 29 Am. & Eng. Enc. Law, 494. *Doe v. Webb*, 1 Taunt. 234, was ejectionment. The lessors of the plaintiff claimed 25 undivided 360ths of the premises in question. If cross remainders were created by the devise in question, the lessors of the plaintiff were not entitled, and in that case a nonsuit was to be entered. The character of the devises sufficiently appears from the following extract from the opinion of Mansfield, C. J.: "The method to bring the estate all together is to imply cross remainders. Here the testatrix devises her moiety of her several manors and lands, and all her moiety of her tithes, etc.; treating it as one entire subject of devise to her husband in the first place. She then adds several devises over, and in each of them she studiously describes her estate by the most collective and comprehensive terms, and devises all that she had before devised, to her sons, and their sons and their daughters, in succession. Afterwards, in default of such issue, she gives the same moiety to her three daughters and the heirs of their bodies, as tenants in common, and not as joint tenants; and, in default of such issue (not thereby meaning her daughters, for to them she gave estates, respectively, but their heirs of their bodies), she gave the same to her own right heirs. What was the same? It is evident from every preceding devise that the same was the whole. She has in no part of her will disposed of less than the whole. It is plain, then, that it was not her intention that a part should go to her heir at law, but the whole. She had given him nothing, unless the issue of all her daughters should fail, when, if the heir at law was to take anything, he was to take the whole estate." The judgment was for the defendant. In 2 Jarm. Wills (Rand. & T. Ed.) p. 552, it is said: "Sir G. Jessel, M. R., said [in *Maden v. Taylor*, 45 Law J. Ch. 569] that the true rule was laid down in *Doe v. Webb*, that you

must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir at law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived. He thought that principle applied to a case like that before him, where it was plain in one event the whole estate was to go over together, although it was possible that another event might happen in which that intention might be disappointed. He therefore held that cross remainders must be implied between the children of each niece; otherwise, while the particular event was still in suspense, a fraction might, by the death of one child without issue, descend to the heir at law." To the same effect is *Doe v. Birkhead*, 4 Exch. 110; *Douglas v. Andrews*, 14 Beav. 347; *Dutton v. Crowdy*, 33 Beav. 272; *In re Jarman's Trusts*, L. R. 1 Eq. 71.

The twentieth clause of the will provides: "And in no case shall any part of the real estate left by me for their use and benefit, or the proceeds thereof if sold, be advanced or conveyed to said grandchildren, or any one of them, during their lifetime;" and this restriction is consistent with the view that the survivor or survivors must take the accruing share of a deceased brother or sister in conformity with, and under the conditions of, the will. We think the trustees should hold the share of Henry J. in the real estate, and the proceeds of any real estate sold or to be sold, in their hands for the benefit of Frank M. Witbeck and Gertrude H. Grice, placing to the credit of each an equal part thereof, and manage and control the same, accounting for the income derived therefrom, in all respects, as provided in the will for the management of the original shares. If Frank M. Witbeck or Gertrude H. Grice should die, leaving no issue or descendants of issue, his or her share in the one-third of said real estate will pass with his or her original share to the survivor, to be held by the trustees in the same manner as the original shares; and if the last survivor shall die, leaving no issue or descendants of issue, then the fee-simple title to the whole of the trust real estate must vest in John H. Witbeck and his heirs. If, however, Frank M. Witbeck or Gertrude H. Grice should die, leaving issue or descendants of issue, and afterwards the other should die, leaving no issue or descendants of issue, then the share of the last survivor will go back to such issue or descendants of issue of the other. The provisions of the last sentence of the nineteenth clause, standing alone, are broad enough to carry over the personal estate in the same manner. The twentieth clause, however, provides that the said trustees may advance from said personal estate not to exceed the full amount thereof, and also that they may withhold the income of any

one of said grandchildren's share, except such part thereof as may be necessary for their actual support, in case of their becoming intemperate, or otherwise incompetent to manage his or her estate, or shall be a spendthrift, "and upon his or her death the said principal and income so retained shall descend to the issue or descendants of issue born in lawful wedlock of such grandchild, if any; otherwise to the survivor or survivors of said last-named three grandchildren." Giving effect to these provisions, we think the decree of the court below, ordering the trustees to pay over and deliver to said Frank M. Witbeck and Gertrude H. Grice, in equal parts, the share of the personal estate left to Henry J. Witbeck should be affirmed. We are also of the opinion that the \$20,375 which was withheld from Henry J. by the trustees, under the facts shown by the evidence, should be divided equally between Frank M. Witbeck and Gertrude H. Grice. The fact that the trustees had not actually turned this fund back into the principal estate, as they were authorized to do by clause 20 of the will, but kept it separate, as a matter of convenience in bookkeeping, did not amount to a transfer of it to the individual estate of Henry J. Witbeck.

Appellees contend that the allowance by the trial court of \$2,500 as solicitor's fees was error—First, because the pleadings did not claim any solicitor's fees; second, that the allowance was excessive; and, third, that the fees should, if allowed, be paid out of the residue of the estate in the hands of the trustees, other than that involved in this suit. They do not dispute the right of appellants to have some allowance if their claim is properly prosecuted. Solicitor's fees, in cases of this kind, when allowed, are treated as costs, and need not be specifically claimed in the bill. The true interpretation of this will is attended with much difficulty, and the allowance does not appear to be excessive. We said in *Missionary Soc. v. Mead*, 131 Ill. 375, 23 N. E. 603, "As to the amounts allowed by the court to the respective parties, they are so far in the discretion of the chancellor that, in the absence of proof of the abuse of that discretion, we cannot interfere." In *Goodwillie v. Millmann*, 56 Ill. 527, the allowance was set aside, but only because, upon the face of the record, it appeared to be excessive. In determining what fund should pay solicitor's fees, it is announced in *Daniell's Chancery Practice* (volume 2, p. 1431): "But although the rule is that the costs of litigation in the course of administering a will are given out of the general assets, in preference to the particular fund, yet if the particular fund has been severed from the residue, and the question is merely between the persons claiming to be entitled to it, the costs must come out of the particular fund." Here the controversy is as to the disposition of the share of the deceased legatee, but the questions raised,

both in the court below and here, affect the rights of all the parties to the trust estate; and our decision must serve as a guide to the trustees in the future performance of their duties. The view taken of the case renders the question as to what fund the expenses of the litigation shall be paid from of little performance. We think, however, that, in view of all the circumstances of the case, they should be paid out of the entire estate. The decree of the circuit court will be reversed in respect to the matters indicated, and in all others affirmed. The cause will be remanded, with directions to the circuit court to enter a decree in conformity with the views here expressed; the costs of this appeal to be paid by the trustees, as other expenses of the litigation. Reversed and remanded.

(173 Ill. 582)

EAST ST. LOUIS CONNECTING RY. CO. v. REAMES.

(Supreme Court of Illinois. June 18, 1898.)

**RAILROADS—INJURIES TO PERSONS NEAR TRACK—
SPEED OF TRAINS—ORDINANCES—NEGLIGENCE—
MASTER AND SERVANT—TRIAL—FINDINGS.**

1. Where a locomotive negligently ran over a person on a street where he had a right to be and while he was exercising due care, the railroad company was liable, even though the injury was not wantonly inflicted.

2. A declaration for personal injuries alleged that defendant had negligently and wantonly caused the injury. A general verdict was returned for plaintiff, with a special finding that the injury was not caused wantonly. *Held*, that the special finding and the general verdict were not inconsistent, the latter being supported by the allegation that the injury was negligently caused.

3. An ordinance regulating the speed of trains applies to detached locomotives not hauling cars.

4. A freight engine used in transferring cars does not, by being detached and used to carry employes to dinner, lose its character as a freight engine, within the terms of an ordinance regulating the speed of passenger and freight trains.

5. Plaintiff, while carrying dinner to one of defendant's employes, walked between defendant's tracks, lying 8 feet 10 inches apart, on a public street on the other side of which was a sidewalk free from tracks, and he was run over by defendant's locomotive and injured. The employe he was looking for might be found anywhere on the tracks in the vicinity. *Held*, that the question of plaintiff's exercise of due care was for the jury.

6. Where employes of a railroad company customarily used its engine in going from their work to dinner, with its knowledge, it was liable for damages to third persons resulting from negligence in such use.

Appeal from appellate court, Fourth district.

Action by Calvin Reames against the East St. Louis Connecting Railway Company. There was a judgment for plaintiff, which was affirmed by the appellate court, and defendant appeals. Affirmed.

Charles W. Thomas, for appellant. Millard & Smith, for appellee.

CARTWRIGHT, J. Appellant's locomotive ran over appellee in Front street, in the city of East St. Louis, causing the loss of his leg, and he recovered judgment for damages on account of his injury, under a declaration charging that it was caused by the negligence of defendant in not ringing the bell or sounding the whistle on the locomotive, and in running the same at a high and dangerous rate of speed, and in violation of an ordinance of the city. The appellate court has affirmed the judgment.

Appellant occupied with its tracks the west part of Front street, a public street of the city of East St. Louis. One of its firemen employed on these tracks boarded with appellee's wife, and his dinner was carried to him at noon at the locomotive on which he might happen to be engaged, wherever it might be found along the tracks. On November 13, 1895, appellee came into this network of tracks with the fireman's dinner, and was walking north between two tracks hunting for the engine, when he was run over. It was raining, and the wind was blowing from the northwest. The engine which ran over him was going north without any car, carrying employes of appellant in the yards to dinner, and came up behind him. He was struck by the beam, and thrown upon the tracks, and run over.

The following propositions are relied upon to reverse the judgment:

1. The court ought to have given judgment upon the special findings. The jury returned questions submitted at defendant's request, with their answers, as follows: "Did the defendant's servants injure plaintiff willfully, wantonly, or on purpose? No." "Was the plaintiff injured while walking on or between defendant's tracks? Between." The declaration alleged that the defendant negligently and wantonly caused the injury, and one of these special findings was that it was not caused wantonly. It is therefore insisted that judgment should have been entered for the defendant on that finding. It was conceded that the street occupied by defendant was a public street of the city of East St. Louis, and it is not now denied that plaintiff had a legal right to be where he was if he was exercising proper care. It was therefore not necessary to allege or prove that the injury was wantonly inflicted, provided the plaintiff was exercising ordinary care for his own safety. The general verdict was a finding that plaintiff was in the exercise of due care and diligence, as alleged in the declaration, and the special findings did not include a finding that he was not in the exercise of such care, and they were therefore not inconsistent with the general verdict. The fact that it was alleged in the declaration that the injury was wantonly caused makes no difference, because the declaration also alleged that it resulted from defendant's negligence, and that averment was sufficient to sustain the general verdict.

2. It is insisted that the court ought not to have given an instruction to the effect that an ordinance of the city prohibited the running of an engine at a speed greater than six miles an hour, or to have admitted the ordinance in evidence. An ordinance of that character applying to freight locomotives and cars was duly pleaded in the declaration. It was held in *Railway Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917, in construing this ordinance, that it was broad enough to include any and all vehicles on the tracks, and to embrace locomotive engines, which are a species of cars. Under that decision, the ordinance covers a detached locomotive like this. There is a further objection in this case that the ordinance limited passenger trains and cars to a speed of 10 miles an hour, and that this engine, being detached and carrying employes to dinner, was either a passenger car or belonged to neither class affected by the ordinance. The evidence was that the engine was a freight engine, used in the business of transferring cars along these tracks from one road to another, and this was sufficient to prove the class to which it belonged and to bring it within the instruction given by the court. It was not then or at any time employed in the carriage of passengers, in the ordinary sense.

3. It is argued that the court ought to have taken the case from the jury. The motion to direct a verdict was made at the close of the testimony for the plaintiff, and also at the close of all the evidence, and was denied in each instance. It is claimed that this was error, both because plaintiff failed to show that he was in the exercise of ordinary care, and because defendant's servants were not engaged in its business at the time of the accident, but were using the engine for private purposes,—in going for their dinner. The ground for claiming that plaintiff was not in the exercise of ordinary care was that on the east side of the street there is a sidewalk, and the part next east of the sidewalk is paved and free from tracks, and that he might have gone there instead of between the tracks. The evidence shows that he had legitimate business where he was. He was carrying dinner to a fireman employed by appellant, and was looking at the various engines to find the fireman or for a signal where he was. The fireman was accustomed to come out of the cab and give a signal with his hand, so that plaintiff would know where he was, and he might be found anywhere on the tracks. It was raining, and the wind was blowing very hard. The tracks were 8 feet 10 inches apart between the rails, and he was walking there. Under these circumstances, it cannot be said that a conclusion of negligence on his part necessarily follows, so that all reasonable minds would pronounce him deficient in the exercise of ordinary care.

The other claim, that defendant was not responsible on account of the use of the en-

gine, is not sustainable. It appears to have been the custom for employes to make such use of the engine, and to take it on this trip of about a mile and a half to their dinner. At this time there were five men on the engine who had started for their dinner, and the general yard master for defendant was standing opposite the Mobile & Ohio freight office waiting for the engine to come up to him, when he was going to get on and go with the others. The men had to go a considerable distance to dinner, and it does not seem to have been unreasonable that, as a part of defendant's business, it furnished the use of this engine for that purpose. The evidence justified the inference that this service of the engine was furnished to the laborers by an understanding between them and defendant. It was not a private purpose of the servants in which defendant had no interest. We do not deem the objections valid, and the judgment is affirmed. Judgment affirmed.

(173 Ill. 430)

CLEVELAND, C. C. & ST. L. RY. CO. v.
STEPHENS.

(Supreme Court of Illinois. June 18, 1898.)

FIRES SET BY LOCOMOTIVES—CONTRIBUTORY NEGLIGENCE—APPEAL.

1. Rev. St. 1874, p. 814, provides that in all actions for injury to property by fire communicated by a locomotive the fact that such fire was communicated shall be prima facie evidence of negligence of the railroad company, and it shall not be negligence in the owner of the property injured that he used it or allowed it to remain in the same condition as it would have been used or remained had no railroad passed it. *Held*, that a person cultivating land adjoining a railroad track was not bound to keep it free from combustible matter to avoid the spread of fire set by locomotives, and, if he uses the property in the usual way, he will not be guilty of contributory negligence.

2. Where both parties accept the same theory as to the measure of damages applicable to a case, objection that such was not the correct rule of damages cannot be made for the first time in the supreme court.

Appeal from appellate court, Fourth district.

Action by Lewis E. Stephens against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiff, which was affirmed by the appellate court (74 Ill. App. 586), defendant appeals. Affirmed.

C. S. Conger, for appellant. Bradbury & MacHatton and Parker & Crowley, for appellee.

WILKIN, J. This case was begun in the circuit court of Crawford county by appellee against appellant to recover damages alleged to have been done to his orchard, fences, grass, etc., by fire set out by the locomotive engine of defendant. The declaration is in case, containing several counts, alleging, in substance, that the plaintiff was the owner of land abutting upon the right of way

of defendant; that through the carelessness and negligence of defendant its engines threw out sparks and set fire to combustible matter on the plaintiff's land, which burned and destroyed certain property owned by and belonging to plaintiff, consisting of 400 bearing trees, 17 acres of clover, 20 acres of timothy, 400 rails in fence, and 75 loads of manure spread upon the ground. Other counts alleged that defendant suffered combustible matter to accumulate on its right of way; that fires from its engines ignited this matter, and spread upon plaintiff's land, causing damage, as set forth in the preceding counts. There was a trial by jury, and verdict was rendered for plaintiff for \$1,500, upon which judgment was entered. The defendant appealed to the appellate court for the Fourth district, where the judgment of the circuit court was affirmed, and it now brings the case to this court.

The appellant recognizes the rule that all controverted questions of fact have been settled adversely to it, and relies solely upon alleged errors of law in the giving and refusing of instructions upon the trial. The court instructed the jury, at the instance of the plaintiff, that "It is no defense that plaintiff used his premises in the same manner, and used no more caution in the manner of use of his lands than he would have done if no railroad had run through such premises." It refused to give three instructions asked by the defendant, to the effect that, if the plaintiff had contributed to the injury sued for by negligently allowing dry grass to remain in his orchard, he could not recover. The giving of the foregoing instruction on behalf of the plaintiff, and the refusal of those asked by the defendant, it is insisted, was error. This contention is based upon the assumption that it was the duty of the plaintiff to keep his premises adjoining the right of way free from combustible matter, in order that fire which might be set out by the locomotive engines of the defendant could not spread, and that, if he failed to do so, he could not recover any damage for injury occasioned by the spreading of such fire. The position is contrary to the plain provisions of our statute. Section 1 of the act of 1869, relating to fires caused by locomotives (Rev. St. 1874, p. 814), is as follows: "That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge with negligence the corporation or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not,

in any case, be considered as negligence on the part of the owner or occupant of the property injured that he has used the same in the manner, or permitted the same to be used or remain in the condition, it would have been used or remained had no railroad passed through or near the property so injured, except in cases of injury to personal property which shall be at the time upon the property occupied by such railroad." Without wholly ignoring the letter and spirit of this statute, it cannot be said that the owner of land adjacent to a railroad right of way and track is bound to keep his premises free from combustible matter in order to avoid the spread of fire negligently set by locomotive engines. Prior to the passage of this statute, it had been held by a divided court that such duty was imposed upon a property owner by the law. It was evidently the purpose of the legislature, in the passage of that part of the foregoing section which says, "and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured that he has used the same in the manner, or permitted the same to be used or remain in the condition, it would have been used or remained had no railroad passed through or near the property so injured," to change the rule theretofore announced in those cases.

The contention that the cases of *Railway Co. v. Larmon*, 67 Ill. 68, and *Railway Co. v. Maxfield*, 72 Ill. 95 (decided since the act of 1869), are to the same effect as the previous decision, is a misapprehension. In the *Larmon* Case, the court, being then authorized to review the facts, found that the railroad company had been guilty of no negligence whatever in the equipment of its engine. On the question as to whether the engineer in charge was competent, and had used proper skill and diligence in handling his engine, the evidence was conflicting, and it was held that an instruction on that branch of the case was erroneous, as making railroad companies insurers against accidents by fire. There is nothing in the decision of that case, or the one following it in 72 Ill. 95, which attempts to discuss or decide the question of contributory negligence on the part of the property holder. The language, "The party who erects his building on or near the track knows the danger incident to the use of steam as a locomotive power, and must be held to assume some of the hazard connected with its use on these great thoroughfares," was mere argument, and wholly unnecessary to the decision of the case; but it cannot be fairly contended that it means that a property owner so erecting his building assumes the hazard of the negligent or wrongful act of those using steam as a locomotive power, so that he cannot recover damages occasioned by such wrongful or negligent act. In the absence of statutory provision, the weight of authority and sound reasoning is that a person owning lands ad-

joining the right of way of a railroad company "has a right to presume that the company will not be guilty of negligence, and is not bound to remove dry and combustible matter from his land in anticipation of probable negligence on the part of the company. He has a right to use his property in the ordinary and usual way, and so long as he does so he will not be deemed guilty of contributory negligence." 3 Elliott, R. R. § 1238, and cases cited. It is difficult to perceive upon what principle it can be held that one cultivating land adjoining a railroad right of way is bound to be to the expense of keeping it free from dry grass, stubble, or other combustible matter. He owes no such duty to individual adjoining owners nor to the public. There can be no negligence in the failure to do that which there is no duty to do. He can only recover damages occasioned by the railroad company through its negligence. It cannot be seriously contended that he is bound to presume it will be negligent, or, even if he is, that he must abandon the ordinary use of his land, or expend labor and money to protect himself against such negligent act.

It is claimed that the true measure of plaintiff's damages is the difference in the value of the real estate before and after the fire, which was not applied to the case on the trial. That question was not raised in the circuit court, and cannot be raised here. Other errors assigned are properly disposed of by the appellate court. Its judgment will accordingly be affirmed. Judgment affirmed.

(173 Ill. 571)

WRIGHT v. STICE.

(Supreme Court of Illinois. June 18, 1898.)

ADVERSE POSSESSION—PRESUMPTIONS—REQUISITES—COLOR OF TITLE—LIFE TENANTS—ACCEPTANCE OF LEASE—ESTOPPEL IN PAIS—WHAT CONSTITUTES.

1. The decree of a proper court, making partition purports on its face to convey title, and constitutes good color of title, even though some of the tenants in common are not made parties to the suit in which it is rendered.

2. Where the tenant for life and the remainderman resided together on the land, the possession of the life tenant, who was the remainderman's guardian, and the payment of the taxes by him, were prima facie not for the purpose of creating a title in the remainderman in bar of the life estate.

3. Where one having a life estate in lands accepts a lease of the premises, it suspends the life estate during the term.

4. Under Limitation Act, § 6, providing that the actual possessor of lands under claim and color of title in good faith, who shall for seven years continue in such possession and pay all taxes, shall be adjudged the legal owner, in order to constitute such ownership the payment of taxes, possession, and color of title must concur.

5. Where a party makes representations, either in words or conduct, which induce another to proceed in a certain way, such representations cannot be regarded as constituting an estoppel in pais, unless the party making them had full knowledge of all the facts, or was guilty of gross negligence in failing to learn the facts.

Appeal from circuit court, Wabash county. Ejectment by Eliza A. Wright against James L. Stice. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action of ejectment brought in the circuit court of Wabash county at the November term, 1893, by the appellant, Eliza A. Wright, against the appellee, James L. Stice, to recover the possession of 32.40 acres of land in that county. The defendant below filed a plea of not guilty. A jury was waived, and the cause was tried by the court, by agreement, without a jury. The trial court found the defendant not guilty, and, after overruling motions for new trial and in arrest of judgment, entered judgment in favor of the defendant, and for costs against the plaintiff. The present appeal is from the judgment so entered by the circuit court. It was admitted upon the trial that the common source of title to the land in question was in John Brown; that John Brown died January 27, 1872, leaving as his widow the appellant, whose present name is Eliza A. Wright, and leaving three children, to wit, Mertie Brown, Rolla Brown, and Mrs. James L. Stice (then the wife of the appellee), his only heirs at law; that he died seised in fee of the land here in question, and other lands; that Mrs. James L. Stice died November 20, 1873, leaving John B. Stice, her only child and heir at law, and her husband, the appellee, James L. Stice. John B. Stice was a minor, 10 years old, on February 5, 1882. On May 30, 1882, one Isaac F. Price was appointed guardian of said minor by the county court of said county upon petition of his father, James L. Stice. On November 3, 1882, Eliza Wright and Mertie Brown and Rolla Brown (the two latter being minors, and suing by Eliza Wright, their mother and guardian) filed a bill for partition in said circuit court, asking for a partition of certain lands, including the land above described, and making defendants thereto the said John B. Stice and his guardian, Isaac F. Price. James L. Stice was not made a defendant to the bill, nor is he mentioned in the decree of partition afterwards entered; and his interest in the premises was not fixed by the decree, nor mentioned in any of the proceedings. A summons was issued in the partition suit, directed to John Stice, Luther Stice, and Isaac F. Price. It is conceded that James L. Stice and Luther Stice are the same person. This summons was served upon Luther Stice, as well as upon the two other defendants, and the sheriff made return that he had served the same upon Luther Stice. The bill for partition set up that John Brown died intestate, leaving his widow and children, as above named, and possessed of the lands sought to be partitioned. The bill further averred that Mary A. Brown, being the daughter of John Brown and the Mrs. James L. Stice above named, intermarried with James L. Stice; that John B. Stice was born as the fruit of said mar-

riage; that said Mary A. Stice died, as above stated, on November 20, 1873; and that no persons other than the complainants and defendants had any interest in said lands. A cross bill was filed by John B. Stice, by his guardian, against Mertie Brown, Rolla Brown, and Eliza Wright, without making James L. Stice a defendant thereto. Answers were filed to the cross bill, and replications to such answers. Answers and replications were also filed in the original suit. Decree was entered appointing commissioners to divide the property. The commissioners made a report, in which they set off the 32.40 acres of land above mentioned to John B. Stice, in severalty, for his share of said premises; being the one-third part thereof, after assigning to the complainant, as the widow of John Brown, her dower. The proceedings show that some or all of the lands sought to be partitioned had been mortgaged by John Brown in his lifetime, and were subject to mortgage at his death; that the widow, the appellant, had paid off nearly all of the amounts due upon said mortgages. The decree in partition subrogates her to the rights of the mortgagees. The decree approves and confirms the report of the commissioners, and decrees that the said parties hold in severalty the titles to the shares set off and assigned to them, respectively, by the commissioners; and by the decree the titles were vested in them according to said assignment. On or about November 20, 1883, the day on which the decree in partition was entered, the appellee, James L. Stice, who had been living theretofore upon a portion of the lands partitioned, called the "Home Place," but not on the land set off and assigned to his son, John B. Stice, moved upon the 32.40 acres so set off to his son, and subsequently lived there with his son. It is conceded that he occupied said 32.40 acres from the fall of 1883 up to the time of the commencement of this suit, and is still in possession of the same. Isaac F. Price remained the guardian of John B. Stice until March 19, 1884, at which latter date he resigned. Thereupon James L. Stice was on March 22, 1884, upon his own petition, appointed guardian of his son, John B. Stice, and thereafter continued to act as such guardian. While he was guardian he made two reports to the county court of said county,—one dated November 30, 1885, and the other dated January 29, 1889. He also paid the taxes upon said 32.40 acres while he was guardian. At the November term, 1892, of said circuit court, James L. Stice filed his petition for dower in said 32.40 acres of land against his son, John B. Stice; but, after evidence heard, he dismissed said petition at his own costs. Upon the trial of the ejectment suit the plaintiff below (appellant here) introduced in evidence the proceedings and decree in the partition suit, and the reports made by James L. Stice as guardian, and certain tax receipts, as well as oth-

er documentary evidence. Witnesses were also examined orally upon the trial of the cause. The plaintiff below also introduced in evidence a quitclaim deed executed by John B. Stice, conveying to the appellant, his grandmother, all his interest in the 32.40 acres so set apart to him in the partition suit. This deed was executed on March 24, 1893, shortly after John B. Stice became of age. Soon after his execution of this deed the said John B. Stice died at appellant's house. Upon the trial of the case the plaintiff submitted certain propositions to the trial judge to be held as law in the decision of the case. Some of these propositions were held to be the law, and some were refused, and the action of the court in refusing those which were refused is one of the errors assigned by the appellant.

Leeds & Ramsey, for appellant. Mundy & Organ, for appellee.

MAGRUDER, J. (after stating the facts). In order to recover in the trial below, the plaintiff there, who is the appellant here, relied upon title claimed to have been acquired, under section 6 of the limitation act, by possession and payment of taxes for seven successive years under claim and color of title made in good faith. The decree in the partition suit, setting off the land here involved to John B. Stice, is relied upon as claim and color of title made in good faith. The court below refused a proposition submitted by the appellant stating that "the decree in the partition suit in evidence in this case is color of title in John B. Stice." This refusal on the part of the court was erroneous, as the proposition announced a correct principle of law. We have held that the judgment or decree of a proper court, making partition, purports on its face to convey title, and constitutes good color of title, even though a part of the tenants in common are not made parties to the suit in which such judgment or decree is entered. *Hassett v. Ridgely*, 49 Ill. 197; *Rawson v. Fox*, 65 Ill. 200. But, in view of what is hereafter said in relation to possession and payment of taxes, we do not regard the error in refusing the above proposition as sufficient to authorize a reversal of the judgment. Color of title alone is not sufficient to establish a bar under section 6 of the limitation act, but payment of taxes, possession, and color of title must concur. *Clark v. Lyon*, 45 Ill. 388.

In order to establish possession and payment of taxes for seven successive years under the decree of partition, as color of title, the appellant relies upon the possession of appellee, James L. Stice, and upon his payment of taxes, while he was guardian of his minor son, John B. Stice. It is said that the possession and payment of taxes by James L. Stice were not his own possession and payment of taxes, but that he was so in possession and so made payment of taxes

as the guardian of the minor, and, therefore, that his acts in this regard inured to the benefit of the minor, and created a bar in the latter's behalf, under section 6 of the limitation act. If this be so, then, inasmuch as James L. Stice had a life estate in the premises his possession and payment of taxes as guardian, if they were his acts as guardian, only operated, in conjunction with the claim and color of title, as a bar against himself, and cut off his own interest in the land as life tenant. That James L. Stice had a life estate is not denied, nor can it be. His wife inherited an undivided one-third part of the lands from her father, John Brown, subject to the dower interest of her mother, the appellant. While she owned this undivided interest, she had a child (John B. Stice) born to her and her husband, James L. Stice; and thereafter, to wit, on November 20, 1873, she died, leaving John B. Stice her only child and heir at law. It thus appears that she died before the act of 1874, abolishing the estate of curtesy, was passed. Hence, under the decisions of this court, James L. Stice, upon the death of his wife leaving issue, was a tenant by the curtesy consummate in the land inherited by her from her father. His interest was more than mere dower in his wife's land. It was a life estate in the whole of it. *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51.

It is true that James L. Stice was not made a party defendant to the partition proceeding. He was a necessary party, and, if he had been made defendant, his estate as life tenant would unquestionably have been decreed to attach to the part set off in partition to John B. Stice. *Spencer v. Wiley*, 149 Ill. 56, 36 N. E. 627; *Manly v. Pettee*, 38 Ill. 128; *Loan Co. v. Bonner*, 91 Ill. 114. But, even where there is a voluntary partition of land, if such voluntary partition is fair and impartial a lien or incumbrance upon the undivided interest of one co-tenant will, as a general rule, be transferred to the portion of the premises set off to that co-tenant in severalty. 7 Am. & Eng. Enc. Law, p. 67, and cases in notes. Although the present partition was not voluntary, but under a judicial proceeding, yet, as it was perfectly fair in the proportion of land set off to John B. Stice, and as its fairness has been recognized by James L. Stice by taking possession of such portion with his son, and improving it and paying taxes upon it, it cannot be said that he is entitled to claim a life estate in the undivided interest owned by his son before the partition. But, however this may be, it seems to be conceded by both parties to this suit that the life estate of the appellee attached to the part so set off to his son in the partition suit. It results that here is a case where a life estate was owned by the father, and the remainder by the son, and both were living upon the premises during the years when the statute

of limitations is claimed to have run. It is well settled that it is the duty of the tenant for life to pay the taxes upon the premises in which he has a life estate. *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611; *Huston v. Tribbetts*, 171 Ill. 547, 49 N. E. 711; *Higgins v. Crosby*, 40 Ill. 280; *Enos v. Buckley*, 94 Ill. 458. It is also well settled that the tenant for life is entitled to the possession of the premises during the existence of his estate therein. *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *Mettler v. Miller*, 129 Ill. 642, 22 N. E. 529; *Borders v. Hodges*, 154 Ill. 498, 39 N. E. 597. The presumption therefore arises that when the owner of the life estate is in possession of the property, and pays the taxes thereon, his possession is held by virtue of his right thereto as tenant for life, and his payment of taxes is made in discharge of his duty to pay them growing out of his interest in the property as tenant for life. Prima facie, the possession of the property and the payment of taxes thereon by the appellee were not for the purpose of creating a title in his son, in bar of his own interest as tenant for life, and did not have such effect.

It appears, however, that in his accounts, as guardian, presented to the county court, the appellee charged himself with certain rents, collected from the property, and credited himself with amounts paid out for taxes and improvements. It also appears that from 1884, when the appellee was appointed guardian of his son, down to November, 1892, when he filed a petition for dower in said lands, he was laboring under a mistake; not knowing that he had a life estate in the whole of the premises, but supposing that he only had a dower interest therein. His error in this regard was not discovered until the introduction of evidence upon the hearing of his petition for dower. It is claimed on the part of appellant that appellee is estopped from denying full ownership of the property in John B. Stice by the statements contained in the inventory and reports filed by him as guardian in the county court. The inventory speaks of the property here in question as a part of the estate of John B. Stice. This was literally true, because John B. Stice had a vested interest in the property as remainder-man, but there was nothing in the inventory inconsistent with the idea that the ownership of the property by John B. Stice was subject to a life estate. So far as the reports as guardian are concerned, the appellee does not therein treat himself as the tenant of the land under his son, as landlord, but merely charges himself with certain quantities of corn and wheat and other products raised upon the land. Even if he is thereby estopped from claiming that he is entitled to recover back the amounts with which he charged himself for such products, no estoppel arises as against his claim to the life interest which he owned in the prop-

erty. If, however, the appellee can be held to have occupied the premises as lessee thereof under his son, by virtue of charging himself with the products raised from the land, his act in this regard would merely suspend his right as life tenant during the time of his occupation as such lessee. If one, having a life estate in lands, accepts a lease of the of the same premises for a term of years, it will have the effect of suspending his life estate for the term. *Helsen v. Helsen*, 145 Ill. 658, 34 N. E. 597. The reports of appellee as guardian do not, however, show that he paid taxes as guardian for more than four years, to wit, the years 1883, 1884, 1886, and 1887. The receipts produced are for the taxes of the years 1884, 1886, 1887, and 1891; being only four years and not seven years. By the terms of these receipts, the collector acknowledges the receipt of money to pay the taxes for these years from James L. Stice, and not from James L. Stice, guardian. In his testimony the appellee says that he paid the taxes for the years from 1885, to 1893, inclusive, "in the same way I paid those, receipts for which are in evidence." It appears, therefore, that, so far as the face of the receipts show, the taxes were paid by him individually, and not as guardian. So far, however, as the reports are concerned, there is nothing in them upon the subject of possession. The reports as guardian do not indicate in any way that he was holding possession as guardian, and not in his own behalf. They cannot, therefore, be regarded as showing an estoppel upon the subject of possession. Without possession, payment of taxes under claim and color does not constitute the bar contemplated by the statute. We are, however, of the opinion, that there was no such estoppel here as cuts off the appellee from claiming his interest in the property as tenant for life. If any estoppel exists, it is an estoppel in pais, or an equitable estoppel, but an estoppel of this kind is not available in an action of ejectment. *Wales v. Bogue*, 31 Ill. 464; *Blake v. Fash*, 44 Ill. 302; *Hayden v. McClosky*, 161 Ill. 351, 43 N. E. 1091; *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. 926. Where there is an estoppel, a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part; and there is involved in such estoppel a representation, which is either false, or is made with knowledge of all the facts. 7 Am. & Eng. Enc. Law, p. 14; *Tillotson v. Mitchell*, 111 Ill. 518; *Gray v. Agnew*, 95 Ill. 315; *Noble v. Chrisman*, 88 Ill. 186. A party in possession of land, even though he recognizes the title of another, may subsequently set up title in himself, if he shows that his recognition was based upon a misapprehension of his rights. *Jackson v. Spear*, 7 Wend. 401. If one party makes representations, either in words or conduct, which induced the other party to proceed in a certain way, such representations cannot be regarded as constituting an

estoppel in pais unless the party making them had full knowledge of all the facts, or had been guilty of gross negligence in failing to learn such facts. *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. 926; *Bringard v. Stellwagen*, 41 Mich. 54, 1 N. W. 909. *Bigelow*, in his work on Estoppel (page 617; 5th Ed.), says that it will be fatal to an estoppel, which is claimed to exist, if "the representation was made in ignorance, under mistake; sometimes even though this mistake be one of law." "The representation must be plain and certain, and ordinarily in reference to past and present facts, not matters of law or opinion." 7 Am. & Eng. Enc. Law, p. 14. Here it cannot be said that if the conduct of appellee, as divulged by these reports, amounted to a representation of any kind, or an admission of any kind, such representation or admission was made by him with full knowledge of his rights. On the contrary, they were made under mistake, and under a misapprehension of what his rights were. They cannot, therefore, be allowed to operate to his disadvantage. All statutes of limitation are based on the theory of laches. *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529. It is an essential element of laches that the party charged with it should have knowledge. 12 Am. & Eng. Enc. Law, p. 547.

The possession contemplated by section 6 of the limitation act is an open, notorious, adverse, actual, visible, and exclusive possession. *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269; *Bail v. Palmer*, 81 Ill. 370; *Busch v. Huston*, 75 Ill. 343; *Turney v. Chamberlain*, 15 Ill. 271. It is an essential element of possession that is adverse and hostile, that it shall be inconsistent with a possession or right of possession by another. 1 Am. & Eng. Enc. Law (2d Ed.) p. 789. If a possession is merely permissive, and entirely consistent with the title of another, it cannot silently bar that title. *Mettler v. Miller*, supra. It is also well-settled law that, as between those occupying parental and filial relations, the possession of one is presumed to be permissive, and not adverse to the other. 1 Am. & Eng. Enc. Law (2d Ed.) p. 821, and cases cited. Here, a father, the guardian of his son, who owned a life estate in real property, and his son and ward, who owned the remainder, are in possession together. The possession of the one is not inconsistent with that of the other. It cannot be said that there is such a possession as can be called adverse. To prevent the running of the statute against himself, it was necessary for the appellee to take possession of the property and pay the taxes. It cannot be said that, because he was guardian of his son while he was so in possession and so paying taxes, he was creating an ownership in his son adverse to his own interest in the land.

The action of the court below in the giving and refusal of propositions of law, except as

already indicated, was in harmony with the views herein expressed. We therefore see no reason for reversing this judgment. Accordingly the judgment of the circuit court is affirmed. Judgment affirmed.

BOGGS, J., took no part in the decision of this case.

(174 Ill. 28)

SIMONTON v. GODSEY et al.

(Supreme Court of Illinois. June 18, 1898.)

STATUTE OF FRAUDS—VENDOR AND PURCHASER—PAROL AGREEMENTS—SPECIFIC PERFORMANCE.

Grantor deeded land to her son to permit him to perfect a trade for certain mill property, with the parol agreement that, if the trade was made, he should pay her a certain price, and secure the payment by a mortgage on said mill property; but, if the trade fell through, the land was to be reconveyed, and she was to retain possession until the trade was made. *Held* that, on failure to make the trade, equity will decree a specific performance of the parol agreement to reconvey, notwithstanding the statute of frauds, since grantor stands in the position of a purchaser having paid the consideration and taken possession.

Appeal from circuit court, Effingham county.

Bill in equity by Amella S. Simonton against Nora Godsey and another. From a decree for defendants, complainant appeals. Reversed.

Gilmore & Gilmore and R. C. Harrah, for appellant. Henry & Houston and Bell & Bell, for appellees.

CRAIG, J. This was a bill in equity, brought by Amella S. Simonton, in the circuit court of Effingham county, against Nora Godsey and Verta Simonton, for the purpose of vacating and setting aside a deed executed by the complainant to Joseph C. Simonton on the 7th day of January, 1891, which purported to convey the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 16, township 7 N., range 5 E. of the third principal meridian, in Effingham county. The bill also prayed that the title to the land be confirmed in complainant. The grantee on the deed, Joseph C. Simonton, died intestate in January, 1893, leaving Nora Simonton (now Nora Godsey), his widow, and Verta R. Simonton, an only child.

There is no controversy in regard to the facts upon which the complainant relied for the relief prayed for in her bill. The facts established by the evidence introduced on the hearing for the complainant may be briefly stated: The land in controversy originally belonged to Hiram P. Simonton, who died intestate in 1887. A decree was subsequently obtained in the county court of Effingham county to sell the land to pay debts, and on the 10th day of December, 1887, the land was sold to Henry W. Wernsing. Subsequently Henry W. Wernsing sold and conveyed the land to the complainant, Amella

Simonton. In January, 1891, Joseph C., William T., and Henry Simonton were operating a sawmill which they owned. They were desirous of obtaining a steam boiler for the mill from one Barbee, who proposed to trade the same to them for the 40-acre tract of land. In order to be able to make the trade, Joseph C. procured the execution of a deed on January 7, 1891, by his mother, the said Amella, to him, whereby her title to the said premises was conveyed to him, with the agreement that if the trade with Barbee should be consummated he and his brothers would pay her \$350 for the land, and secure its payment by a mortgage upon the mill property, of which the boiler would become a part; and, if the trade with Barbee should fall, then Joseph C. was to reconvey the land to his mother; and it was a part of the agreement that she should not surrender to him the possession of said premises in the event of the failure to make such trade. It further appears that after the deed had been executed the creditors of Barbee took possession of the boiler, and the trade fell through. The land was never surrendered to Joseph C., but the possession was retained by the complainant, who paid all taxes and claimed to own the property. After the trade was abandoned Joseph C. did not claim the land, but, on the other hand, as the evidence shows, stated to different persons that the land belonged to his mother, and was to be reconveyed to her.

The statute of frauds was set up and relied upon by the defendants to the bill. A parol contract for the sale of lands cannot be enforced in a court of equity unless there has been a performance of the contract by the purchaser. But the law is well settled that a court of equity may enforce the specific performance of a parol contract for the conveyance of land, notwithstanding the statute of frauds, where the consideration has been paid and the purchaser has taken possession. *Ramsey v. Listen*, 25 Ill. 114. Here, under the contract, no purchase money was to be paid by the complainant. She therefore occupied the same position she would occupy if she had agreed to pay a certain sum of money and had paid it. As to the possession of the land, it was expressly agreed that she was to hold the possession, under the contract, until her son, Joseph C. Simonton, had concluded the trade with Barbee. She was therefore in possession of the land under the parol agreement. Complainant, therefore, established by the evidence a parol contract, under which Joseph C. should reconvey the land to her. She also established possession under the contract and payment of the purchase money. These facts having been established, equity required a decree in her favor.

It is, however, claimed that H. P. Simonton, the father of Joseph C., agreed to give the land to his son, and under the agreement the son built a log cabin on the land, cleared

"a potato patch," and lived on the land for a short time. The conduct and declarations of Joseph C. in regard to the land are all so inconsistent with the theory that he became the owner by gift from his father that it cannot be adopted. Moreover, there is evidence in the record tending to prove that after complainant purchased the land from Wernsing, who bought at administrator's sale, the heirs of Hiram P. Simonton, including Joseph C., united in a quitclaim deed conveying whatever interest they had in the premises to the complainant. If, therefore, Joseph C. ever had any title under an arrangement with his father (which we do not think was established by the evidence), that title passed by his deed to the complainant. The fact, too, that Joseph C. was made a party to the proceeding to sell the land by the administrator of his father's estate for the payment of debts, and failed to set up any title in himself, is a strong circumstance tending to prove that he held no title to the land by gift from his father.

In conclusion, after a careful consideration of all the evidence, we are of opinion that the court erred in rendering a decree dismissing the bill. The decree will be reversed, and the cause will be remanded, with directions to enter a decree in favor of complainant, as prayed for in the bill. Reversed and remanded.

(173 Ill. 587)

FOSTER v. CITY OF ALTON.

(Supreme Court of Illinois. June 18, 1898.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—RIGHT TO PAYMENT FROM GENERAL FUND.

Where, under an ordinance providing for the construction of a sewer which fails to sufficiently describe it, a special assessment is made which is successfully resisted, the defect may be cured by amendment, and a new and valid assessment levied; and hence, under article 9, § 49, of the act for the incorporation of cities, providing that persons taking contracts with the city and agreeing to be paid from special assessments shall take all risk of their invalidity, where one has taken a contract for the building of a sewer under such ordinance, which stipulates that he is to make no claim except from the collection of such special assessment, and that in case of its invalidity the city is to make a new assessment, he cannot maintain an action against the city for payment of balance due out of the general fund.

Appeal from appellate court, Fourth district.

Action by Alfred F. Foster, for use of Alton Stoneware Pipe Company, against the city of Alton. From a decision of the appellate court (74 Ill. App. 511) reversing a judgment for plaintiff, he appeals. Affirmed.

Levi Davis, for appellant. Henry S. Baker, Corp. Counsel, for City of Alton.

CARTWRIGHT, J. Appellant recovered judgment in the circuit court of Madison county against appellee for \$1,245.95 for fur-

nishing materials and doing the work in the construction of a sewer in pursuance of an ordinance of the city and a contract between the parties. The ordinance, which was set out in the declaration, provided for making the improvement and letting the contract, and section 7 was as follows: "Said contract shall contain, among other things, a covenant in substance to the effect that the contractor or contractors shall have no lien upon the city, in any event, over and above the amount hereinbefore provided to be raised for said improvement by general taxation, if any, except from the collection of the special assessment ordered to be levied, assessed and collected by the city council for said improvement." The declaration also contained a copy of the contract between plaintiff, as party of the first part, and defendant, as party of the second part, which includes the following stipulation: "The said party of the first part further agrees to make no claim against the city in any event, except for the city's share of the cost of the sewer as above specified, and from the collection of the special assessments ordered to be collected for said improvements, and agrees to take all risks of the invalidity of said special assessments. The city shall in no event be liable by reason of the invalidity of said special assessments, or of the proceedings therein, or for a failure to collect the same: provided, however, that in case said assessments, for any cause whatever, be declared invalid and void, the city hereby agrees to make a new assessment to pay for said improvements, and all excess of said actual cost of said improvements shall be rebated to the property owners."

The plaintiff alleged that the cost of the sewer was \$2,890.65; that defendant instituted a special assessment proceeding, and collected and paid to him \$1,645; that the owners of certain pieces of property assessed filed objections to the assessment, which were sustained; that this court affirmed the judgment of the county court for the reason that the ordinance providing for the improvement failed to describe it; and that there was a balance of \$1,245.65 uncollected and still due and unpaid to plaintiff on account of the sewer. A jury was waived, and the cause was submitted upon an agreed statement of facts, in which it was stipulated that the averments of fact in the declaration were true, and that on February 11, 1896, the plaintiff presented a petition to the city council of defendant praying for the passage of an ordinance for a new and valid special assessment to collect the balance due, which petition the city council granted and directed the ordinance committee to prepare, and report such an ordinance to the next meeting of the city council, but prior to such next meeting plaintiff commenced this suit, March 6, 1896. The court held, on propositions of law submitted by the plaintiff, that

It was impossible for defendant to provide any valid special assessment to pay for the improvement, and that it was therefore liable for the balance unpaid, and refused to hold, at the request of defendant, that it had power to levy a new and valid assessment. The appellate court reversed the judgment, and entered the following finding of facts as a part of the judgment: "Appellant passed an ordinance for the construction of a sewer, to be paid for by special assessment, and contracted with appellee to build the sewer, he to be paid from the special assessment and to take all risk of the invalidity of the assessment. Appellant agreed that, in case the original assessment was for any reason declared to be invalid, it would cause a reassessment to be made. Appellee completed the sewer according to contract, and part of the special assessment was collected and received by him. A part of the assessment, viz. \$1,245.65, was contested successfully, on the ground of an insufficient description of the sewer in the ordinance. Appellee then petitioned appellant to make a reassessment, which it immediately took the initial steps to do; but before an ordinance could be passed appellee brought this suit, upon the ground that appellant had exhausted its power, and could not make a reassessment as it had agreed to do, and that it was therefore liable for the balance, to be paid by general taxation or out of the general fund. The trial court so held. The finding of the trial court upon this holding is error, this court holding that a reassessment can be made. The case is not remanded, for the reason that, if the holding of this court is correct, this action cannot be maintained except upon the refusal or neglect of appellant to levy a reassessment, which is not claimed."

Section 49 of article 9 of the act for the incorporation of cities and villages is as follows: "All persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collections of the special assessments made for the work contracted for." The provisions of the ordinance and contract bring this case within that section. But appellant relies upon the proposition that the ordinance was void, and that the case comes within the rule in *Maier v. City of Chicago*, 38 Ill. 266, and *City of Chicago v. People*, 56 Ill. 327. With this claim we do not agree. In the first of those cases the city had no right, under its charter, to levy a special assessment, and any attempt to exercise a power not conferred by the charter was necessarily void. In the second case the property, other than that of the North Chicago Railway Company, had already been assessed, and had paid the full

amount of benefits realized, and the city had made a contract with the railway company by which its property was exempted from assessment. The contractor had done the work in ignorance of the agreement for exemption, and had been induced to accept a contract for payment out of an assessment which the city had agreed not to make, but to exempt the property from. In this case objections were sustained in the county court, and the judgment affirmed in this court because the ordinance did not sufficiently describe the improvement. *City of Alton v. Middleton*, 158 Ill. 442, 41 N. E. 926. The sewer was described generally, and its location was given. It was to be an underground pipe sewer of the best stone-glazed pipe, 18 inches in diameter, with other specifications, but the ordinance failed to show the depth on the vertical plane of the city, and it was deficient in that respect. The statute provides that the ordinance shall specify the nature, character, locality, and description of the improvement. This is an essential element of an ordinance, and, if it contains no description whatever, the ordinance will necessarily be void as lacking such essential element. Where the work has not been done at the time a special assessment is levied, it must be based upon an estimate, and it is essential, in order to make that estimate a safe and proper basis, that the improvement should be described with such particularity that an intelligent estimate can be made and that bidders will understand what is to be done. This is essential to the protection of the property owner; but if the assessment is not questioned in the direct proceeding, and there is a description of the improvement in the ordinance, although loose or defective in some particulars, it does not render the ordinance a nullity, and the judgment of confirmation is not subject to collateral attack, as in the case of a void ordinance. *Steenburg v. People*, 164 Ill. 478, 45 N. E. 970; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Gross v. People*, 172 Ill. 571, 50 N. E. 334. Where there is an attempted ordinance which is absolutely void, there is no ordinance at the time the work is done. But that is not the case here. The defect was not one which the city could not cure, but it could be remedied by amendment, and the ordinance made perfect, so that a new and valid assessment could be levied. Section 46 of said article 9 provides for such new assessment where an assessment has been set aside by any court, and where the ordinance is not a nullity, but merely inadequate, the new assessment may be levied. *Freeport St. Ry. Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137; *Commissioners v. Sweet*, 167 Ill. 326, 47 N. E. 728. The judgment of the appellate court is affirmed. Judgment affirmed.

(151 Ind. 108)

STARNES et al. v. ALLEN.

(Supreme Court of Indiana. July 1, 1898.)

SUFFICIENCY OF RECORD—LONGHAND MANUSCRIPT.

The clerk's certificate, authenticating the transcript, and reciting, "I * * * do hereby certify that the above and foregoing is a full, true, and correct copy of the records and judgment of the court in the above-entitled cause, as the same appears of record in my office," is binding on the appellate court, in the absence of any showing to the contrary appearing in the record, that the bill of exceptions, including the longhand manuscript, has been copied by the clerk into the transcript; making it immaterial whether the longhand manuscript has ever been filed in the clerk's office, separate and apart from the bill of exceptions.

Petition for rehearing. Overruled.

For former opinion, see 45 N. E. 330.

McCABE, J. A petition for a rehearing is presented in this case, supported by an exhaustive brief of over 40 pages of printed matter. We have read and considered it with patience and forbearance. The first 20 pages are devoted to a profound, logical, and able argument, couched in language ornate and dignified, supported by the citation of many recent decisions of this court to the effect that when the longhand manuscript of the evidence is sent up to this court the transcript must show that it was filed in the clerk's office before it was incorporated in the bill of exceptions, or the evidence is not in the record. And, it not being shown that the longhand manuscript was filed in the clerk's office in this case before the bill of exceptions was filed, it is contended, in a liberal display of charming rhetoric, that we erred in holding that the evidence was in the record. If we had decided in the original opinion that it need not be shown in the transcript that the longhand manuscript was filed before its incorporation in the bill of exceptions, in opposition to the long line of cases decided by us, cited by appellee's counsel, it would not tax our patience to read this long argument to prove a proposition which no one disputes. The original opinion makes no such decision, but is in perfect accord with all those cases holding that, in order to bring the evidence into the record by the original longhand manuscript sent up to this court, the transcript must show that such manuscript was filed in the clerk's office below before its incorporation in the bill of exceptions, as required by the statute in force when these proceedings took place. Therefore all this long effusion about our duty to be governed by our previous decisions as to what is required to make the original longhand manuscript, when sent up, a part of the record, is nothing less than an inexcusable waste of labor and valuable time, or "love's labor lost." But it may be counsel intended such useless argument as a sort of a makeweight in favor of the appellee on another proposition that is involved. Each proposition, how-

ever, must stand or fall on its own merits. The sole ground on which we held that the evidence was in the record is that the clerk had, in his certificate authenticating the transcript, said: "I * * * do hereby certify that the above and foregoing is a full, true, and correct copy of the records and judgment of the court in the above-entitled cause, as the same appears of record in my office." Two things are said in this certificate, vital to the controversy: One is that what precedes it is a copy of a transcript of the original, and the other is that the original of all contained in the transcript remains and appears of record in the clerk's office below. That could not be so if the original manuscript of the evidence had been sent up here. We simply held in the original opinion that this statement of the clerk below, within his power to make, was binding on us, in the absence of any showing to the contrary appearing in the record; holding that that made it appear that the bill of exceptions, including the longhand manuscript, had been copied by the clerk into the transcript, making it wholly immaterial whether the longhand manuscript had ever been filed in the clerk's office, separate and apart from the bill of exceptions, or not. And it is not now contended that the record shows anything to the contrary. It is conceded that the transcript properly shows the filing of the bill of exceptions in time. It is, however, contended by appellee's learned counsel that even in that case the transcript must show the filing of the original longhand manuscript in the clerk's office before its incorporation in the bill of exceptions. But that is a total misapprehension of the force and effect of the statute then in force, providing for sending up the original longhand manuscript of the evidence without copying it, instead of a transcript thereof. It is only when that is to be done that there was any requirement that it should be filed in the clerk's office. That statute neither repealed nor modified the other provisions of the Code as to incorporating the evidence in a bill of exceptions, and copying the same into the transcript. When that course was pursued, all that these provisions required was that the transcript should show the filing of the bill of exceptions, incorporating the evidence, within the proper time, in the clerk's office below. Appellee's counsel assume that this is not the law; citing in support of such assumption the line of decisions already referred to, as to the requisites to bring the evidence into the record under the statute then in force as to bringing up the original longhand manuscript. But such decisions have no bearing on the question. Where the clerk's certificate shows, as is the case here, that the bill of exceptions has been copied into the transcript, this court has steadily recognized the law to be as we declared it in the original opinion (that it is not necessary to show

anything about the filing of the original longhand manuscript in the clerk's office) in the following cases: *Holt v. Rockhill*, 143 Ind. 530-533, 40 N. E. 1090; *Morrison v. Morrison*, 144 Ind. 379, 43 N. E. 437; *Hamrick v. Loring*, 147 Ind. 229-231, 45 N. E. 107. And in *Madden v. State*, 148 Ind., at pages 184, 185, 47 N. E. 220, the question was directly decided in the following words: "Where the transcript does not purport to contain the original longhand manuscript, but where the bill, as here, states that it contains all the evidence given in the cause, there is no reason why such transcript should show that the longhand manuscript of the evidence was ever filed in the clerk's office. It is sufficient if the judge certifies, as he has here, that the bill of exceptions contains all the evidence given in the cause, and the clerk certifies, as he has here, 'that the above and foregoing transcript contains complete copies of all the papers and entries in said cause'; the transcript otherwise showing the filing of the bill of exceptions in said cause."

But if we are wrong in holding the evidence is in the record, aside from this, our attention is called to the fact by appellants' counsel that there is a special bill of exceptions in the record, about the validity of which there is no question, and none can be made, and which is wholly ignored by appellee's learned counsel, more fully and completely exhibiting the ruling of the court overruling appellants' objection and exception to the admission of the evidence, for which we reversed the judgment in the original opinion. It is contended that there was no specific objection stated to the introduction of the evidence for which we reversed the judgment. The objection stated in the bill of exceptions containing the evidence is as follows: "Counsel for defendants objected to this question as being immaterial to any issue in this case." And again the objection was stated when the same question was repeated: "Counsel for defendants objected to this question,—incompetent and immaterial to any issue in the case." There is some confusion in the bill containing the evidence as to what specific objection was made and ruled on. But the special bill reads thus: "To the introduction of which evidence the defendants at the time objected, for the reason that it was incompetent to show that within a few minutes after the death of David Allen there was a search for papers, in the absence of any showing that the original deed had ever been in said stand or drawer, or was in there at the time of the death of the said David Allen, and in the absence of any showing that David Allen was in possession of said deed at the time of his death, or that said Zibeon took said deed from said drawer. That the court overruled said objection, and permitted the witness to testify to said facts [which are set out in said special bill], to

which ruling of the court the defendants at the time excepted." This objection fully sets forth the objections to said testimony, for overruling which we reversed the judgment in the original opinion. And the above quotation answers the point made, that no proper exception was taken to the ruling. The exception, as shown in the bill containing the evidence, was not as apt and perfect as could have been made, but the above exception is not open to any valid objection.

To the last point made, that the evidence was competent, and that we erred in holding it incompetent, we must say counsel have made no new or valid answer to our reasons, stated in the original opinion, why it was incompetent, and its admission was harmful to the appellants. The petition is overruled.

CHICAGO & C. TERMINAL RY. CO. v.
HAMMOND-WHITING & E. C.
ELECTRIC RY. CO.

(Supreme Court of Indiana. June 30, 1898.)

On petition for rehearing. Overruled.
For former report, see 46 N. E. 999.

MCCABE, J. After the indorsement by the clerk of this court on the back of the transcript showing the filing of appellant's petition and brief for a rehearing, on May 28, 1897, and on the return of the record to us by the clerk, more than six months ago, we discovered that no such petition and brief were to be found among the papers accompanying the transcript. We at once returned the transcript and papers to the clerk, directing him, in case he could not find the missing petition, to notify the appellant's attorneys, which he did more than six months ago. They have taken no steps to supply copies of the missing papers, nor caused to be returned to the files the originals. Therefore, being unable to know what objection is made to the original decision and opinion, and being satisfied therewith, and seeing no objection thereto, we overrule the petition for a rehearing.

(151 Ind. 123)

WATKINS, County Auditor, v. STATE ex
rel. VAN AUKEN.

(Supreme Court of Indiana. July 1, 1898.)

DRAINS—REPAIRS—BY WHAT STATUTE GOVERNED.

Rev. St. 1894, § 5631, provides, as to drainage secured by proceedings in the circuit court, that where a drain is completed the county surveyor shall keep it in repair, and as to the apportionments and collection of the cost between the lands of the several counties, and in addition that the section shall apply to all drainage works under any law now or heretofore in force. Section 5646 provides that the act shall not repeal or affect in any manner the act of April 21, 1881, for drainage proceedings in the commissioners' court, under which the drainage in dispute was accomplished, and which provided a different method for paying the cost of keeping the drains in repair, which provision

had been declared unconstitutional. *Held*, that section 5631 applies to the repairs, since such section is not within the proviso of section 5646, and the proviso will not be held to limit the act to drainage secured by proceedings in the circuit court.

Petition for rehearing. Overruled.

For former opinion, see 49 N. E. 169.

HACKNEY, C. J. The petition for a rehearing is directed only to the question of the power of the surveyor to make the repairs in question. If we understand counsel, they maintain that the act of 1885 (Rev. St. 1894, § 5631) does not apply to the drain here in question, because of the proviso in the thirteenth section (Rev. St. 1894, § 5646) that said act shall not be held to repeal or affect in any manner the act of April 21, 1881, the act under which this drainage was accomplished. Section 10 of the act for drainage proceedings in the circuit court (Rev. St. 1881, § 4282) and section 23 of the act for drainage proceedings in the commissioners' court were in the same language. They provided for the cleaning and repairing of drains by the township trustee, the payment therefor from the township fund, and the reimbursement of that fund by assessments. This court, in *Campbell v. Dwiggins*, 83 Ind. 473, in 1882, held said two sections unconstitutional as to the proceedings to reimburse the township fund. In 1885 the general assembly enacted the act of April 6th (Acts 1885, p. 129), its general features applying to proceedings for drainage in the circuit courts. In section 10 of that act (Rev. St. 1894, § 5631) it was provided that when a drain was completed the county surveyor should keep it in repair. Its language clearly made it applicable to drains constructed in two or more counties, and provided for the apportionments and collection of the cost between the lands of the several counties. It then provided, in language free from ambiguity or doubt, that "the provisions of this section shall also apply to all works constructed for the purpose of drainage under any law now or heretofore in force in this state." There then existed no substitute for the provisions of the acts of 1881 so held to violate the constitution. The intention of the general assembly to create a new method of repairing and collecting the cost seems manifest unless the proviso referred to should be held to limit the act to drainage secured by proceedings in the circuit court. The necessity for such legislation, and the comprehensive language of said provision, applying to all drainage under all laws, strongly support the intention to cover the provisions of section 23 of the act of 1881, and cure the defect therein. The proviso, in our opinion, does not defeat this intention. It speaks with reference to the act of April 21, 1881, as a whole, and expresses the purpose to keep said act alive and in force. It is not to be implied that the new provision as to repairs, in the

absence of the proviso, would repeal the act of April 21, 1881. Construing the two acts of 1881 with that of 1885, it seems clear to our minds that it was intended by the latter act to provide for the cleaning of drains in two or more counties by the surveyor of the county in which the proceedings were instituted, whether by proceedings in the circuit court or in the commissioners' court. In the original opinion we employed language implying our conclusion that section 4310, Rev. St. 1881 (section 5679, Rev. St. 1894) failed by the holding that section 4307, Rev. St. 1881, was not constitutional. From the holding in *Ingerman v. Noblesville Tp.*, 90 Ind. 393, that only the provisions of section 4307, *supra*, as to assessing lands for the reimbursement of the township fund, were unconstitutional, section 4310 (section 5679), *supra*, would probably not be defeated. But, as intimated in the original opinion, section 4310 (section 5679) was of doubtful force from its failure to designate the officers and the procedure for repairing joint drains. However, we are clearly of the opinion that the act of 1885, *supra*, provided a complete method, and applied when the repairs here in question were made. The petition is overruled.

(151 Ind. 139)

CITY OF INDIANAPOLIS *v.* NAVIN.

(Supreme Court of Indiana. July 1, 1898.)

SUPREME COURT—DECISIONS—CONFLICT WITH FEDERAL DECISIONS.

The question whether a statute is in contravention of the state constitution is one to be finally determined by the supreme court, and its decision will not be discarded on a rehearing, on the ground that the United States courts have subsequently decided a like case contrary to such decision.

Petition for rehearing. Overruled.

For former opinion, see 47 N. E. 525.

PER CURIAM. In this case the principal contention was that the act of March 6, 1897, amending section 9 of the act to provide for the incorporation of street-railroad companies, was inoperative and void, because in contravention of section 13 of article 11 of the constitution of this state. In arriving at the conclusion reached in the original opinion, we had the benefit of the opinion of the circuit justice, delivered in the case of *Central Trust Co. v. Citizens' St. R. Co.*, reported in 80 Fed. 218, and also of the very able argument addressed to the justice in that case by the eminent counsel for the complainant. After carefully considering, not only the arguments presented in this case, but also the arguments and opinion referred to, and all the light that we could obtain upon the question, we were constrained to hold that the contention that the legislation in question was in violation of the constitution of this state was without just foundation, and that the act was in harmony

therewith. The question thus presented to us was purely one arising upon the construction of the constitution of this state. Such a question, when presented to this court, is one that it must decide upon its own judgment as to the requirements of the state constitution. While in search of assistance and information to enable us to decide such a question correctly, it is eminently proper and necessary that we should examine, weigh, and consider, not only the arguments of counsel, but also the adjudications of courts and the opinions of judges, in other jurisdictions, upon similar or analogous provisions of this or other constitutions, and give to them such weight as in our opinion they are justly entitled to; but, after that has been done, the responsibility rests upon us, and us alone, and that responsibility can not be shirked, evaded, or avoided. What the constitution of the United States, and the laws of congress or treaties made thereunder, require, is to be finally determined by the supreme court of the United States; and its decisions, when made upon such questions, are binding upon the courts in every state, "anything in the constitution or laws of any state to the contrary notwithstanding." *Cooley, Const. Lim.* (6th Ed.) pp. 18-23; *Black, Interp. Laws*, pp. 378-380, 427-429; *23 Am. & Eng. Enc. Law*, pp. 37-40, and cases cited. The interpretation and construction of the statutes of this state, and whether the same have been enacted in accordance with the requirements of the constitution of this state, and are or are not in violation of any provision of the constitution of this state, however, are questions to be finally determined by this court, and by this court alone. The rule is that the construction put upon the constitution and laws of a state by the court of last resort of such state, and the decision of such court that a law has or has not been passed in conformity with the requirements of the constitution of such state, or that the same is or is not in violation of the constitution of such state, are binding upon the federal courts, and will be adopted by them. *Black, Interp. Laws*, pp. 378-381, 427-429; *23 Am. & Eng. Enc. Law*, pp. 37-40, and cases cited; *Cooley, Const. Lim.* pp. 18-23; *Black, Const. Law*, p. 140; *35 Cent. Law J.* 322; *Goodnow v. Wells*, 67 Iowa, 654, 25 N. W. 864; *May v. Tenney*, 148 U. S. 60, 64, 65, 13 Sup. Ct. 491; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 187-189, 14 Sup. Ct. 1010; *Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114; *Leeper v. Texas*, 139 U. S. 462, 467, 11 Sup. Ct. 577; *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 166-169, 13 Sup. Ct. 54; *Bauserman v. Blunt*, 147 U. S. 647, 652-659, 13 Sup. Ct. 466; *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345; *Forsyth v. City of Hammond*, 166 U. S. 506, 518-520, 17 Sup. Ct. 665; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U. S. 685, 688, 17 Sup. Ct. 718; *Merchants' & Manufacturers' Nat. Bank v.*

Pennsylvania, 167 U. S. 461, 462, 17 Sup. Ct. 829; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 357, 18 Sup. Ct. 157; *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 566, 18 Sup. Ct. 445; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 Sup. Ct. 939; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 63, 16 Sup. Ct. 1096; *Nobles v. Georgia*, 18 Sup. Ct. 87; *McCain v. City of Des Moines*, 84 Fed. 726; *Leighton v. Young*, 3 C. C. A. 176, 52 Fed. 439; *Western Union Tel. Co. v. Poe*, 64 Fed. 9; *Crowther v. Safe-Deposit Co.*, 29 C. C. A. 1, 85 Fed. 41; *Hill v. Hite*, 29 C. C. A. 549, 85 Fed. 268; *Hoge v. Magnes*, 29 C. C. A. 564, 85 Fed. 355.

Since the decision of this case and the filing of the petition for a rehearing, our attention has been called by appellant's brief on said petition to the decision of the United States circuit court in the case of *Central Trust Co. v. Citizens' St. Ry. Co.*, 82 Fed. 1, in which the learned judge, who had arrived at a different conclusion before the announcement of our opinion upon the question, adhered to his original conclusion, notwithstanding the opinion announced by this court. We have also examined the opinion, upon appeal, in the circuit court of appeals (*City of Indianapolis v. Central Trust Co.*, 27 C. C. A. 580, 83 Fed. 529), and have carefully re-examined the question presented in this regard, not simply as a matter of courtesy to a high court, but constrained thereto by the duty which is cast upon us by the presentation of the petition for a rehearing. We have done this not alone because of the importance of the question, but because of the misfortune to the community, and the parties, especially interested in a correct decision of the question, that this court should differ from the circuit court of the United States upon the question. Upon such re-examination we are constrained to adhere to our original opinion, that the act in question, even if local and special, is not in contravention of any of the provisions of the constitution of this state, as contended by the appellant. As the power to amend or repeal the act of 1861 was expressly reserved in section 11 of said act, and as the act of 1897 was a valid amendment of said act of 1861, it is not material whether or not the legislature would have had the power to regulate the fare upon street railroads organized under said act if said section 11 had been omitted therefrom. In arriving at the conclusion that the act of 1897 is not in contravention of any provision of the constitution of this state, it has not been necessary for us to consider any questions arising under the constitution of the United States. As to such questions we should be constrained to follow the adjudications of the supreme court of the United States, if any, without in any wise considering whether such a construction should or should not commend itself to our independent judgment. But up-

on the requirements of the constitution of this state we are not at liberty to set aside or discard our own views because of the fact that they do not meet with the concurrence or approbation of any other court, however high, or any judge, however eminent. We do not deem it necessary to add anything further to what we have heretofore said upon the questions involved, but, adhering to the opinion originally pronounced in this case, the petition for a rehearing is overruled.

(151 Ind. 30)

OWINGS v. JONES et al.

(Supreme Court of Indiana. June 28, 1898.)

WITNESSES — TRANSACTIONS WITH DECEDENTS — RIGHT TO CALL ADVERSE PARTY.

Plaintiff heirs sued defendant heirs for partition of property inherited from their common ancestor, and to quiet title to said property against O., one of the heirs, who claimed it under a deed from the ancestor. W., the brother of O., filed an answer averring that the ancestor, a short time before his death, delivered a deed to the property to him, to be delivered to O., as the grantee. The other defendants, excepting O., filed no pleas. *Held*, that under Burns' Rev. St. 1894, § 510 (Horner's Rev. St. 1897, § 502), giving the right to any party to a suit by or against heirs, founded on a contract with the ancestor, to call and examine as a witness "any adverse party," defendant O. had a right to examine W. as to what the ancestor said about delivering the deed, since W., to all intents, was an adverse party, in that his interests were with the heirs and against the claim of O.

Appeal from circuit court, Blackford county: E. C. Vaughn, Judge.

Action by Malinda Jones and others against Thomas B. Owings, Sr., and others. From a judgment for plaintiffs, defendant Owings appeals. Reversed.

Carroll & Dean, for appellant. H. J. Paulus, for appellees.

JORDAN, J. Appellees, Malinda Jones, Jane Case, and Mary A. Heinlein, instituted this action in the Grant circuit court against appellant and a number of other defendants, for the purpose of securing partition of the real estate described in the complaint among the plaintiffs and defendants, and to quiet title to the said realty against the defendant (now appellant) Thomas B. Owings. The venue of the case appears to have been changed to the Blackford circuit court, wherein a trial resulted in the finding that the plaintiffs and defendants were the heirs of a common ancestor, and entitled to partition of the lands as such heirs; that their title be quieted as against the defendant Thomas B. Owings; and, over the motion of the latter for a new trial, a judgment was rendered declaring the deeds herein involved void, and partition was awarded accordingly, and the title of the plaintiffs and defendants as to the shares assigned to each of them was quieted as against the title claimed

by appellant under his deeds, and it was further adjudged that he pay the cost of the action. The complaint, among other things, alleges that the plaintiffs and defendants are brothers and sisters, nephews and nieces, and the only heirs, of Sarah R. Smith, who died intestate at Grant county, Ind., on July 10, 1895, the owner in fee simple of the real estate therein described, and that the plaintiffs and defendants hold the same, undivided, as tenants in common, by inheritance, as the heirs of the said Sarah R. Smith, and the share to which each party is respectively entitled is stated. The complaint also avers that the said ancestor, prior to her death, had signed and acknowledged deeds purporting to convey the real estate described in the complaint to the defendant Thomas B. Owings, but it was alleged that these deeds were not delivered to him, nor to any other person for his use, by the grantor, Sarah R. Smith, but at all times were retained by her in her exclusive possession and under her control until her death; and that thereafter said Thomas B., without right, obtained possession of the deeds, and caused them to be placed upon the public records, and that under and by virtue of such deeds of conveyance he is claiming and asserting an absolute title to all of the land in fee simple, etc. It is averred that these deeds are void, for the reason that they were never delivered to the defendant, nor to any one for his use, but that they serve to cast a cloud upon the title of the plaintiffs and each of the other defendants; and the prayer is that they be declared null and void, and that the title of the parties to the land be quieted as against the claim of the defendant Thomas B. Owings, etc. William Owings, one of the defendants, filed what he denominated his separate answer to the complaint, wherein he alleged that he was an heir of Sarah R. Smith, as stated in the complaint, and that prior to her death she executed warranty deeds of conveyance to his co-defendant Thomas B. Owings, conveying the real estate described in the complaint, and delivered the same to him (William Owings), with directions to deliver said deeds to Thomas B. Owings as soon as he had an opportunity; that he took the deeds into his possession, and so retained them until he delivered them to said Thomas B., which he did at the first opportunity; and he further alleged that under such deeds Thomas B. was the owner of the real estate in question; and in his answer he demanded judgment for costs. The defendants, other than Thomas B. and William Owings, are not shown by the record to have filed any pleadings in the action. The record recites that the cause, being at issue, is submitted to the court, and, at the request of the defendant Thomas B. Owings, the court made a special finding of facts.

The disputed question at the trial, under the issues, and the only one, related to the delivery of the deeds. The plaintiffs, to

maintain this issue tendered by them under their complaint, introduced evidence to show that the deeds from Mrs. Smith, through which appellant claims title to all the real estate involved, had not been delivered by the said grantor during her life, but had been retained by her, under her control and in her possession, until her death; while on the part of the appellant the claim was that the deeds had been signed and acknowledged by her a short time prior to her death, and by her delivery to her brother William Owings, with directions to deliver them to appellant (who is also a brother) at the first opportunity, and appellant introduced evidence tending to support his claim in respect to the delivery of the deeds. During the trial, at the proper time, he called his said co-defendant William Owings as a witness, and proposed to prove by him that Sarah R. Smith, the ancestor, a short time previous to her death, delivered the deeds in suit to this witness, and directed him to deliver them to the appellant at the first opportunity he had of seeing the latter; that the witness took the deeds in his custody, and so kept them until July 12, 1896, two days after the death of Sarah R. Smith, when he took them from a drawer of a bureau belonging to him, and, in compliance with the directions of Mrs. Smith, did on that day deliver them to appellant, that being the first time he had seen the appellant, and the first opportunity which he had of delivering the deeds to him. The court, upon the objections of appellees, excluded this evidence, for the reason, as urged, that the witness, being a party to the suit, was not competent, under the circumstances, to testify to any matter which occurred prior to the death of the ancestor. The ruling of the court upon this question was assigned as one of the reasons for a new trial, and it is here urged as reversible error. Section 507, Burns' Rev. St. 1894 (section 499, Horner's Rev. St. 1897), provides: "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor." Section 510, Burns' Rev. St. 1894 (section 502, Horner's Rev. St. 1897), gives the right to any party to such suit to call and examine as a witness any adverse party. It has been repeatedly held by this court, in placing an interpretation upon the statute in question, that the term "party," as therein employed, means not merely a party to the record, but a party to the issue. If only a party to the record, in order to render him incompetent, it must further appear that he has an interest in the result of the suit in common with the party calling him as a witness. *Spencer v. Robbins*, 106 Ind. 590, 5

N. E. 726, and cases there cited; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, and 23 N. E. 271.

It is insisted by appellant's counsel that the witness, by the answer which he had filed in the action, virtually disclaimed all interest in the lands in controversy as an heir of Mrs. Smith, and recognized the validity of appellant's title under the deeds in question, and therefore, under the decision in the case of *Spencer v. Robbins*, supra, he was a competent witness. But, without considering this feature of the case, it is evident that appellant, by virtue of section 510 of the statute cited (Burns' Rev. St. 1894; section 502, Horner's Rev. St. 1897), had the right to call and examine this witness relative to the facts which he proposed to prove by him. There can be no question as to his right to have called and examined any or all of the plaintiffs, relative to matters occurring during the lifetime of the ancestor, which were germane to the issue involved. William Owings, the witness called by appellant, was an heir of the common ancestor, and the claim or interest which he asserted, or could have asserted, at least, in the real estate involved in the suit, rendered him as much of an opposite or adverse party to appellant, in a legal sense, as were the plaintiffs; and the mere fact that he had been made a party defendant in the action would not, under the circumstances, render his interest in the result of the suit in any manner less adverse to appellant than the interests of the plaintiffs. If the action resulted in the deeds through which appellant claimed title being declared void, then the interest or title which William Owings claimed to hold in the real estate as an heir and tenant in common along with the plaintiffs would be sustained. The interest, therefore, of this witness, as a party, under the circumstances, in the result of the suit, certainly was in common with that of the plaintiffs, and not with that of the appellant, who called him. To all intents and purposes he was, in respect to his interest in the land, as an heir, an opposite or adverse party to the appellant. The court, therefore, under the provisions of section 510 Burns' Rev. St. 1894 (section 502 Horner's Rev. St. 1897), could not deny appellant's right to call and examine him as a witness in regard to the facts which were proposed to be proven by him. In addition to the cases heretofore cited upon this point, see *Howard v. Howard*, 69 Ind. 592; *Nye v. Lowry*, 82 Ind. 316; *Cupp v. Ayers*, 89 Ind. 60. For the error of the court in refusing to permit appellant to call and examine the witness in question relative to the facts proposed to be proven by him the judgment is reversed, and the case remanded to the lower court, with instructions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

(151 Ind. 89)

FORBES et al. v. UNION CENT. LIFE INS. CO.

(Supreme Court of Indiana. July 1, 1898.)

LIFE INSURANCE—PREMIUMS—PAYMENT—RIGHTS OF BENEFICIARY.

1. The beneficiary of an insurance policy takes his interest subject to a condition of the policy that it shall be void unless premiums are paid when due.

2. On the maturity of notes given for a balance of an insurance premium, insured gave other notes in renewal, which recited that the sum therein named represented the premium on the policy, and on failure to pay them at maturity the policy was to be void. *Held*, that the notes were not given in payment of the premium or of the original notes.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by Frances Forbes and another against the Union Central Life Insurance Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Chambers, Pickens & Moores, for appellants. Ramsey, Maxwell & Ramsey and Chas. E. Barrett, for appellee.

MCCABE, J. The appellants, as the beneficiaries named in a life insurance policy issued on the life of John F. Forbes, sued the appellee thereon for \$5,000, the amount of insurance expressed in the policy. The superior court overruled a demurrer for want of sufficient facts to the second and third paragraphs of defendant's answer, severally, and sustained a like demurrer to the second and third paragraphs of the plaintiffs' reply; and thereupon the plaintiffs withdrew the first paragraph of their reply, the same being the general denial, and refused to amend or plead further, and the trial court rendered judgment upon such ruling that the plaintiffs take nothing by their complaint. Error is assigned by the appellants upon these several rulings.

It is one of the conditions of the policy that it "shall not be valid or binding until the first premium is paid to the company or its authorized agent." Another is that it shall not be valid or binding on failure to pay "all premiums or notes given the company for premiums * * * on or before the days upon which they become due." The second paragraph of the answer avers that said policy of insurance was issued to said John F. Forbes on condition that the premium therefor, \$232.50, payable annually, should be paid, the first premium being payable on delivery of said policy, and a like premium being payable on the 30th day of September of each year thereafter for a period of 20 years; that said first premium became due and payable on the 30th of September, 1893, and the same was not paid; that thereafter, on the 7th day of December, 1893, the said John F. Forbes executed and delivered to this defendant his two promissory notes, copies of which are set out, bearing date December 7, 1893, one falling

due three months after date and the other falling due six months after date, the one falling due three months after date calling for \$111.26, and the other \$111.25, each bearing 8 per cent. interest, and which notes were so executed as evidence of the balance remaining unpaid of said premium due and payable on September 30, 1893. And the defendant avers that it is expressly stipulated and agreed in each of said notes that, if the same be not paid at maturity, said policy, including all conditions therein for surrender or continuance as a paid-up or term policy, should, without notice to any party or parties interested therein, be null and void; that the note due three months after date became due and payable on March 7, 1894, and the other one became due and payable on June 7, 1894, and that neither of said notes were paid at maturity, and have not been paid; that each of said notes matured and became due and payable long before the death of said John F. Forbes, the assured named in the policy. The third paragraph alleges the same facts, and, in addition, sets forth the conditions in the policy already quoted above. The additional allegation is made that the notes mentioned were given for the balance of the first premium.

There is much contention as to whether the giving of the notes was a waiver of the condition, but we need not and do not decide that question, if the other facts stated constitute a sufficient defense to the action. The other facts stated are, as before observed, the same as those alleged in the second paragraph. And those facts show that both premium notes matured before and remained unpaid at the time the assured died. This made the policy void according to its own terms. Appellants' learned counsel contend that the title to the policy vested in appellants as the beneficiaries named therein at the time of its issue, and cite authority to the effect that such interest could not be divested by any act of the assured without the assent of the beneficiaries. Those authorities have no application, because those were cases where the assured attempted to assign the policy without the knowledge or consent of the beneficiary, the same having been kept alive by a strict compliance with the terms of the contract of insurance. But the beneficiary takes his interest in the contract of insurance in strict accordance with the terms of such contract. He has and holds such interest and rights as the contract gives him, and no more. While the assured cannot diminish or destroy those rights by any act of his without the consent of the beneficiary, neither can he diminish the rights nor enlarge the obligations of the insurer, without its consent, by any act on his part, or by any failure to act. In short, both parties to the contract have a right to insist on a strict compliance with its terms unless waived. *Klein v. Insurance Co.*, 104

U. S. 88; *Wheeler v. Insurance Co.*, 82 N. Y. 543; *Fenn v. Insurance Co. (La.)* 19 South. 623. One of the terms of the contract is that all premiums or notes given the company for premiums must be paid on or before the days upon which they become due, or the policy shall not be binding or valid. The answer shows, and the demurrer admits, that that contingency happened before the death of the assured. Therefore both answers show that the policy, by its own terms, had been rendered null and void by the neglect to pay the premium notes at maturity. Hence the court did not err in overruling the demurrer to the answers.

The second paragraph of the reply admits that the first premium was due on September 30, 1893, and that the whole of the same was not then paid in cash, but avers that on said date Forbes, the assured, paid to the company \$10 on said premium, and executed his two promissory notes for the remainder of the premium, which were accepted by the defendant as payment of said premium; and that the conditions of said policy requiring the first premium to be paid in cash on the delivery of the policy was thereby waived by said company; that said notes became due on December 7, 1893, and were not paid by said Forbes; but by the consent of said company said notes were on said day renewed by said John F. Forbes executing to defendant his two certain renewal notes, which were accepted by said company as payment of said first notes given. Said notes read as follows: "111.23. Huntington, W. Va., Dec. 7th, 1893. Three months after date, for value received, we jointly and severally promise to pay to the order of the Union Central Life Insurance Company one hundred and eleven ²⁵/₁₀₀ dollars, without discount or defalcation, at National Bank of Huntington, being the premium on policy No. 109,896 in said company, bearing date Sept. 25th, 1893. Said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at eight per cent. per annum, payable annually. In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable without reviving the policy, or any of its provisions,"—signed by the makers. The other note reads exactly the same, except that it is made payable six months after date. There is much contention by counsel to the effect that, the notes being payable in bank, and commercial paper, their acceptance as payment was a payment of the first premium, and hence there could be no forfeiture or avoidance of the policy for non-payment of these notes. These notes are alleged to be renewals of the first ones given and accepted as payment of the premium.

Therefore we have a right to assume that the first ones read just as these do. Therefore we need not and do not decide whether the allegations of the reply, aside from the notes themselves, are sufficient to show that the acceptance of the notes as payment constitutes a valid payment of the premium. It is sufficient to say that the notes themselves conclusively contradict the averments of the reply as to the payment of the premium by the acceptance of the notes. The notes state that the amount therein promised to be paid is the premium on the policy in suit. That cannot be true if the premium is paid. Nor is the allegation true that avers that these notes were given in payment of the first ones executed, because the notes conclusively contradict it. The notes state, over the signature of the assured and one of the appellants, that they are given for the premium of the policy in suit. That conclusively contradicts the allegation that the first notes paid the premium. This is so because these notes could not be given for the premium if it had theretofore been paid. And then comes the further stipulation in the note that the policy is to be null and void on the failure to pay the note at maturity, thus showing conclusively that the premium is not paid until these notes are paid. That being true, the reply did not state facts sufficient to avoid the answer.

The third paragraph of the reply is substantially the same as the second, and hence neither paragraph states facts sufficient to avoid the answer. The trial court did not err in sustaining the demurrer to each of said replies. The judgment is affirmed.

(151 Ind. 75)

HEADY et al. v. BROWN et al.

(Supreme Court of Indiana. March 10, 1898.)

JURISDICTION OF APPELLATE COURT—WAIVER OF OBJECTIONS.

1. Under Acts 1893, p. 29, conferring jurisdiction on the appellate court, that court has no jurisdiction over proceedings for partition.

2. Want of jurisdiction of the appellate court over partition proceedings pertains to the subject-matter, and is not, therefore, waived by failure to urge the objection in that court.

Petition for rehearing. Overruled.

For former opinion, see 49 N. E. 805.

HACKNEY, C. J. The petition for a rehearing denies the jurisdiction of this court. The appellate court has only such jurisdiction as is expressly conferred upon it. *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98. Partition is not within the jurisdiction conferred by the statute upon the appellate court. Acts 1893, p. 29. We do not regard the question of jurisdiction as waived by a failure to present it while the appeal was pending in the appellate court, and before its transfer to this court. Jurisdiction over the subject-matter is not waived, as it is, frequently, over the person. Upon a re-

examination of the record, we are confirmed in our conclusion that the question originally considered and passed upon was presented by the record, and was correctly decided. The petition is overruled.

THIEME v. ZUMPE.¹

(Supreme Court of Indiana. June 28, 1898.)

WILLS—BEQUESTS—TRUSTS FOR BENEFIT OF LEGATEE—VALIDITY.

Testatrix bequeathed all the residue of her property to her children, and provided that the share thereby bequeathed to a certain daughter should be subject to the provisions contained in item 10 of the will. Item 10 appointed a son as trustee for such daughter, and directed that he take charge of the property bequeathed to her, and pay to her annually the net income derived, and on her death turn over the property to her children. Item 12 provided for the appointment by the probate court of a trustee to take the place of the son, in case of his death. *Held*, that (without deciding whether the provision for the children of the daughter was valid, but following the intent of the testatrix) there was a complete gift in fee to the daughter, under a trust of management and control, which was valid, though no estate was conferred on the trustee.

Appeal from circuit court, Tippecanoe county; William C. L. Taylor, Judge.

Action by Sophia Zumpe against John Henry Thieme, as trustee under the will of Elizabeth M. Thieme, deceased, to have a trust in the will declared void. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

John M. La Rue and Orth Behm, for appellant. John T. McHugh, for appellee.

HOWARD, J. By item 8 of her will, Elizabeth M. Thieme, now deceased, devised to the children of her daughter, Sophia Zumpe, the appellee, a certain farm, on which the said Sophia and her husband then resided; the devise being made subject to a life estate in said land in favor of appellee. Items 4 and 10 of the will read as follows: "Item 4. I give, devise, and bequeath to my children Charles C. Thieme, Sophia Zumpe, John Henry Thieme, Frederick Thieme, and my grandchildren Edward Thieme and John Thieme, children of my son William Thieme, deceased, all the remainder of the real and personal property of which I may die seised or possessed; the said grandchildren both together receiving the undivided one-fifth part thereof. And, in case my said son Charles C. Thieme should die without issue, then at his death one-third of the amount bequeathed to him hereby shall go to his wife, Frances, and the other two-thirds shall be divided among my other children and grandchildren, sons of my son William, as in this item heretofore provided. And the share bequeathed by this clause to my daughter, Sophia Zumpe, is made subject to the provisions contained in item ten of this will." "Item 10. My daughter, Sophia Zumpe, is afflicted with deafness,

and is now the mother of nine children; and it is for these reasons that I have favored her and her children, by giving them the farm they now reside on, over and above her full share in my estate. And, that she may not be taken advantage of by any one, I hereby appoint my son John Henry Thieme a trustee for her, and direct that he take charge of all the property, real and personal, bequeathed to her by this will, except, however, the said farm, and that he pay to her annually the net income or profits derived from her said share, and that upon her death he turn over said property to her children, if of age, or to their legally appointed guardian, if minors." By item 12, provision is made for the appointment, by the court having probate jurisdiction in Tippecanoe county, of a trustee to take the place of John Henry Thieme, in case of the latter's death. The appellee brought this action to have declared void, as against her, the trust attempted to be set up in the foregoing items of the will of Elizabeth M. Thieme, and that she be declared the absolute owner, and be given immediate possession, of the property bequeathed to her in item 4 of the will. A demurrer to the complaint was overruled, and judgment given in favor of appellee. The property so brought in controversy consists of certain dividends and shares of stock in a brewery company, and also bank stock, all of the value of \$30,000.

The contention of appellee is that this property was given to her absolutely by item 4 of her mother's will, and that such bequest could not subsequently be cut down or limited by the trust attempted to be set up in item 10 of the will. And counsel quote in support of their contention from *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659, that: "The correct test of the effect of provisions apparently at variance with other parts of the will is whether the intent is to give a smaller estate than the words making the gift, standing alone, would import, or only to impose restraints upon the estate given. The former is lawful and effective, because the testator's intention is the controlling consideration in the construction of the will. The latter is rarely, if ever, effective, for the reason that even a clear intention of the testator cannot be permitted to contravene the settled rules of law, by depriving any estate of any of its essential legal attributes." See, also, *Rusk v. Zuck*, 147 Ind. 388, 45 N. E. 691, and 46 N. E. 674. Appellant's contention, on the contrary, is that the bequest to appellee was, in the beginning, not absolute, but conditional; that by the concluding clause of item 4 the bequest to her was made subject to the trust declared in item 10; the reasoning being that said concluding clause of item 4, by express reference, has, in effect, incorporated item 10 with item 4, so that both items must be read as one, thus showing to a demonstration the intent of the testatrix to be that her

¹ Superseded by opinion, 52 N. E. 449. Rehearing denied.

daughter should have her share of the estate only conditionally, and subject to the trust in favor of her brother. Accepting as correct the view that items 4 and 10 of the will must be read together, and reading consecutively so much of these items as relates to appellee, the gift to her would be expressed thus: "I give, devise, and bequeath to my daughter, Sophia Zumpe, the undivided one-fifth of the remainder of my estate; subject, however, to the provisions following, to wit: I appoint my son John Henry Thieme trustee for my said daughter, and direct him to take charge of her said share of my estate, and pay to her annually the net income or profits thereof, and upon her death to turn over said property to her children." The general purpose of the testatrix seems clear enough. By item 3 of her will she had given to her daughter's children a farm, subject to a life estate in favor of the daughter herself. By items 4 and 10 she gave to her daughter an undivided one-fifth of the remainder of her estate, subject to a trust in John Henry Thieme to take charge of the property, and manage it, for the use and benefit of the daughter, and on the daughter's death to turn the property over to her children. By item 12, finally, provision is made for continuing the trust in case of the death of John Henry Thieme. The meaning of items 4 and 10, taken together, being thus clear, the only question is whether the disposition so made of the property was a lawful one. A court, in construing a will, is bound to give effect to every part of the will, without change or rejection, provided an effect can be given to it not inconsistent with the general effect of the whole will taken together. The predominant idea of the testator's mind, if apparent, is heeded, as against all doubtful and conflicting provisions which might of themselves defeat it. The struggle in all such cases is to accomplish the real objects of the testator, so far as they can be accomplished consistently with the principles of law. Schouler, Wills, §§ 467, 473, 476. It is true, as observed by the same author (Id. § 478), that a clear gift or devise in one part of a will may not be cut down or out by indefinite, doubtful, or ambiguous expressions in another part, or upon any conjecture; but the intention to cut down or out, or the inconsistent provision, must be indicated with at least reasonable certainty. Conditions and provisions in wills are of endless variety, depending upon the diversity of relations of the testator to devisees and legatees and upon the nature of the property to be disposed of. No precise form of words is necessary in order to create such conditions, but whenever it clearly appears that it was the testator's intent to make a condition, and the condition is a lawful one, that intent should be carried into effect. *Lindsey v. Lindsey*, 15 Ind. 552, and other authorities cited in 29 Am. & Eng. Enc. Law, 471. It is the in-

tent, when discovered, that will govern; and, where conditions show no intent to work a forfeiture, they will be interpreted accordingly, and will often be regarded as creating a mere trust in, or charge upon, the estate, and be enforced as such. *Woodward v. Walling*, 31 Iowa, 533, and authorities there cited; *Theob. Wills* (4th Ed.) 450. So, too, if an intent is shown to make a devise or bequest subject to a provision that the property be held by another in trust for the beneficiary, such intent will prevail. And it is not always necessary, in case of such a trust, that there be any estate conferred upon the trustee. The fee simple may be in the beneficiary, and a trust of management and control, not unlike a simple guardianship, be given to the trustee (*Post v. Hover*, 33 N. Y. 593), although a condition showing a naked trust—one without power of control over the property—will be treated as of no effect (*Allen v. Craft*, 109 Ind. 476, 9 N. E. 919; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864). It follows that if an intent be discovered in a will, subjecting the use of or interest in property to reasonable and lawful provisions, it will be the duty of the court to carry such intent into effect. The right of an owner to dispose of his property in such manner as to him may seem best, subject to statutory enactments, if any, and to the rules of law, must always be maintained and enforced.

Appellee's contention seems to be that an absolute interest in and title to the property here in controversy was given to her by the first part of item 4 of her mother's will, and hence that the concluding clause of that item, together with the whole of item 10, seeking to place such property in charge of a trustee, must be rejected, as repugnant to the absolute interest and title given to her. Appellant's contention, on the contrary, is that, taking the whole will together, it appears that only a life estate in the property was given to appellee, with remainder to her children; the property being in charge of a trustee during the life of appellee. We do not think that either of these contentions can be sustained. The share of appellee is as fully given to her as is the share of any of the other children of the testatrix, save only that her share is put in charge of a trustee. There is, however, no estate given to the trustee, and the fact that there is such a trust does not affect her title. The provision for turning over such share to her children on her death does, indeed, seem to be repugnant to such complete gift to appellee. We may concede, without deciding, that this provision cannot stand, and that the property, on her death, would therefore fall to her heirs, whether her children or others. There is no provision for a life estate as to this property. The gift is to appellee, as fully as if made to a minor under guardianship. The guardian, in such a case, would have full charge of the property, but

on the death of the minor the property would go to its heirs. Much seems to be made by counsel for appellee of the fact that no estate was given to the trustee. It is evident, however, that a trust may be affixed to property without giving to the trustee any estate therein. There is a difference between a gift upon trust and a gift subject to a trust. In a gift upon trust, the donee takes the whole property, but in trust only for the purposes declared, in which case, if the trust fails, the property goes to the heirs. In a gift subject to a trust, the property goes absolutely to the donee, subject only to the trust imposed; and in such case, if the trust fails, or on the termination of the trust, the property remains with the donee. *Theob. Wills* (4th Ed.) 401, 646. And no reason appears why the trust may not be in another as well as in the donee. In *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618, by one clause of his will a testator gave to his five daughters two-thirds of his estate, to be divided equally among them, and by another clause provided that the interests of two of the daughters should be held in trust during life by the executor for their sole use and benefit, and at their death "the balance, if any, to their children." It was held that the two daughters took an absolute estate, and hence that the gift over of "the balance, if any, to their children," being repugnant to the absolute estate first given, was void. No objection is shown to have been raised as to the trust in the executor. The case is much like the one at bar. In *Post v. Hover*, supra, a testator gave certain estate to his three grandchildren, who were minors, to have and to hold, share and share alike, but subject to conditions named. The grandchildren were not to take the estate until they severally arrived at the age of 21 years. It was further provided "that, during the minority of the said three grandchildren, my son John Hover shall take charge of, and have the management of, that part of my real estate immediately after my decease, and out of the avails of said estate my said son John shall support my said grandchildren and their mother, Mary." John Hover was also appointed, by the will, guardian of the grandchildren. The trial court held that the will attempted to vest the estate in the trustee during the minority of the grandchildren, which provision was void, as violating the rule against perpetuities,—the attempted trust being during minority, and not for lives in being,—and found the devise to the grandchildren valid and effectual. The court of appeals disagreed with the theory and reasoning of the trial court. "That," said Denio, C. J., speaking for the court of appeals, "supposes the testator's intention to have been to withhold the legal estate from these devisees until they should all have arrived at the age of 21 years, and in the meantime to vest the title in the trustee. The change wrought in

the will by the application of this theory would be to anticipate the gift to the grandchildren by the whole period of their minorities, to transform a devise which was intended to be distant and contingent into one which will be immediate and direct, and to subvert the power of management during the nonage of the children, which was carefully provided for by the testator. The cases referred to in the opinions do not go the length of authorizing so great a departure from the provisions of a will. * * * The will should therefore, I think, be construed as conferring a trust power of management; the estate vesting in the meantime in the grandchildren, under the express devise to them. * * * I have therefore attempted to show that there was no estate, but only a power conferred upon John Hover, and that the grandchildren took a fee simple conditional under the formal devise to them." This case is even more like the case at bar than is the Virginia case, previously cited. In the New York case, while the trust estate attempted to be set up was overthrown, yet the trust to control and manage the estate was maintained. In the case at bar the gift to appellee was complete in every respect, except that it was made subject to a trust of management for the benefit of the donee. Surely the testatrix might do this if the donee were a minor, or otherwise incompetent to manage her property. From the will before us it is plain, from several provisions, that the testatrix did not think her daughter competent to have charge of her property. Whether the testatrix was mistaken in this, can make no difference. She had the right to dispose of her property subject to such a trust, and she must be permitted to do so. The cases of *Fowler v. Duhme*, 143 Ind. 243, 42 N. E. 623, *Mandlebaum v. McDonell*, 29 Mich. 78, *Jones v. Thresher Co.* (Ill.) 49 N. E. 700, and others, relied upon to show that an estate devised in fee simple cannot be cut down afterwards by declaring that the devisee shall not have power to alienate or incumber the estate for a given time, can have no application here. Here the simple question is whether a bequest or devise can be made subject to a trust for the benefit of the donee. We think it can. The court therefore erred in overruling appellant's demurrer to the second paragraph of appellee's complaint. Judgment reversed.

(151 Ind. 42)

CITY OF EVANSVILLE v. SENHENN.

(Supreme Court of Indiana. June 29, 1898.)

APPEAL—REHEARING—MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—NOTICE—INDEPENDENT CONTRACTORS—INSTRUCTIONS.

1. A point which might have been made on the original hearing will not be considered on rehearing for the first time.

2. In an action against a city for injuries resulting from the negligent piling of lumber in a

street, an instruction that if, at the time, defendant had a contract with any person to furnish it with lumber and deliver same, and such person did actually deliver and pile said lumber in the street, then such act was not the act of the city, and the city is not liable for negligence of such person in placing the same in the street, unless it had notice thereof, correctly states the law; and the word "deliver," as used, being synonymous with "place," does not involve acceptance, and therefore notice, by the city.

3. Where there was some evidence of a purchase by the city of lumber from one who hauled it to the city, the exclusion of oral evidence of a contract for such lumber because the contract was in writing did not leave the case to stand as without proof as to whether such lumber was piled in the street by a servant of the city, or by an independent contractor; and therefore a refusal to charge that the negligence of an independent contractor was not chargeable to the city was error.

On petition for rehearing. Overruled.
For former opinion, see 47 N. E. 634.

MCCABE, J. A very earnest petition for a rehearing, supported by a very elaborate brief, is presented in this case.

The first fault found with the original opinion is that we stated therein that the venue was changed from Vanderburg to Warrick county before the first trial. We hasten to cheerfully correct the error, if error it is, by saying that the statement of appellee's counsel is probably correct, to the effect that the first trial took place in the superior court of Vanderburg county, resulting in a judgment in favor of the defendant. After the reversal of this judgment the cause was remanded to the trial court, and the venue was then changed to the Warrick circuit court. If we were "in error" in this statement, as counsel says we were, we were excusable, because the record shows that the first trial that it gives any account of took place in the Warrick circuit court. We certainly ought not to be criticised for strictly following the record, especially in the absence of any information from the learned counsel that it does not speak the truth. Nor do we mean to intimate that we could accept the statement of counsel, in conflict with the record, if the point was material.

Appellee's learned counsel, in support of the petition for a rehearing, says that: "It is not our purpose to controvert any of the rules of law laid down by this court in its decision in this case. We believe, upon the other hand, that the law is correctly stated, and we have at no time contended for a different statement." And counsel proceeds to favor us with 24 printed pages of a brief in support of appellee's petition for a rehearing. And, in the very next statement in his brief, counsel, as to instructions 7 and 12, for the refusal of which we reversed the judgment, says that "both instructions 7 and 12 are contrary to the law." This, at least, seems a little difficult to understand. The principal defense made of the court's re-

fusal to give instruction 12 is that it was substantially given and sufficiently embraced in instruction No. 15 given by the court to the jury. We would be fully justified in refusing to consider this point in support of appellee's petition for a rehearing, because no such defense of the refusal of that instruction was made by appellee's counsel prior to the petition for a rehearing. It has often been decided by this court that a point made for the first time on a petition for a rehearing that might have been made before is not entitled to notice. The correct and orderly administration of justice requires such a rule. Points must be made in the briefs filed before the decision of the cause, if they are to be noticed on a petition for a rehearing. Glittering generalities will not do in the place of points. But in this case there was not a word said, prior to the petition for a rehearing, about instruction 15 given by the court embracing the substance of the proposition couched in instruction 12 refused by the court, as a justification or a defense of the court's refusal of instruction 12. The correct administration of justice does not require this court to search a voluminous record to discover some matter which might tend to establish that an erroneous refusal of an instruction was rendered harmless, when the party to be benefited by such discovery is represented in this court by able counsel, with a voluminous brief, wherein no effort is made to point out such matter, or mention the same. Under such circumstances, this court is justified in presuming that no such matter exists. However, we are inclined to think that the court's refusal of said instruction 12 was justified on the ground that the same was substantially given in the fifteenth instruction. But there is no way of justifying the refusal of the seventh instruction, except that it is not the law as applied to the evidence. Appellee's counsel has attempted to justify the refusal of that instruction, both on the ground that it does not express the law, and that it was not applicable to the evidence, and that the evidence was not sufficient to establish the fact upon which it is based. We quote the instruction again: "If, at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber, by the year, or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber, and pile the same in the street, then the act of such persons in delivering and piling the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." Great stress is put upon the word "deliver," as used in this instruction. It is contended that there could be no such thing as a delivery of the lumber, without an acceptance thereof by the city, and many definitions of the

word "deliver" in cases of contracts for delivery of goods or things are cited. Many of them are to the effect that a delivery implies an acceptance, and hence an act of the will, and hence knowledge on the part of the party to whom delivery is made. There are many definitions to the word "deliver." What particular meaning among its many definitions is to be assigned to the word depends on the connection in which it is used. The fourth definition given to it by Webster is: "To give forth in action or exercise; to discharge; as to deliver a broadside or a ball." That is the same meaning the word has in the sentence, "To deliver the opinion," "To deliver an address." The word used in such a connection does not imply an act of the will on the part of some one else, nor an acceptance of anything. Such was the sense in which it was evidently used in instruction 7, as clearly indicated in the sentence reading: "And the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." If the court meant, by the word "deliver," in the previous part of the instruction, to imply an acceptance by the city, then there would have been no sense and no meaning in the words "unless it had notice thereof, express or implied." This is so because the city could not accept the lumber in a pile on the street without notice that it was there. The word "deliver," in the instruction, evidently was intended to mean the same that the word "placing," in the sentence above quoted from the instruction, was intended to mean. Appellee's counsel does not question the plain meaning of these words, "and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied," nor that they express the law by themselves correctly; but the contention is that the use of the word "deliver," in the previous part of the instruction, changes the meaning of these words. But we have shown that one of the meanings of the word "deliver" is synonymous with the sense in which the word "place" was used in the instruction. But we need not descend into a technical definition of every word in the instruction. The meaning of the whole could not be misunderstood by the jury or any one else. It told them, in substance, that if the persons from whom the city purchased the lumber in question piled it in the street without notice to the city, express or implied, that it was so piled, the act of placing the lumber in the street was not the act of the city, and it was not liable therefor. Other instructions given by the court properly directed the jury as to when the city would become liable if such lumber pile, so wrongfully placed in the street without notice to it, was left there an unreasonable length of time. In addition to the cases cited in the

original opinion holding that the instruction correctly expressed the law, we note a case cited by appellee's counsel in support of the petition for a rehearing, namely *Railway Co. v. Farver*, 111 Ind. 195, 12 N. E. 296. This case directly and emphatically upholds the correctness of the refused instruction 7.

It is next contended that because it turned out on the trial that the contract the city had with the sawmill men for the purchase of lumber was in writing, and oral evidence of its particular terms was excluded on objection by appellee's counsel, therefore we must treat the case as if there had been no proof upon the subject. There was enough evidence to show that the city had purchased the lumber, and that it was hauled by the sawmill men to the city. At least, the evidence was sufficient to warrant the jury in so inferring. This was sufficient to show the nature of the transaction, and to show that the relation of master and servant did not exist between the city and the sawmill men; and hence the city would not be liable for their negligence in piling the lumber in the street, unless it had notice, express or implied, of such negligent act, or suffered it to remain there an unreasonable length of time. *Railway Co. v. Farver*, supra. If there was anything in the particular terms of the contract between the city and the sawmill men tending to establish a different relation, or tending to show the relation of master and servant between the city and the sawmill men, then the appellee's counsel ought to have introduced such evidence. The evidence that was introduced was sufficient, prima facie, to warrant the jury in drawing the inference that no such relation as master and servant existed between the sawmill men and the city, and authorized them to infer that the only relation existing between them was that of buyer and seller; making the sawmill men independent contractors with the city. The jury were the judges of the evidence, and on them devolved the duty of determining whether the evidence was sufficient to establish that relation; and the duty devolved on the court of telling them what the law was, in case they concluded that the evidence did establish that relation. The nature of the transaction, as disclosed by the evidence already alluded to, makes a much stronger case than *Railway Co. v. Farver*, supra, relied on by appellee, for the application of the doctrine that, in case of the relation of independent contractor, there is no liability on the part of one of the contracting parties for the negligent acts of the other in carrying out the contract, where it does not necessarily create a nuisance. The facts on which that decision was made were that the railway company was engaged in constructing a well or reservoir to supply a water station on the line of its road, near Auburn, Ind. Running water interfered with the work, and it became necessary to cause the accumulat-

ing water to be pumped out of the way, so as to prevent it from running into the well or reservoir which was in process of construction. The construction of the well, and laying pipes thence to the water station, had been committed to the charge of a Mr. Kress, an employé of the railway, who, with a force of men under his control, was engaged in providing means to supply the station with water. Williams, who resided in or near Auburn, was the owner of a small, portable steam engine, which he was accustomed to employ in sawing wood, threshing grain, pumping water, and the like, as opportunity offered. He contracted with Kress, for a stipulated per diem, to furnish and operate his engine in pumping at such times as might be necessary in order to keep the water from interfering with the work which the latter was constructing. Williams agreed to furnish his engine, and personally superintend the running of it, and to provide and pay for such assistance as he needed in keeping the water from obstructing the progress of the work. If it became necessary that he should run the engine at night, he was to receive extra compensation. In pursuance of the agreement, the latter placed his engine in a vacant lot some six feet or more outside the line of a public highway, which intersected the railway company's line at or near the point where the reservoir was being constructed. So far as appears, he selected the location of the engine, and controlled its operation, as the work he engaged to do required. While he was thus engaged in carrying out his agreement, the plaintiff's horse, in passing along the adjacent highway, took fright at the engine, and became unmanageable. The plaintiff was thrown from the carriage and injured. He recovered a judgment in the trial court, and, in reversing the judgment on the facts above stated, Mitchell, J., speaking for the court, said: "The question is whether, under the circumstances, the railway company is liable for the negligence of Williams; assuming that he was negligent in operating his engine so near the public highway. The rule which controls in cases of this class has become well established, and has more than once been recognized and applied in this court. *Ryan v. Curran*, 64 Ind. 345; *Sessengut v. Posey*, 67 Ind. 406; *City of Logansport v. Dick*, 70 Ind. 65. Under this rule, where work, which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer, who merely prescribes the end, to another, who undertakes to accomplish the end prescribed by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by

the contractor, the employer is not answerable. The inquiry in such case is, did the relation of master and servant subsist between the person for whom the work was done, and the person whose negligence occasioned the injury? * * * The work contracted to be done was not in itself unlawful, nor was it necessarily a nuisance to operate a portable steam engine in a careful manner in close proximity to a public highway. Injury could only result from its negligent use." And the judgment was reversed on the evidence because it failed to show that the relation of master and servant subsisted between the railway and Williams, the owner and operator of the portable steam engine, and hence the railway was not liable for his negligence. But the rule there laid down is much more applicable to the evidence here, because it clearly indicates that the only relation existing between the city and the sawmill men was that of buyer and seller, and not that of master and servant. And there being enough evidence to warrant and require the submission of the question of fact to the jury as to the true relation subsisting between the sawmill men and the city, the appellant had a right to demand an instruction stating what the law was in case the jury found that the relation was not that of master and servant, but was merely that of buyer and seller. If they found that to be the relation, appellant had a right to an instruction that the negligent acts of the seller were not chargeable to the buyer. That, the refused instruction 7 would have done.

Another contention why the instruction was properly refused, is that the evidence was wholly insufficient to establish that there was any contractor in the case. But such contention assumes that it is the duty of the trial judge to determine that issue, as well as all other issues, in advance of the submission of the case to the jury, and if he thinks the evidence insufficient, after carefully weighing it pro and con, he need not submit it to the jury. But that is very far from the legal duty of the trial judge. If there is any evidence sufficient to warrant the jury in drawing the inference that a certain fact exists, pertinent to the issues, it is the duty of the trial judge, especially if requested, to instruct the jury what the law arising from such fact is, even though he may be of opinion that such fact is not established by a preponderance of the whole evidence. Otherwise a trial of the facts by a jury could take place only in empty form, but not in truth and in reality. Under such a rule no question of fact could be submitted to the jury until the trial judge had decided that the preponderance of the evidence had established the fact. We are constrained to hold that the trial court erred in refusing to give instruction 7, and therefore the petition for rehearing ought to be, and is, overruled.

(151 Ind. 316)

STATE v. WINSTANDLEY et al.¹

(Supreme Court of Indiana. June 29, 1898.)

PERJURY—JOINT INDICTMENT—VALIDITY.

1. Where two defendants joined in a false affidavit for a continuance, signing it together, being sworn together, and one certificate of oath being attached, an indictment charging both with perjury is not joint only, but joint and several.

2. Burns' Rev. St. 1894, § 1891 (Rev. St. 1881, § 1822), provides that when an indictment is for a felony charged against two or more defendants jointly, any defendant requesting it before the jury is sworn must be tried separately; and section 1825, cl. 10, provides that defects in criminal pleadings, which do not tend to prejudice the substantial rights of the defendant upon the merits, shall be disregarded. *Held*, that since two defendants jointly indicted for perjury were entitled to separate trials, if demanded, they were not prejudiced by the fact that they were jointly indicted, and that such an indictment was valid.

3. A false oath to secure continuance *held* to render affiant guilty of perjury.

Appeal from circuit court, Clark county; H. D. Gibson, Judge.

Isaac S. Winstandley and another were indicted for perjury. From a judgment quashing the indictment and discharging defendants, the state appeals. Reversed.

H. C. Montgomery, Pros. Atty., W. C. Utz, J. K. Marsh, and W. A. Ketcham, for the State. A. Dowling, M. Z. Stannard, W. H. Watson, and Kelso & Kelso, for appellees.

HOWARD, J. The appellee Winstandley, being the president, and the appellee Frederick, being the cashier, of the New Albany Banking Company, were indicted for embezzlement, charged with having received certain deposits for said banking company, knowing the company to be at the time insolvent. On February 6, 1897, the prosecution under said indictment having been called for trial, the appellees appeared, and filed their joint affidavit for a continuance, and the trial was accordingly continued. Thereafter, on February 11, 1897, the appellees were jointly indicted for perjury, for having in said affidavit for a continuance falsely, willfully, and corruptly sworn to matters material to the point therein in question. On April 21, 1897, the appellees filed in court their separate motions to quash each count of the indictment for perjury. These motions were sustained, and the appellees were thereupon discharged. That a false oath, taken to secure the continuance of a trial, renders the affiant guilty of perjury, does not admit of doubt. *State v. Shupe*, 16 Iowa, 36; *State v. Flagg*, 27 Ind. 24; *State v. Anderson*, 103 Ind. 170, 2 N. E. 332. The objection to the indictment in this case is that it is joint, and, as stated by counsel for appellees, "that the crime of perjury is, in its nature, several and distinct, and that it cannot be committed jointly by two or more

persons." In support of this contention counsel quote from Bick. Cr. Prac. 103, that "two cannot be indicted for perjury, or for seditious words, because such offenses are, in their nature, several,"—citing as authority *Rex v. Phillips*, 2 Strange, 921. Reliance is likewise placed by appellees on Whart. Cr. Law (9th Ed.) § 1253; Whart. Cr. Pl. & Prac. (9th Ed.) § 302; McClain, Cr. Law, § 884; and *Respublica v. Goss*, 2 Yeates, 479. The authorities so referred to are all shown to depend upon *Rex v. Phillips*, supra, in which case it appeared that "six persons were indicted in one indictment for perjury," and the court said: "There may be great inconveniences if this is allowed. One may be desirous to have a certiorari, and the other not. The jury, on the trial of all, may apply evidence to all that is evidence against one." The inconveniences referred to in *Rex v. Phillips* can, as we think, have no application under our statute, which provides that "when the indictment or information is for a felony charged against two or more defendants jointly, any defendant requesting it before the jury is sworn must be tried separately." Section 1891, Burns' Rev. St. 1894 (section 1822, Rev. St. 1881); *Trisler v. State*, 39 Ind. 473. And it has been held that a change of venue as to one such joint defendant has the effect of a severance in trials. *Shular v. State*, 105 Ind. 289, 4 N. E. 870. As, therefore, each joint defendant may have a separate trial, he need suffer no inconvenience or injustice by reason of the joint indictment. But the second inconvenience referred to, in *Rex v. Phillips* shows plainly that the indictment there was for different acts of perjury, otherwise there could be no danger that on the trial the jury might "apply evidence to all that is but evidence against one." If the act of perjury was, as in the case at bar, but the joint affidavit of two defendants, signed and sworn to by both as a single act, it would be quite impossible that the jury should apply evidence to both that was true only as to one. Where a single affidavit is signed and sworn to by two persons, the guilt of both in swearing falsely cannot be less joint than is the guilt of two or more persons who together sing a libelous song, or together use other indictable language. But it was said in *Rex v. Benfield*, 2 Burrows, 980,—one of the cases cited to show that the indictment here is bad: "*Williams v. Custodes*, Style, 244, was a joint indictment for words spoken by both, and the court held the joint indictment good, though a joint action on the case could not have been brought against them. *Custodes v. Tawny and Norwood* (Style, 312), jointly indicted for blasphemous words severally spoken by them: Roll, C. J., held the indictment good enough, though joint. Cannot several persons join in singing one and the same song? Forty people may join in the same chorus. And if such song or chorus

¹ Rehearing denied.

be libelous, the doing so is one joint act, criminal in itself, without regard to any peculiar personal default." But in truth the indictment before us is not one which must necessarily be regarded as joint. So in *Com. v. Griffin*, 3 Cush. 523, it was held that in every indictment against two or more persons, except in case of conspiracy and riot, or other cases where the agency of two or more is of the essence of the offense, "the charge is several as well as joint; in effect, that each is guilty of the offense charged, so that, if one is found guilty, judgment may be passed on him, although one or more may be acquitted." In like manner it has been held by this court that on the trial of several defendants, indicted jointly, different decisions may be rendered as to each defendant. *Hughes v. State*, 65 Ind. 39. And in *State v. Edwards*, 60 Mo. 490, where two persons were jointly indicted, and it appeared that each was guilty of acts which would warrant a separate indictment and conviction, the joint indictment was held good, under provisions of a statute identical with our own (clause 10, § 1825, Burns' Rev. St. 1894; section 1756, Rev. St. 1881), providing that defects in criminal pleadings should be disregarded which do not tend "to the prejudice of the substantial rights of the defendant upon the merits." It could not be contended that each of the appellees in the case at bar might not have been separately indicted for perjury in taking the affidavit here in controversy. No prejudice upon the merits could, therefore, be caused to either appellee in being indicted with the other jointly. This is particularly true where another statute, as we have seen, gives to one who is jointly indicted for a felony the right to a separate trial. And besides, as said in *State v. Woulfe*, 58 Ind. 17: "Where two persons are jointly indicted, a nolle prosequi may be had as to one, and a trial on the merits as to the other. 1 Bish. Cr. Proc. § 1020. One may be convicted and the other acquitted. *Hall v. State*, 8 Ind. 439; *Bick. Cr. Prac.* 103." Appellees were not indicted for a series of false oaths made by each in the course of a trial, but for one act of perjury; that is, the swearing to the truth of a single affidavit. The act is as single and joint as is the indictment charging the affiants with the offense. And while it may be said that each of them committed the act, yet it is also true that both committed the same act; so that the act and the indictment may be regarded as both several and joint. Precisely the same evidence would be requisite to sustain the indictment as to either appellee. "The general rule as to the joinder of defendants, as laid down in works of good authority," it was said in *Elliott v. State*, 26 Ala. 78, "is that, where the same evidence as to the act which constitutes the crime applies to two or more, they may be jointly indicted." And in *Volmer v.*

State, 34 Ark. 487, the court said: "The rule is well settled that several may be jointly indicted for offenses arising wholly out of the same joint act or omission." In *State v. Forcier*, 65 N. H. 42, 17 Atl. 577, it was said, citing 1 Bish. Cr. Proc. § 467, 1 Whart. Cr. Law, § 429, and *Com. v. Sloan*, 4 Cush. 52, that: "If more persons than one engage in the doing of a criminal thing in such a way as to make each one guilty of the crime, they may be indicted jointly, not necessarily in several counts, but in a single count." In *Chit. Cr. Law*, *268, the reason is very clearly indicated why it is generally true that an indictment of two or more persons for perjury jointly will not be good, namely, because the words sworn to by each are usually not the same. It is there said: "So, also, several cannot be joined in an indictment for perjury, because the assignment must be of the very words spoken, and the words uttered by one cannot possibly be applied to those which proceed from another." But in the case at bar the same written words were used by each of the indicted persons; both at the same time swore together to the same affidavit. The distinction is rendered even more clear in 2 Bish. Cr. Law (2d Ed.) § 936, where it is said: "It is laid down in the books that two persons cannot be jointly indicted for perjury. But in legal principle this cannot be strictly so, though it will be so in the facts of most cases. Suppose, for instance, two persons join in an affidavit, signing it together, being sworn together, and one certificate of the oath being attached. In such a case there is no reason why the indictment should not be joint." Mr. Bishop thus states exactly the case at bar. Here the two appellees have joined in an affidavit; they have signed it together; they were sworn to it together; and one certificate of their joint oath is attached. The purpose of each affiant was also the same, namely, the continuance of the prosecution against them both in the embezzlement case. There does, indeed, seem to be no good reason why the indictment should not have been joint. In addition, as we have said, any possible source of danger to either appellee is removed by our statute, cited above, which will permit either of the parties who have sworn to the joint affidavit to have a separate trial. The rule governing in such a case is well stated in 10 Enc. Pl. & Prac. 554, as follows: "When an offense is one which may be committed by more than one person at the same time, the several persons engaged in its commission may be jointly charged. But, while the charge is made against the defendants jointly, it is nevertheless said to be a separate charge against each of the defendants, and either or both may be acquitted or convicted thereunder." Judgment reversed, with instructions to overrule the motion to quash the indictment, and for further proceedings.

(151 Ind. 102)

BYNUM et al. v. HENDERSON et al.

(Supreme Court of Indiana. July 1, 1898.)

DESCENT AND DISTRIBUTION—SURVIVING WIFE AND CHILDREN BY FORMER MARRIAGE—STATUTES—CONSTRUCTION.

1. Under Rev. St. 1894, §§ 2640, 2643 (Rev. St. 1881, §§ 2483, 2486), providing that, if a husband dies, leaving a widow, one-third of his real estate shall descend to her in fee simple, and if he dies intestate, leaving a widow and one child, his real estate shall descend to them equally; and under section 2644, providing that if a man marry a second wife, and has by her no child, and dies, leaving children alive by a previous wife, the lands which at his death descend to such wife shall at her death descend to his children by the previous wife,—a second wife, having no children, takes a fee in such land, and on her death children by a previous marriage inherit it from her as her forced heirs, but in case of the death of such children before her the heirs of the latter do not take.

2. A change in the construction of a statute relates back to its enactment, except so far as the construction would impair the obligation of contracts.

Appeal from circuit court, Knox county; G. W. Shaw, Judge.

Action by Eliza Bynum and others against Isaac Henderson and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Canthorn, Dailey & Cauthorn and John H. Weathers, for appellants. Cullop & Kessinger and Townsend & Wilhelm, for appellees.

MONKS, J. This was an action in ejectment and to quiet title, brought by appellants against appellees. The court made a special finding, and stated conclusions of law thereon in favor of appellees, and rendered judgment against appellants. It appears from the special finding that one Joseph Bouchie, in 1856, died intestate, the owner in fee simple of real estate in Knox county, Ind., leaving surviving him as his only heirs, his widow, Mary Bouchie, a second wife, by whom he had no children, and one Peter Bouchie, his son by a former marriage. Afterwards, on September 6, 1857, said Mary Bouchie, for a valuable consideration, sold, and by quitclaim deed conveyed, said real estate, which she held as widow of said Joseph Bouchie, deceased, to one August Delisle, who then took possession thereof, claiming to own it in fee simple. On January 5, 1858, the said August Delisle and wife and the said Mary Bouchie, for a valuable consideration, sold, and by warranty deed conveyed, all the real estate which the said Mary Bouchie conveyed to the said August Delisle to one James Reynolds, who then took possession thereof, claiming to own the same in fee. At the September term, 1858, of the Knox common pleas court, in an action for partition, brought by said James Reynolds against said Peter Bouchie and his guardian, Vetal Bouchie, the land in controversy was set off to said James Reynolds as the owner thereof in fee. Afterwards the said James Reynolds sold, and by warranty deed con-

veyed, the real estate set off to him, being the real estate in controversy, to one Cassell, who took and held possession thereof, claiming to own it in fee, until 1870, when he sold, and by warranty deed conveyed, said real estate to one Henderson, who took and held possession of the same until in August, 1894, when he died intestate, leaving appellees as his only heirs at law, who have held possession of said real estate until the commencement of this action, claiming to own the same in fee. The said Peter Bouchie died intestate in 1873, unmarried, leaving no children or their descendants surviving him, his only heirs being appellants, one of whom is a brother, and the others children of a deceased sister of his deceased father. The said Mary Bouchie died intestate in 1883. The court stated as conclusions of law that appellants were not entitled to recover possession of said real estate from appellees, nor were they entitled to have the title thereto quieted in them against the appellees.

Section 2483, Rev. St. 1881 (section 2640, Rev. St. 1894), provides that if a husband dies testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors, with a proviso reducing her interest as to creditors if the real estate exceeds in value \$10,000, etc. Section 2486, Rev. St. 1881 (section 2643, Rev. St. 1894), provides that if a husband die intestate, leaving a widow and one child, his real estate shall descend one-half of it to the widow and one-half to his child. It is provided in section 2487, Rev. St. 1881 (section 2644, Rev. St. 1894), that if a man marry a subsequent or second wife, and has by her no children, and dies, leaving children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children by the previous wife. Under said sections it was held in *Martindale v. Martindale*, 10 Ind. 566, decided in 1858, that a second or subsequent wife took a life estate only in the lands of her deceased husband, when he left surviving him children by a former wife. This construction of said sections was adhered to by this court until the case of *Utterback v. Terhune*, 75 Ind. 363, was decided in 1881, in which it was held that under said sections a second or subsequent wife, having no children by her husband, took a fee in his land at his death, and, if he leaves children alive by a previous wife, that upon her death such children inherit said real estate from her as her forced heirs. This is now the settled, as well as the correct, construction of this statute. *Haskett v. Maxey*, 184 Ind. 182, 187, 33 N. E. 358, and cases cited; *Myers v. Boyd*, 144 Ind. 496, 43 N. E. 567; *Stephenson v. Boody*, 139 Ind. 60, 65, 38 N. E. 331, and cases cited. It is settled law, therefore, that under our statutes of descents the same interest descends to a childless second or subsequent wife on the death of her husband, leaving no children or

their descendants by a former marriage surviving him, that descends to a first wife. The only difference between the estate of the first wife and a second or subsequent childless wife is when the husband of a childless second or subsequent wife dies, leaving children or their descendants by a former marriage surviving him, in which case such children or their descendants, under section 2487 (section 2644), supra, become, at the death of the childless second or subsequent wife, her forced heirs as to all the land which she inherited from said deceased husband. *Bryan v. Uland*, 101 Ind. 477, 480, 1 N. E. 52, and cases cited; *Gwaltney v. Gwaltney*, 119 Ind. 144, 146, 21 N. E. 552. It follows, therefore, that if a husband die, leaving a childless second or subsequent wife as his widow, and leaving a child or children or their descendants by a former marriage surviving him, and such child or children or their descendants should die before such widow, and there should be no child or children of such former marriage, or the descendant of any such child or children, living at the death of such widow, then there would be no one to take as the forced heir of such widow under said section 2487 (section 2644), supra, and any real estate which descended to her from her said husband, if owned by her at the time of her death, will descend to her heirs, if she die intestate, the same as if she was a first wife, and, if she die testate, will go to the person or persons to whom she devised it in her last will and testament. If she has sold and conveyed said real estate in her lifetime, the same could not descend to her heirs, nor could she devise the same by will. It follows, therefore, that the estate which Mary Bouchie inherited in the real estate of her husband was a fee simple, and during her lifetime Peter Bouchie, the child of her husband by a former marriage, had no estate or interest therein, but only an expectancy to take the same as her forced heir at her death. No conveyance she could make would deprive him or his descendants of this right, if they or any of them survived her. As he died before the widow, leaving no child or children or their descendants surviving him, at her death, if she then owned said real estate, or any interest therein, inherited from her said husband, it would have descended to her heirs if she died intestate. It is clear, therefore, that appellants, the brother and nephews and nieces of Joseph Bouchie, the husband of Mary Bouchie, and father of Peter Bouchie, did not inherit said real estate, or any interest therein, from said Peter Bouchie, because he had no title thereto at the time of his death; nor did they inherit the same, or any interest therein, from Mary Bouchie, as her forced heirs, because they were not made such by statute. It is true that it was held by this court in *Haskett v. Maxey*, supra, that if, prior to 1881, at a time when it was held that a childless sec-

ond or subsequent wife took only a life estate in the lands of her deceased husband, she and the children of the former wife sold and conveyed the real estate in which such wife had such life estate, this construction of the statute became and was a part of the contract, and that a subsequent change in the construction of the statute could not operate retroactively, so as to impair the obligation of such contract, but the rights of the parties who joined in such conveyance were governed thereby. This was only the application of the settled doctrine that the obligation of a contract can be no more impaired by a change in the construction of a statute by the decision of the courts than it can by a legislative enactment. If Mary Bouchie only conveyed a life estate in said lands by her deeds to Dellsie and Reynolds, and was the owner in fee simple thereof at the time of her death, appellants would have no interest in the lands. When *Utterback v. Terhune*, supra, was decided, in 1881, it related back to the date of the enactment of our statute of descents. *Center School Tp. v. State* (last term) 49 N. E. 961, and cases cited; *Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N. E. 153, and cases cited; *Stevenson v. Boody*, supra, 65, 66. It is settled law, therefore, that at all times since the same was enacted the childless second or subsequent wife took a fee simple, and not a life, estate in the lands of her deceased husband. To this rule there is no exception, and it was only held in *Haskett v. Maxey*, supra, that the change in the construction of said statute could not impair the obligation of any contract made before the case of *Utterback v. Terhune*, supra, was decided. Finding no error in the record, the judgment is affirmed.

(151 Ind. 353)

ULLRICH v. CLEVELAND, C., C. & ST. L. RY. CO.¹

(Supreme Court of Indiana. June 30, 1898.)

RAILROADS—INJURY TO PERSON ON TRACK—WILLFULNESS—COMPLAINT.

1. A complaint charging a willful killing by a railway company's servants of one walking across a high trestle does not sufficiently set forth a cause of action which states that the engineer saw deceased when 2,000 feet away, and he was trying to get off the trestle, and had about 100 feet to go, the train running 1,000 feet of that distance, at 25 miles an hour; but not stating how fast it ran the last part of the distance of about 40 rods, and how fast it ran when the engine struck him, or at what point the peril of deceased became reasonably manifest, or at what point the engineer failed to make every possible effort to stop the engine, he having the right to continue the presumption that deceased would get off the trestle until the point making it perilous to continue was reached.

2. The reliance of an engineer of a train on the presumption that a man on the track could and would get to a point of safety is not willfulness.

Appeal from circuit court, Dearborn county; A. C. Downey, Judge.

¹ Rehearing denied.

Action by John Ullrich, administrator of the estate of Peter Vogel, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Geo. E. Downey and McMullen & McMullen, for appellant. Elliott & Elliott and John T. Dye, for appellee.

HACKNEY, C. J. The lower court sustained the appellee's demurrer to an amended second paragraph of complaint, and that ruling is here urged as error. Said paragraph was entitled, "John Ullrich, Administrator of the Estate of Peter Vogel, Deceased, vs. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company." The allegations in the body of the complaint were by "John Ullrich, plaintiff," against the appellee named as defendant; and it was alleged that between Aurora and Lawrenceburg the appellee maintained, as a part of its railway, a narrow trestle, 300 feet in length, and 15 feet high, and upon which there was no escape from passing trains by persons walking thereon, excepting from either end thereof. It was alleged that said trestle and a person upon it could be plainly seen for the distance of one-half mile by the managers of a train approaching the same from Aurora; that the appellee and the managers of its trains knew the location and dangers of said trestle, and knew that the only escape for a person walking upon the same was from the ends thereof; that, on a day named, "plaintiff's decedent" went upon said trestle for the purpose of crossing from the end thereof nearest to Aurora, no train then being in view, and, when he had gone but 100 feet of the distance over said trestle, his attention was called to an approaching train from Aurora, whereupon he attempted to return to the end of the trestle upon which he so entered, but, before he could do so, was run upon and killed by said train. It is alleged that the appellee, "by its employees in charge of said approaching train, * * * well knowing the danger in which plaintiff's decedent was, and well knowing the dangerous condition of said structure, and well knowing that there was no means of escape therefrom, except as hereinbefore mentioned, and well knowing that plaintiff's decedent was cut off from all means of escape, and being in full view of said decedent for a distance of 2,000 feet, and being fully able to stop said train in time to save decedent from injury, and seeing decedent on said structure for said distance of 2,000 feet, and defendant's servants then operating said engine saw plaintiff's decedent's perilous and dangerous situation, and saw him turn around and attempt to reach the nearest end of said bridge, so as to escape the danger, failed to stop said train, but then and there negligently, recklessly, purposely, and willfully

ran said train upon said decedent." One thousand feet of the course of said approaching train is alleged to have been in Aurora, and to have been run at the rate of twenty-five miles per hour, and the distance from the corporation line of Aurora to the trestle is described as forty rods. There were other allegations as to negligence, but it is conceded that the sufficiency of the pleading must be determined upon its allegations of willfulness. It was alleged also that "plaintiff is the duly appointed and qualified administrator of 'decedent's estate,' and that decedent left his widow and grandchildren surviving him." In the body of the pleading there was no allegation of the name of or as to who the decedent was, nor, beyond the allegation already referred to, as to the capacity in which the appellant sued. There are no allegations as to the distance of the train from the decedent when he discovered its approach, nor as to the rate of speed at which the train ran over the space of 40 rods next before reaching the trestle; but the allegations support the theory that he discovered the approach of the train when it was 2,000 feet distant, and that its speed of 25 miles per hour was to the point 40 rods from the trestle. The ad damnum allegation was as follows: "Plaintiff avers that, on account of the wrongs and injuries hereinbefore complained of, he has been damaged in the sum of," etc.

Three objections are urged against the complaint: First, that it does not appear from the body thereof that the appellant sues in a representative capacity; second, that the allegations do not disclose the name of the person killed; and, third, facts sufficient to constitute a willful killing are not alleged. Deeming the last of these objections sufficient, we disregard the others, and we also pass over the serious doubt as to whether the assignment of error is sufficiently specific to present any question for decision, it appearing from the record that the second paragraph of complaint was superseded by four separate filings of an "amended second paragraph of complaint," three of such amended paragraphs having gone down under demurrer. No claim is made for the pleading that it states a cause of action sounding in negligence, and it is practically conceded that its sufficiency must be determined as a charge of a willful killing, the decedent having been a trespasser upon the railway at the time. Mere epithets give the pleading no force, and it is conceded by the learned counsel for the appellant that specific averments control general averments. The following analysis of the specific averments of the pleading is made on behalf of the appellant: "(1) Appellant's decedent was on a high trestle. (2) There was no escape from the trestle except by either end. (3) Appellant's decedent was 100 feet from the end. (4) Appellant's decedent was endeavoring to retrace his steps. (5) Appellee's en-

gineer in charge of the engine saw appellant's decedent on the trestle. A. knew where the trestle began. B. knew the construction of the trestle. C. knew appellant's decedent was cut off from all means of escape, except by the end. D. saw decedent trying to escape. E. was two thousand feet distant. F. knew of decedent's perilous condition in time to have stopped the train. G. failed to stop the train, and ran decedent down." A single authority is cited in support of the complaint. *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70. That case correctly decides that there may be what the law will pronounce a willful killing where life is taken purposely, or where one pursues a course which he must reasonably know will bring death to another, although he may not intend to inflict injury; and, further, that one upon a railroad when a train is approaching, although he may be seen by the engineer, may be presumed until the last moment to leave the track and avert danger, unless there be something from which the engineer may reasonably infer that such person, from inability to do so or from ignorance of the approach of the train, will not leave the track. To the same effect are many other decisions of this court, including the late cases of *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504; *Pennsylvania Co. v. Meyers*, 136 Ind. 242, 36 N. E. 32; *Evans v. Railway Co.*, 142 Ind. 264, 41 N. E. 537. It is apparent, therefore, that to bring the case within the rules of the authority cited, it not being claimed that the killing was done intentionally, it must appear that the decedent was in a position of peril from which he could not escape unless the engineer should slacken the speed or stop the train, and that the engineer knew of the peril in time to have so slackened speed or stopped the train. No doubt, there was a time when the decedent's position was one of peril; and that it was when the locomotive first came so near to him that he could not reach the end of the trestle before it arrived. That was the time when the engineer, seeing the decedent, and it being reasonably apparent that such peril existed, should have used every proper energy to check the speed or stop the train. It is manifest that at the point of 2,000 feet from the trestle, with knowledge that decedent was upon the structure, and attempting to retrace his steps for 100 feet, to a place of safety, the engineer was not reasonably required to lessen the alleged speed of 25 miles an hour, which would give the decedent nearly 55 seconds to escape, requiring him to walk only at the rate of 1¼ miles per hour. Peril did not exist when the train was 2,000 feet distant, and from that point, under the authorities cited, the engineer had the right to presume that the decedent would get off the trestle, and the right to continue that presumption until the point making it perilous to continue was reached. It cannot be said, therefore, that

it was the engineer's duty to reverse his engine when 2,000 feet from the trestle, and we are not advised by the pleading at what other point the peril became reasonably manifest, nor that at such point the engineer failed to make every possible effort to stop the engine. The absence of allegation of the rate of speed covering the last 40 rods, and at the time the engine struck the decedent, is suggestive that the rate was unfavorable to the appellant, and that would also imply effort on the part of the engineer to check the speed or stop the engine. If the engineer acted on the presumption that the deceased could and would get to a point of safety, and so acted until it became too late by the use of the means within his control to avoid running upon him, such reliance could not be considered willfulness. *Railway Co. v. Miller* (Ind. Sup.) 49 N. E. 445, and authorities there cited. In our opinion, the lower court ruled correctly, and the judgment is affirmed.

(151 Ind. 79)

KNOWLTON et al. v. DOLAN.

(Supreme Court of Indiana. June 30, 1898.)

APPEAL — REVIEW — RECORD — PRESUMPTIONS — COURT COMMISSIONERS — DEED — MISDESCRIPTION — CORRECTION — SUIT BETWEEN PARTNERS — ORDER FOR JUDICIAL SALE — CONSTRUCTION — DISMISSAL — EFFECT — COLLATERAL ATTACK.

1. Error in striking out a pleading cannot be considered, unless brought into the record by order of court, or set out in a bill of exceptions.

2. The presumption arises that a pleading was properly struck out, unless the contrary is affirmatively shown by the pleading, as a part of the record on appeal.

3. A court commissioner appointed to execute a conveyance misdescribed the land, and the deed containing the misdescription was entered of record in the order book of the court, and the court's approval indorsed on the deed, as required by *Burns' Rev. St. 1894, § 1081* (*Hornor's Rev. St. 1897, § 1019*). *Held*, that the misdescription was a clerical mistake in entering the proceedings of the court, which could be corrected by motion, and a complaint therefor would be regarded as a motion.

4. One of the members of a firm sued his partner for dissolution, and a receiver was appointed. The plaintiff, pendente lite, petitioned the court, showing that the firm had agreed in writing to dissolve, and that all the right, title, and interest of his partner was thereby transferred to him, except an undivided fifteenth of certain canal property. The court made an order confirming the agreement, and appointed a commissioner to make deeds of all the partnership real estate to the partners; the order not specifically describing it. *Held*, that the order should be construed with the written agreement, and that, so construed, it directed a conveyance of all partnership real estate to the plaintiff, except such undivided interest.

5. That the partnership real estate was not specifically described in the order, but was embraced in a general description, including all partnership real estate, would not invalidate the commissioner's authority to make the conveyance.

6. In a suit to dissolve a partnership, plaintiff petitioned the court, pendente lite, showing that the firm had agreed in writing to dissolve, and that, among other things, the partnership real estate was to be transferred to plaintiff. A decree dismissing the cause was made accordingly, and an order made at the same time for

conveyance to plaintiff of the partnership real estate. *Held*, that the decree in such a case would be considered as an entirety, so as to give effect to each order it contained, and the dismissal would only take effect when plaintiff's deed was made and approved, and then to an extent not to interfere with the decree and order of the court.

7. The defendant in such an action, and those who claim under him, are equally bound by the order for the conveyance, and cannot assail it in a collateral proceeding.

Appeal from circuit court, Cass county; D. H. Chase, Judge.

Proceeding by William Dolan against Ellen M. Knowlton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

McConnell & Jenkins and T. J. Tuley, for appellants. De Witt C. Justice, for appellee.

MONKS, J. This proceeding was brought by the appellee against appellants, the heirs at law of Charles B. Knowlton, to correct an alleged mistake in the description of real estate in a commissioner's deed, and in the order-book entry where said deed was approved by the Cass circuit court. The complaint was in two paragraphs, and appellants' demurrer to the same for want of facts was overruled. Appellants filed a cross complaint, which was, on motion, stricken out. The court found in favor of appellee, and rendered a judgment correcting the alleged mistake in the deed, and in the order-book entry of the court. The errors assigned call in question the sufficiency of the complaint, the action of the court in sustaining the motion to strike out the cross complaint, and the action of the court in finding for the appellee, and rendering judgment in his favor on said finding.

It is shown by a bill of exceptions that the court sustained appellee's motion to strike out appellants' cross complaint; but said cross complaint is not set out in any bill of exceptions, or brought into the record by an order of court. It is settled law that, when a pleading is stricken out on motion, the same is not part of the record, and can only be brought back into the record by a bill of exceptions or order of court; and, if not so brought into the record, it cannot be considered by this court. *Dudley v. Pigg* (Ind. Sup.) 48 N. E. 642, and cases there cited. The presumption is that the court did not err in sustaining such motion to strike out the cross complaint, unless the contrary is affirmatively shown by the record. *Holland v. State*, 131 Ind. 568, 570, 31 N. E. 359, and cases cited. As the cross complaint forms no part of the record, we cannot say that the court committed any error prejudicial to appellants in sustaining the motion to strike it out. *Hiatt v. Renk*, 64 Ind. 590; *Goodwin v. Smith*, 72 Ind. 114.

Many objections are urged by appellants against the first paragraph of complaint, but they are such as only apply to a complaint to correct a mistake in written instruments, and do not apply to complaints or motions

to correct mistakes in the entries made in judicial proceedings. Courts have the power, on application, to make their records speak the truth, and to correct mistakes made in entering their proceedings, orders, judgments, and decrees. The complaint in this case shows that the Cass circuit court appointed a commissioner to execute a conveyance of real estate, and that by mistake the real estate to be conveyed was not correctly described in the deed, and that said deed containing the incorrect description was entered of record in the order book of said court, and approved by the court, and such approval indorsed on said deed, as required by statute. The deed executed by the commissioner could not convey any right or title, and was not a deed, in a legal sense, until it was examined and approved by the court, which approval must be indorsed thereon as required by section 1031, Burns' Rev. St. 1894 (section 1019, Horner's Rev. St. 1897). The mistake, therefore, was a clerical mistake in entering the proceedings of the court. Such mistake may be corrected by motion, and a complaint to correct the same will be regarded as a motion. *Gray v. Robinson*, 90 Ind. 527, 531, 532; *Urbanski v. Manns*, 87 Ind. 585; *Hughes v. Hinds*, 69 Ind. 93; *Miller v. Royce*, 60 Ind. 189; *Latta v. Griffith*, 57 Ind. 329; *Sherman v. Nixon*, 37 Ind. 153; *Goodwine v. Hedrick*, 29 Ind. 383; *Jenkins v. Long*, 23 Ind. 460. It has been held that such motion cannot be tested by demurrer, or by an assignment of error, that it does not state facts sufficient, that the rulings on the pleadings are harmless, and that, if a correct result is reached, a cause will not be reversed for an error in the mode of reaching it. *Gray v. Robinson*, 90 Ind. 532; *Bales v. Brown*, 57 Ind. 282; *Latta v. Griffith*, Id. 330; *Jenkins v. Long*, *supra*.

It is next insisted by appellants that the evidence is insufficient to sustain the finding of the court in favor of appellee. It is shown by the evidence that on the 25th of March, 1889, there was pending in the Cass circuit court an action, in which William Dolan was plaintiff and Charles B. Knowlton was defendant, brought to dissolve the partnership existing between them, and in which a receiver had been appointed. On said day, Dolan, the plaintiff in that action, filed a petition showing that on December 6, 1888, said plaintiff and the defendant, Knowlton, had entered into an agreement in writing by which said partnership was dissolved, and it was provided that "all the right, title, and interest of said Knowlton in and to the real estate, personal property, stock, and assets, of every kind and character, owned, or in which any right may exist, of said firm of Knowlton and Dolan, is hereby transferred and set over to said William Dolan, excepting only the interest of said Knowlton in the Wabash and Erie Canal property; and said canal property is hereby declared to be the individual property of

each of said parties,—each of them holding the undivided one-fifteenth interest therein.” It was also provided in said agreement that Knowlton should indorse to Dolan certain notes, and that Dolan should indorse to Knowlton a certain promissory note for \$1,000, and that said Dolan assumed and agreed to pay all the firm debts of Knowlton & Dolan. It was provided in said agreement that “said Knowlton and wife are to make quitclaim deeds to Dolan for all said property, and Dolan and wife are to make quitclaim deeds to Knowlton for Knowlton’s one-fifteenth interest in the canal property; said deeds to be made at once.” Said petition also set forth that said Dolan had paid \$20,122 of the indebtedness of said firm, and that the remainder of said firm debts had been arranged by him, as per the agreement, and prayed that said receiver be ordered to make a final report, and turn over all of the property of said firm in his hands to said Dolan, and that said cause be dismissed. Such proceedings were afterwards had in said cause that the court entered an order and decree that said cause and all intervening petitions be dismissed, and that the receiver turn over to said Dolan all the real and personal property of said firm, and that said agreement be confirmed, and that said receiver account to said Dolan in the matter of this trust. It was also provided in said decree “that the costs of this proceeding be paid by the receiver out of the funds in his hands; and it is further ordered that De Witt C. Justice, Esq., be, and he is hereby, appointed master commissioner to make deeds of the partnership property to said Charles B. Knowlton and William Dolan, and submit the same to the court for approval.” Afterwards said Justice, as such commissioner, pursuant to said order, executed a deed to said William Dolan, intending to thereby convey the real estate sold by said Knowlton to Dolan,—describing each parcel specifically,—which deed was submitted to, and approved by, the court. There was a mistake in the description of a part of the real estate described in said deed. Said Charles B. Knowlton died after the approval of said commissioner’s deed, and before the commencement of this proceeding. The grounds upon which appellants claim that said finding is not supported by the evidence are (1) that the order-book entry shows that the commissioner was ordered to convey the partnership real estate to Charles B. Knowlton and William Dolan, and not to William Dolan, as alleged in the complaint; (2) that the authority of the commissioner to make the conveyance was void, because the partnership real estate to be conveyed was not specifically described in the order; (3) that the order appointing the commissioner to make deeds for said partnership, and the order approving the deed made to Dolan, were made after said cause of Dolan v. Knowlton, in which said order was made, was dismiss-

ed, and such orders were therefore void; and that, therefore, the finding of the court is not sustained by the evidence.

The order of the court, that the commissioner make deeds of the partnership property to Charles B. Knowlton and William Dolan, must be construed in connection with the written agreement of said Knowlton and Dolan. When so construed, it is clear that said commissioner was ordered to convey all the partnership real estate, except an undivided one-fifteenth of the Wabash & Erie Canal property, to William Dolan, and he was ordered to convey said undivided one-fifteenth of said Wabash & Erie Canal property to Charles B. Knowlton. It is true that the real estate is not specifically described in the order, but the written agreement, which was a part of the order, provided that “all the right, title, and interest of Charles B. Knowlton in and to the partnership real estate is hereby transferred and set over to William Dolan,” except an undivided fifteenth of the Wabash & Erie Canal property. Such a description in the written agreement was not void, nor did it render the contract void; but it was sufficient to identify the real estate intended, and to be effective to vest the equitable, if not the legal, title to said Knowlton’s interest in said real estate in said Dolan. *Sherwood v. Whiting*, 54 Conn. 330, 8 Atl. 80; *Langley v. Honey* (R. I.) 38 Atl. 699; *Waterman v. Andrews*, 14 R. I. 589; *McCoy v. Pease* (Tex. Civ. App.) 42 S. W. 659; *Brigham v. Thompson* (Tex. Civ. App.) 34 S. W. 358; *Witt v. Harlan*, 66 Tex. 661, 2 S. W. 41; *Vineyard v. O’Connor* (Tex. Sup.) 36 S. W. 424; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028; *Lick v. O’Donnell*, 3 Cal. 59; *McCulloch v. Price*, 14 Mont. 320, 36 Pac. 194; *Harmon v. James*, 7 Smedes & M. 111; *Carson v. Ray*, 7 Jones, Law, 609; *Henley v. Wilson*, 81 N. C. 405; *Farmer v. Batts*, 83 N. C. 387, 389; *Hammond v. Abbott*, 166 Mass. 517, 44 N. E. 620; *Melvin v. Proprietors*, 5 Metc. (Mass.) 15; *Fordyce v. Rapp*, 131 Mo. 354, 366, 33 S. W. 57; 2 Ballard, Real Prop. § 165; 3 Ballard, Real Prop. § 213; 2 Devl. Deeds (2d Ed.) § 1013; 1 Jones, Real Prop. § 346; 2 Ping. Real Prop. § 1378. In *Pettigrew v. Dobbelaar*, supra, it was held that the words, “all lands and real estate belonging to the party of the first part, wherever situate,” in the descriptive clause of a deed, passed all the real estate belonging to such party at the time the deed was executed. In *Wilson v. Boyce*, 92 U. S. 325, the supreme court of the United States said: “The generality of the language forms no objection to the validity of the mortgage. A deed ‘of all my estate’ is sufficient. So a deed ‘of all my lands, wherever situated,’ is good to pass title. *Jackson v. Lelancey*, 4 Cow. 427; *Pond v. Bergh*, 10 Paige, 140; 1 Atk. Conv. 2. A mortgage ‘of all my property,’ like the one we are considering, is sufficient to transfer title.”

The order of the court directing the commissioner to convey said real estate to Dolan was not void, and the same is not subject to collateral attack. *Doe v. Henderson*, 4 Ga. 148; *Davie v. McDaniel*, 47 Ga. 195, 205; *Pendleton v. Trueblood*, 48 N. C. 96; *Maxwell v. Pittenger*, 3 N. J. Eq. 156, 165; *Wilmurt v. Morgan*, cited in 9 N. J. Law, 341; *Wells v. Polk*, 36 Tex. 126; *Robertson v. Johnson*, 57 Tex. 62, 64; *Davis v. Touchstone*, 45 Tex. 490, 497; *Hurley v. Barnard*, 48 Tex. 83, 88; 1 *Thornt. Adm'n*, p. 329. In *Doe v. Henderson*, supra, it was held that where the only description of the real estate in an order to sell real estate of a decedent to pay debts was, "all the real estate of the decedent" (naming him), such order authorized the sale of all the real estate said decedent owned at the time of his death, and the particular description of such real estate could be set out in the deeds conveying the same to purchasers. In *Davie v. McDaniel*, supra, it was held that an order to sell real estate, when the same was described as "the lands belonging to the estate of Uriah Blanchard, deceased," was not void on account of the general description of the real estate to be sold. The court, at page 205, said: "But it is said that the order of sale is void because it does not more definitely describe the land ordered to be sold. Section 2518 of the Code requires the order to 'specify' the land 'as definitely as possible.' Conceding that the land is not so specified, yet it appears to a majority of the court that this is only directory to the ordinary,—certainly not an objection which can be successfully urged in a collateral attack upon the judgment. *Brooks v. Rooney*, 11 Ga. 428." It is not the office of a description in a deed or other writing to identify; it is sufficient if it furnishes the means of identification; and that part of a deed describing the land will be construed with the utmost liberality in favor of the grantee, and against the grantor. *Frick v. Godare*, 144 Ind. 170, 174, 42 N. E. 1015, and cases cited; *Rucker v. Steelman*, 73 Ind. 396, 407; *Thain v. Rudisill*, 126 Ind. 272, 279, 26 N. E. 46; 4 *Am. & Eng. Enc. Law* (2d Ed.) 801, 802; *Hopk. Real Prop.* p. 421. It is a settled rule, as to descriptions of real estate in deeds, mortgages, and other writings, that that is certain which can be made certain. 4 *Am. & Eng. Enc. Law* (2d Ed.) 793, 794, and cases cited in note 1, p. 794. This rule also applies, to a certain extent, to decrees of courts, and deeds made thereunder. *Thain v. Rudisill*, 126 Ind. 278-280, 42 N. E. 46, and cases cited; *Willson v. Brown*, 82 Ind. 471; *Lanman v. Crooker*, 97 Ind. 163.

In this case the decree of the court was that the proceedings and intervening petitions be dismissed, and that the partnership be dissolved; that the receiver turn over to Dolan all the real and personal property of the firm of Knowlton & Dolan, and that the receiver pay the costs of the pro-

ceeding out of the funds in his hands; and that De Witt C. Justice, Esq., be appointed commissioner to make deeds of the partnership property, and submit the same to the court for approval. Said decree was an entirety, and said orders were made at the same time, and entered in one entry in the order book of the court. After the entry of said decree, on another page of the order book, follows an entry containing the commissioner's deed, and its approval by the court. The decree is therefore to be considered as an entirety, so as to give effect to each order contained therein. So construed, the decree in regard to the appointment of the master commissioner and the execution and approval of the deeds remain in full force, and authorized the execution of the deed to Dolan; and the dismissal only took effect when said deed was made and approved, and only then to an extent not to interfere with said decree and order of the court. But, even if the court erred in making said orders, Knowlton, who was a defendant in said action, was bound thereby, and could only assail them by a direct proceeding. And appellants, who claim under him, are equally bound by said decree. In *Miller v. Mans*, 28 Ind. 195, this court, speaking of the effect of a judgment rendered by a court after the dismissal of a cause by a plaintiff in vacation, said, "The error of the court in retaining the cause and overruling the motion to dismiss the action cannot be inquired into collaterally." Finding no available error in the record, the judgment is affirmed.

(151 Ind. 36)

TRAVELERS' INS. CO. v. PRAIRIE SCHOOL TP. et al.

(Supreme Court of Indiana. June 28, 1898.)

JUDGMENT—ACTION TO REVIEW—SUFFICIENCY OF COMPLAINT—APPEAL—REVIEW.

1. *Horner's Rev. St.* §§ 615-617, providing that proceedings for review shall be by a complaint, which section 338 defines to be "a statement of the facts constituting the cause of action, * * * in such manner as to enable a person of common understanding to know what is intended," is not satisfied by an indorsement on a transcript on appeal of statements good as assignments of error, under section 655, providing that no pleadings shall be necessary on appeal, but requiring specific assignments of error; nor can a transcript of the record, filed by an exhibit, supply necessary allegations of the complaint, but the complaint itself must allege the condition of the record, so as to advise the court of the existence of errors relied on.

2. On appeal, in order to uphold a judgment, matters apparent in the record may be considered, though not involved in any question raised by counsel.

On petition for rehearing. Overruled.

For former opinion, see 49 N. E. 1.

HACKNEY, C. J. Counsel for the appellant support their petition for a rehearing by an able and earnest brief, urging that the decision herein is a departure from the well-

recognized rule of long standing. We have carefully read their briefs, and all of the cases cited by them, and, while assenting to many of the propositions contended for, we do not agree that a single decision cited, nor one discovered by our researches, is at variance with our holding. We do not find it necessary to affirm or deny the propositions that the transcript of the proceedings sought to be reviewed may properly be filed as an exhibit with the complaint, nor that more of the proceedings than will disclose the error complained of need be filed, nor that the effect of the proceeding to review is the same as an appeal, nor that errors subject to review are such as might be considered upon appeal. These are the propositions passed upon in the cases cited by counsel. Nor do we agree that the questions in the decisions cited bear any analogy to the questions passed upon in the original opinion. We do not accept the conclusion that any statement constituting a sufficient assignment of error, if indorsed upon the transcript on appeal, is sufficient as a complaint for review. No decision which has come to our attention so decides. As to assignments of error, the statute (Horner's Rev. St. § 655) provides that "no pleadings shall be required in the supreme court upon appeal, but a specific assignment of all errors relied upon * * * shall be assigned," etc. As to the proceedings for review, the same statute (sections 615-617) provides that it shall be by complaint. "A complaint" is defined by the Code to be "a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Horner's Rev. St. § 338. To say that the provision as to assigning error on appeal satisfies the statute as to proceedings in review would be nothing less than judicial legislation, and no decision, as we have said, goes to any such limits. Indeed, there seems to be no requirement for construction, as the provisions are perfectly plain, and the legislature has made the distinction by it deemed wise. Conceding that the record may be filed as an exhibit, there is no reason for holding that it may supply the allegations necessary to constitute the complaint. In no instance where the instrument indisputably constitutes the basis of the action is it held to dispense with allegations in the complaint. Respect for the provisions of the statute requiring a complaint, in proceedings for review, renders it impossible to accept the conclusion that allegations disclosing the errors complained of may be made by a general reference to a voluminous transcript, accompanying the pleading as an exhibit. It is suggested that it was an error in this case, and in the case of *Jamison v. Railway Co.* (Ind. Sup.) 43 N. E. 223, to apply the rule that, in a complaint for a review for newly-discovered evidence, the exhibited record will not supply allegations as to the

character of the action and the materiality of the evidence, as held in *Anderson v. Hathaway*, 130 Ind. 528, 30 N. E. 638, *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935, and other cases. Just why a general reference to the exhibit for errors of law should be sufficient in the one case, and in the other specific allegations as to the character of the action and the pertinency and materiality of the evidence must be made, we do not observe. Would it not answer the rule of the one case, when applied to the other, to allege generally the discovery, the diligence, and exhibit the new evidence, and the transcript of the original proceedings and evidence? If less than a complaint, within the statutory definition, is permitted in the one case it should be in the other. The court in considering either can have the same source of information in one as in the other,—the transcript. Nor need there be any misunderstanding that under the case of *Jamison v. Railway Co.*, supra, and this case, it is necessary to set out the proceedings of the original suit or action in full in the body of the complaint, or that any part of the record must be incorporated in the complaint. We hold that it is necessary to allege the condition of the record so as to advise the court of the existence of the error or errors relied upon. The pleading is not a sufficient complaint if, when its allegations are presented to the court, the court cannot say, "If supported by the record, this was error." The rule upon which this case was decided was adhered to in *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831, and the *Jamison Case*, supra.

Complaint is made, also, that we decided the case upon a question not discussed by counsel. The sufficiency of the complaint was discussed, and we deem it our duty, seeing the deficiency in it, to uphold the judgment of the trial court, although attention to that particular deficiency may not have been called by counsel. We may not ignore what we do see that will prevent a reversal of the judgment. *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 42 N. E. 464, and 43 N. E. 5; *Martin v. Martin*, 74 Ind. 207; *Jones v. Castor*, 96 Ind. 307. As said in *Martin v. Martin*, supra: "We never go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out in the brief; but the appellee, without filing any brief at all, is entitled to the benefit of everything in the record which may prevent a reversal of the judgment upon the error assigned; and because the counsel on both sides may discuss some questions with very great learning and ability, as was done in this case, we are not, therefore, permitted to shut our eyes against the fact, which we cannot otherwise help seeing, that the question is not in the record. The silence of appellee on any point is not equal to an agreement to waive the point; the burden is on the appellant to show the error which he has assigned. *Pow. App. Proc.* 125-128. If there

are points in the record which counsel do not suggest, and we do not perceive them, there are numerous decisions that we will not consider such points on the petition for a rehearing, but there is no rule which permits us to ignore what we do see. We read the briefs of counsel, but, as the appeal is tried by the record, we examine that too." The petition is overruled.

(151 Ind. 70)

HARRIS et al. v. MILLEGE et al.

(Supreme Court of Indiana. June 29, 1898.)

MUNICIPAL CORPORATIONS—INCORPORATION—PROCEDURE—APPEALS FROM COUNTY COMMISSIONERS—AMENDMENT OF ISSUES—BOND—REVIEW—HARMLESS ERROR—DISMISSAL.

1. Rev. St. 1894, § 4313 et seq. (Rev. St. 1881, § 3293 et seq.), providing for the incorporation of towns, directs that the returns of the election shall be made to the county commissioners, and that, if satisfied of the legality of the election, they shall declare the town incorporated. *Held*, that where persons appear before the commissioners, and move to dismiss the proceeding, it is an appearance, and sufficient to raise an issue as to the validity of the election, and on appeal by objectors to the circuit court, after a denial of their motion, such issue, or the sufficiency of the objections, should be decided on the merits, and not on motion to dismiss the appeal.

2. Such objectors were prejudiced by failure of the court to hear said issue and objections, and by dismissing the appeal, even though they could not have succeeded had they been accorded a hearing on the merits.

3. Issues raised before a court of county commissioners may be amended on appeal to the circuit court.

4. Where an appeal is taken from a decision of county commissioners, a bond signed only by appellants is not a compliance with the statute granting appeals "upon the filing of bond with surety," nor is such a bond cured by Rev. St. 1894, § 1235 (Rev. St. 1881, § 1221), providing for the validity of informal bonds given by officers; and, if a proper bond is not filed, the appeal will be dismissed.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Proceeding by Herman H. Millege and others to incorporate Shirley City. A motion to dismiss the proceedings was filed by Bernard H. Harris and others before the board of county commissioners, which was overruled, and an appeal was taken to the circuit court. From a judgment dismissing the appeal, objectors appeal. Affirmed.

Zollars & Worden, for appellants. W. G. Colerick, for appellees.

HACKNEY, C. J. This was a proceeding instituted by the appellees for the incorporation of certain territory as the town of Shirley City. It is conceded that all of the steps were regular up to the election to determine whether a majority of the voters within the territory favored the incorporation. An election was held, and the inspectors reported the result to the next session of the commissioners, upon which report the evidence was heard, and thereupon, but before the

final order of incorporation, the appellants came before the board, and filed a motion reciting that they were qualified electors within said territory, and moved "to dismiss all proceedings in said cause, and reject the reports of election herein," for numerous reasons stated. This motion was overruled, and the appellants appealed to the circuit court, under section 7859, Rev. St. 1894 (section 5772), but without an affidavit "setting forth an interest in the matter decided," and that they were "aggrieved by such decision." In the circuit court, on the motion of the appellees, the appeal from the board was dismissed. One question presented by the record is as to whether an affidavit was necessary to support the appeal to the circuit court. Under the statute last cited one not a party to the proceeding is given the right of appeal only upon the condition that he file "his affidavit setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest." It appears from the recital in the motion of the appellants to dismiss the proceedings, that they were interested, and entitled to become parties to the proceeding. There is no provision of the statute under which incorporations are had (Rev. St. 1894, § 4314 et seq.; Rev. St. 1881, § 3293 et seq.) expressly authorizing an appearance and opposition by one interested in the proceedings at any step. It is provided, however, that upon the making of returns by the election inspectors to the board of commissioners, the board, "if satisfied of the legality of such election, shall make an order declaring that said town has been incorporated." If the right exists to appear and oppose the proceedings after the election, and thereby become a party, it must be by implication arising from the provision just quoted. We incline to the view that the duty to be satisfied of the legality of the election at least implies the duty to hear objections against its legality. This would certainly carry with it the right of one interested to intervene, and challenge the legality of the election. A person interested, and having that right, appearing unconditionally, and not merely as *amicus curiæ*, would become a party. Such intervention should be timely to merit recognition from the board, but here no question was made as to the time of appearance, and the board, instead of rejecting or ignoring the motion, entertained the same, and passed upon it. The numerous cases arising under this statute which have found their way into this court attest the rule of practice in admitting persons as parties opposed to the petition.

Another reason assigned for the dismissal of the appeal was that the transcript disclosed no remonstrance or other pleading by which any issue was tendered for hearing by the board, and therefore no issue was presented upon appeal. After the filing of the motion to dismiss the appeal, and before

the same was passed upon, proceedings were had before the board by which an entry *nunc pro tunc* was made showing the filing of the motion before the board to dismiss the proceedings, and that entry was certified to the circuit court. The motion to dismiss the proceedings we regard as an appearance, and it raised an issue as to the validity of the election. The efficacy of that issue, or the sufficiency of any of the objections to the election, or as to whether the entire proceedings should have been dismissed as prayed, are not questions upon which the trial court could have acted in dismissing the appeal. Such questions should have been tested upon the merits of the objections raised, and not by a dismissal which precluded an inquiry as to the sufficiency of any issue tendered against the legality of the election. Appellants' learned counsel insist that, upon the authority of *Railway Co. v. Hood*, 130 Ind. 584, 30 N. E. 705, the dismissal reached the correct result, and is not made erroneous by having been reached by a wrong method. That was held upon the theory that the appellants were not harmed. It cannot be said in this case that the appellants were not harmed by the failure of the court to hear their objections to the validity of the election. They were entitled to a hearing, and it could not be said that because they could not have succeeded they could properly be denied a hearing. Issues raised before the board were amendable on appeal and appellants were entitled to a ruling on their motion. *Fletcher v. Crist*, 139 Ind. 121, 33 N. E. 472; *Hardesty v. Hine*, 135 Ind. 72, 34 N. E. 701; *Stockwell v. Brant*, 97 Ind. 474; *Burns v. Simmons*, 101 Ind. 557, 1 N. E. 52; *Green v. Elliott*, 86 Ind. 53; *Hedrick v. Hedrick*, 55 Ind. 78.

Still another reason assigned by the appellees for the dismissal of the appeal by the circuit court was that the appeal bond was insufficient. Pending the motion, the appellants filed, and the court entertained and approved, a new bond. This was proper, and was intended to cure any informality or other objection to the original bond. *Rev. St. 1894, § 1307 (Rev. St. 1881, § 1283)*; *Bennett v. Selbert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; *Graeter v. De Wolf*, 112 Ind. 1, 13 N. E. 111. It is said, however, that the new bond was insufficient because it contained no sureties. It was signed alone by the appellants, and did not purport to contain sureties. This, it has been held, is not a compliance with the statute granting appeals, upon filing bond with surety, and is cause for dismissal. *McVey v. Heavenridge*, 30 Ind. 100. We do not regard section 1235, *Rev. St. 1894 (section 1221, Rev. St. 1881)*, as to the validity of informal bonds as bearing upon the sufficiency of the bond in question. While perhaps true that the trial court should not have approved the bond, and could not consistently have dismissed the appeal for the insufficiency of the

bond, yet it was the right of the appellees to have a bond with sureties, and to have a dismissal if such bond was not filed. The action of the court in dismissing the appeal was correct, although it may have been reached in an irregular manner. The judgment is affirmed.

(20 Ind. App. 706)

CENTER SCHOOL TP. v. STATE ex rel.

MARION SCHOOL CITY et al.

(Appellate Court of Indiana. June 28, 1898.)

DOG TAX — MISAPPROPRIATION BY TOWN — OVER-
RULED DECISIONS—VESTED RIGHTS.

A school township which wrongfully appropriated a portion of the surplus dog fund through a judicial misinterpretation of *Burns' Rev. St. 1894, § 8654 (Horners' Rev. St. 1897, § 2651h)*, providing for the distribution of such fund, acquired no vested rights therein which were involved by the overruling of such erroneous decision.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Action by the state, on relation of Marion school city and others, against Center school township of Marion county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Elliott & Elliott, for appellant. Carroll & Dean, for appellee.

ROBINSON, J. Appellee seeks to recover from appellant its pro rata share of the surplus dog fund, over \$50, in the hands of appellant, in March of the years 1892, 1893, 1894, and 1895. It is charged in the complaint that, on the first Mondays of March in each of said years, the surplus dog fund over \$50 in the hands of appellant was for 1892 \$262.22, for 1893 \$451.84, for 1894 \$99.82, and for 1895 \$185.20; that a portion of said sum should have been distributed to appellee in proportion to its enumeration for school purposes; that appellant failed and refused to distribute any of said funds to appellee, but, on the contrary, expended all of said funds for the benefit of the schools of appellant; and that no part was received by appellee. Center school township filed a demurrer to the complaint, which was overruled; and, refusing to plead further, judgment was rendered in appellee's favor for \$1,101.75. This ruling is the only question presented.

Section 8654, *Burns' Rev. St. 1894 (section 2651h, Horners' Rev. St. 1897)*, provides that the revenue received from the tax on dogs shall be a fund for the payment of damages for sheep killed or maimed by dogs, and also provides "that when it shall so happen on the first Monday of March in each year, in any township, that the said sum shall accumulate to an amount exceeding fifty dollars over and above orders drawn against the same, then the surplus over said sum of fifty dollars shall be expended by such trustee for the use of the school revenue of the township." In *Taggart v. State*, 142 Ind.

668, 40 N. E. 260, and 42 N. E. 352, it is held that by this proviso the township trustee is required to turn over to each school corporation within his township its pro rata share of such surplus in proportion to the enumeration of such school corporation. It is argued by counsel for appellant that the complaint does not show that there is any money or fund on hand with which to pay such claim, but that it appears that the same had been expended by the trustee; that, at the times complained of, it was the law, as declared by the supreme court, that no part of said fund belonged to appellee; and that a more recent decision of the supreme court, made since the acts complained of, cannot be given a retrospective effect, so as to make such use of such fund wrongful. These questions have been decided by the supreme court adversely to the position maintained by counsel for appellant in this case, in the recent case of *Center School Tp. v. State* (Ind. Sup.) 49 N. E. 961. Upon the authority of that case, the judgment in the case at bar must be affirmed. *Center School Tp. v. State* (Ind. App.) 50 N. E. 591. Judgment affirmed.

(20 Ind. App. 668)

NORRIS v. CHURCHILL.¹

(Appellate Court of Indiana, June 23, 1898.)

**CONTRIBUTION BETWEEN JOINT MAKERS OF A NOTE
—NEW TRIAL.**

1. Plaintiff and defendant and three others borrowed money from a bank on their joint note to pay the price of a horse purchased in common, each agreeing to pay his ratable share thereof. Defendant paid his share, and the others executed a new joint note for the balance, on which judgment was obtained against them, two of whom were insolvent. Plaintiff was compelled to pay, in addition to his own share of the judgment, the shares of the insolvents. *Held*, that defendant was liable to contribute his ratable share of the amount paid by plaintiff in excess of his share of the debt.

2. Assessment of excessive damages as a cause for a new trial applies only in actions of tort.

Appeal from circuit court, Rush county; John D. Miller, Judge.

Action by William Churchill against Benjamin F. Norris. From a judgment for plaintiff, defendant appeals. Affirmed.

Cullen, Martin & Magee, for appellant. Smith, Cambern & Smith, for appellee.

BLACK, J. The appellee sued the appellant for contribution. They, with three others, jointly purchased a horse, each of the five purchasers paying one-sixth part of the price. The remaining one-sixth part of the purchase money they borrowed from a bank upon their joint promissory note payable at said bank upon demand. The appellant, without the knowledge or consent of the appellee, paid to the bank the one-fifth part of the amount of the note in cash. The other makers thereof, on the same day, gave their joint promissory note, negotiable by the law merchant, to the bank for the balance, being four-fifths of the amount of the debt, the ap-

pellant not joining with the other makers in the execution of the latter note. Prior to the appellant's said payment of a part of the debt, two of the makers of the original note, Joseph T. Johnson and Owen Kincaid, had become insolvent, and they so continued thereafter. When the second note became due the makers thereof renewed it, and upon this third note the bank sued and recovered judgment thereon against the makers thereof. The appellee paid the judgment by giving his note, negotiable by the law merchant, to the bank, and the bank assigned the judgment to the appellee. The appellee thus paid all the original debt except the one-fifth part thereof so paid by the appellant. The five makers of the original note owned equal interests in the horse. When the makers of the original note borrowed the money for which it was given, they agreed between themselves that each should pay one-fifth of the amount borrowed.

The questions saved and presented in this court may be disposed of by deciding whether, upon such a state of facts, the appellee was entitled to contribution from the appellant.

It is contended, in effect, that as the appellant paid in cash his agreed share of the original note, and as the balance thereof was paid to the bank by the promissory note, negotiable by the law merchant, of the other makers of the original note, the appellee could not acquire the right to contribution from the appellant by the appellee's final compulsory payment of the balance of the debt represented by the renewed promissory note, negotiable by the law merchant, given by the makers of the original note other than the appellant. Each of the makers of the joint obligation was principal as to his part, and co-surety for the others as to their respective parts. *Goodall v. Wentworth*, 20 Me. 322; *Bragg v. Patterson*, 85 Ala. 233, 4 South. 716. The right to contribution originated in equity, and is based upon natural justice. It applies to any relation, including that of joint contractors, where equity between the parties is equality of burden, and one of them discharges more than his share of the common obligation. *Bragg v. Patterson*, supra; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Sexton v. Sexton*, 35 Ind. 88. Where a number of persons borrowed a sum jointly, but received different portions for their several uses, and one of the borrowers became insolvent, it was held that the others should contribute to pay his share in proportion to the amount received by each. *Kincaid v. Hocker*, 7 J. J. Marsh. 333. In the case at bar the makers of the original joint note derived benefit equally from the proceeds of that note. When there is an entire debt owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of a part of their number. *North v. Brace*, 30 Conn. 60, 72. Sureties who are insolvent are

¹ Rehearing denied.

to be excluded in determining the proportions. See *Newton v. Pence*, 10 Ind. App. 672, 38 N. E. 484; *Michael v. Albright*, 126 Ind. 172, 25 N. E. 902.

The agreement between the joint makers of the note that, as between themselves, they were to be bound to discharge the common obligation to the payee equally, each paying his equal share, would not relieve any one of them who had paid his ratable share from the equitable obligation to contribute to another of the joint makers who was compelled to pay more than his ratable share. Such a contract or understanding between the joint makers would not create a relation between them different from that which would exist by law by reason of the makers being bound by a common obligation; for, in such case, there is an implied contract that each will pay and discharge the common obligation equally. The obligation to make contribution is based upon an implied contract which exists from the date of the creation of the relation between the parties. The right is inchoate from that date. It becomes complete upon payment, but it relates back to the time the relation commenced out of which the right springs. *Nally v. Long*, 56 Md. 567; *Bragg v. Patterson*, supra; *Sexton v. Sexton*, supra. It is no defense to an action for contribution that the defendant has been released by the original creditor. *Clapp v. Rice*, 15 Gray, 557. The appellant had not performed his implied contract arising at the original creation of the joint debt. The suit for contribution was not based upon any note or judgment, but was founded upon that implied contract. Equity looks through mere forms to find the natural justice of the whole transaction. Two of the five original joint debtors being insolvent, and the appellee having been compelled to pay, in addition to his own share, the shares of these two insolvents, equity, which is equality, demanded that the debtors who were not insolvent should equally bear the burden of the shares of the insolvents so paid; that the appellant should reimburse the appellee to the extent of one-third of the amount which the latter has thus been compelled to pay in excess of his ratable share of the joint debt.

Counsel for appellee have suggested that no question as to the amount of the recovery was saved by the motion for a new trial, wherein it was assigned as cause that "the damages assessed by the court are excessive," which is the fourth statutory cause, and can be properly assigned only in cases of tort. This suggestion is supported by decisions. *Railroad Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Thomas v. Merry*, 113 Ind. 83, 91, 15 N. E. 244; *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 182, 23 N. E. 1138. The judgment is affirmed.

HENLEY, C. J., took no part in the consideration or decision of this cause.

HAAS v. CITY OF EVANSVILLE.

(Appellate Court of Indiana. June 28, 1898.)

APPEAL—REHEARING—NEW QUESTIONS.

1. After decision on the merits, a constitutional question cannot be raised on petition for rehearing for the purpose of having the cause transferred to the supreme court.

2. Questions not urged in argument will not be considered after a rehearing has been granted on other grounds.

On motion to transfer cause to the supreme court and for rehearing. Denied.

For former report, see 50 N. E. 46.

PER CURIAM. Counsel for appellant strenuously reargue the questions decided in the principal opinion. Nothing whatever is presented in the petition for a rehearing that was not fully considered by the court on the original hearing. We have again carefully considered all the questions raised by the petition, and there is nothing said in support of the petition calling for special notice. Counsel have presented no reason or authority, and we know of none, why the affirmance of the judgment rendered by the trial court should not stand. We are content with the original opinion, and adhere to the law of the case as therein declared on every material point. A motion is also presented and argued at length to transfer the case to the supreme court on the ground that a constitutional question is involved. No such question was presented, or even suggested, in the briefs on the original hearing. After a case has been argued and decided solely upon the merits, a constitutional question cannot be raised upon a petition for a rehearing for the purpose of having the case transferred to the supreme court. It is a very familiar rule that new questions will not be considered by the appellate tribunal on petition for rehearing. And it has also been held that questions not urged in argument before the decision in the cause will not be considered after a rehearing has been granted on other grounds. *Wasson v. Bank*, 107 Ind. 206, 8 N. E. 97; *Danenhoffer v. State*, 79 Ind. 75; *Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, and 37 N. E. 24; *Johnson v. Jones*, 79 Ind. 141, and cases cited; *Railway Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, and 39 N. E. 767. The petition for a rehearing and the motion to transfer are overruled.

(20 Ind. App. 491)

PENINSULAR STOVE CO. v. ELLIS et al.

(Appellate Court of Indiana. June 28, 1898.)

REPLEVIN—JUDGMENTS—SALES—FRAUD OF BUYER—SUBSEQUENT MORTGAGES—ASSIGNMENTS FOR CREDITORS.

1. A judgment for plaintiff in replevin is not warranted, where it does not appear that defendant is in possession of the goods or claiming title thereto.

2. Where an insolvent purchased goods through fraud, and mortgaged them to persons who had no notice of his fraud, for a valuable

consideration, before disaffirmance by the seller, the mortgagees acquired a good title.

3. A judgment cannot be rendered against a defendant on a count to which his demurrer has been sustained.

4. Where an insolvent purchased goods through fraud, the seller could recover against him and his assignee for the benefit of creditors for conversion, the assignee not being an innocent purchaser for value as against the seller.

5. A purchase of goods by one unable to, and not intending to, pay for them, constitutes a fraud entitling the seller to avoid the sale.

Appeal from circuit court, Steuben county; W. L. Penfield, Judge.

Action by the Peninsular Stove Company against Clark B. Ellis, as assignee of one Snyder, and others. There was a special verdict, on which judgment was entered in favor of plaintiff against defendant Snyder, and in favor of defendants Russell, Croxton, and Wickwire. From the judgment, and from an order denying a motion to modify plaintiff's judgment so as to make the same in its favor as against defendants Croxton, Russell, and Wickwire, it appeals. Reversed.

Sol. A. Wood, for appellant. Brown & Davis and Croxton & Powers, for appellees.

COMSTOCK, J. The complaint is in two paragraphs: The first in replevin; the second for conversion. The cause was put at issue, submitted to a jury, and, upon proper request, a special verdict returned.

No question is presented on the pleadings.

On the special verdict the court rendered judgment in favor of plaintiff against appellee Snyder for the possession of the property, and overruled its motions as against the other appellees, and rendered judgment in favor of defendants Russell, Croxton, and Wickwire for the return of the property, or, upon failure of plaintiff to return the property, judgment for \$231, the amount found by the jury to be the value thereof, and that they recover of the plaintiff their costs. Plaintiff moved to modify the judgment so as to make the same in its favor as against Croxton, Russell, and Wickwire, and for all costs in the cause, which motion the court overruled.

The assignment of errors challenges the action of the court in overruling the motion for judgment against the several appellees, and its motion to modify the judgment, and in rendering judgment in favor of appellees on the special verdict. The special verdict shows that appellee, at the time of ordering the goods in controversy, was, and had been for years, in business as a retail dealer in stoves and hardware; that on the 9th of April, 1894, he ordered the goods of plaintiff's agent for the purpose of selling them at retail; that they were delivered August 15th, and placed in his store as a part of his stock. On September 3, 1894, appellees Russell, Croxton, and Wickwire being among his bona fide creditors to the amount of \$2,999.03, he executed to them a chattel mortgage upon his merchandise, including stoves

purchased and received of plaintiffs, to secure said indebtedness, which was evidenced by promissory notes. When defendant Snyder purchased the goods of plaintiff, he was insolvent, and was not able and intended not to pay for them. On September 5th he made a deed of assignment, conveying all his property to appellee Ellis, assignee, for the benefit of his creditors. Ellis, assignee, was afterwards succeeded by Gates, appellee, as assignee. Snyder's indebtedness, aside from that provided for by said mortgage, was \$8,576.29. At the time said appellees Russell, Croxton, and Wickwire received said mortgage they had no knowledge or notice that said Snyder had purchased said goods with the fraudulent intent of not paying for them. Plaintiff's agent demanded of each of the defendants the goods in controversy before the commencement of this suit. It does not appear from the special verdict that there was any disaffirmance of the sale or any claim of fraud made prior to the execution of the mortgage and the deed of assignment.

By his deed of assignment for the benefit of his creditors Snyder had divested himself of all title to the property. He was not, at the time of the commencement of this action, in possession thereof, nor claiming title thereto, nor were either of the appellees, nor were they or either of them, detaining the same, so far as appears from the special verdict, and in a special verdict nothing is taken by intentment. A judgment in favor of appellant in replevin would not, therefore, have been warranted by the findings of the jury. It remains to be determined whether it was entitled to judgment for conversion.

Benjamin on Principles of Sales, at page 107, states the following to be the rule of law applicable to fraudulent sales: "When a person obtains possession of goods with the intention by the owner to transfer to him both the property and possession, although the buyer has made a false and fraudulent representation in order to effect the contract or obtain the possession, the property vests in him as buyer, without the defrauded owner has done some act to disaffirm the transaction; and the legal consequence is that if, before the disaffirmance, the fraudulent buyer has transferred either the whole or a partial interest in the goods to an innocent transferee for value, the title of said transferee is good against the defrauded owner." See authorities cited on the same page. In *Thompson v. Peck*, 115 Ind. 516, 18 N. E. 16, our supreme court, by Mitchell, J., said: "It is well settled that, even though a sale of property be induced by fraud, the contract is not void, but only voidable. The title to the property passes to the fraudulent vendee, subject to the right of the vendor, upon discovering the fraud, to elect whether he will rescind the contract by returning, or offering to return, whatever of value he may

have received, and reclaim his property, or whether he will retain the consideration, and treat the bargain as subsisting. Until the vendor makes his election, the contract continues, and the title of the property remains in the purchaser as against all the world." *Powers v. Benedict*, 88 N. Y. 605. In *Curme v. Rauh*, 100 Ind. 251, the supreme court, by Mitchell, J., says: "But where there is an absolute sale and delivery of personal property by the owner to the vendee, and the sale is merely voidable on account of fraud in the vendee, such vendee may transfer a good title by a sale made to a bona fide purchaser for value." The special verdict shows that the goods in controversy were sold to appellee Snyder to be sold by him at retail, in the ordinary course of his business, as a stove and hardware merchant; that the mortgagees had no knowledge of the facts attending the purchase of the goods, or the fraudulent intention with which they were purchased; and that the mortgage was executed to them for a valuable consideration,—money loaned after the purchase, and time of payment extended on an antecedent debt. So that, if conversion had been a fact in issue, the findings would not have established it. But the several demurrers filed by the mortgagees to the paragraph of conversion were sustained by the court, and as to them conversion was not an issue in the cause. It is clear, therefore, that it would have been error for the court to have rendered judgment against the mortgagees either in replevin or for conversion.

It remains only to determine the liability, upon the facts found by the special verdict, of the assignor and his assignee on the second paragraph of complaint. Had Snyder retained possession of the goods, and refused, upon demand, to surrender them to the seller, this sale being fraudulent, that refusal would have been a conversion. The assignee and assignor occupy the same relation with reference to the seller. A refusal upon the part of the assignor would also be a conversion. An assignee for the benefit of creditors is not a purchaser for value as against the defrauded owner. Vide *Benj. Sales*, p. 108; *Dugan v. Nichols*, 125 Mass. 43; *Nichols v. Michael*, 23 N. Y. 264; *Bussing v. Rice*, 2 Cush. 48; *Donaldson v. Farwell*, 93 U. S. 631; *Ratcliffe v. Sangston*, 18 Md. 383; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Trust Co. v. Trumbull*, 137 Ill. 146-179, 27 N. E. 24; *Farley v. Lincoln*, 51 N. H. 577; *Rogers v. Whitehouse*, 71 Me. 222; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101. The assignment was therefore, as against the seller and except as to bona fide purchasers for value, a conversion. Counsel for appellees argue that the alleged fraudulent representation, artifice, and concealments; which the jury found constituted the fraud which induced appellant to make the sale, were not such concealments or such representations as warrant the conclusion of

fraudulent intent. But the jury found as a fact, which was its province to do, that the vendee, at the time he purchased the goods, was not able to pay for them, knew that he was not able to pay for them, and intended not to pay for them. In *Benj. Sales*, p. 423, note e, it is said: "It is settled in the American courts, by a great weight of authority, that a purchase of goods by one who at the time intends not to pay for them is such a fraud as will entitle the vendor to avoid the sale, although there were no fraudulent representations or false pretenses,"—citing *Barnard v. Campbell*, 65 Barb. 236; *King v. Phillips*, 8 Bosw. 603; *Wiggin v. Day*, 9 Gray, 97; *Peters v. Hilles*, 48 Md. 506; *Thompson v. Rose*, 16 Conn. 71-81; *Talcott v. Henderson*, 31 Ohio St. 162; *Bid-ault v. Wales*, 19 Mo. 36; *Redington v. Roberts*, 25 Vt. 686; *Nichols v. Michael*, 23 N. Y. 264; and numerous other cases. So that, upon the finding alone that appellee Snyder intended not to pay for the goods, the appellant had a right of action for conversion. The special verdict is contradictory, indefinite, and uncertain. We have concluded that the ends of justice will be better subserved by a new trial than by a modification of the judgment. The judgment is therefore reversed, with instructions to the trial court to retry the cause.

(20 Ind. App. 542)

CLARK SCHOOL TP. v. HOME INSURANCE & TRUST CO.

(Appellate Court of Indiana. June 30, 1898.)

SCHOOL TOWNSHIP — LIABILITIES — TRUSTEE'S AUTHORITY.

1. While a school township would not be bound for a debt contracted by its trustee for a thing suitable and necessary, in violation of *Horner's Rev. St. 1897*, §§ 6006, 6007 (*Burns' Rev. St. 1894*, §§ 8061, 8062), which requires him to first secure an order from the county commissioners, yet, when it accepts the benefit thereof, a recovery may be had therefor.

2. By a provision of *Horner's Rev. St. 1897*, § 4444 (*Burns' Rev. St. 1894*, § 5920), that a trustee of a school township "shall have the care and management of all property, real and personal, belonging to their respective corporations for common school purposes," authority to expend a reasonable sum in insuring school property against fire may be implied.

Appeal from circuit court, Perry county; Edward Gough, Judge.

Action by Home Insurance & Trust Company against Clark school township, etc. Judgment for plaintiff, and defendant appeals. Affirmed.

Sol. H. Esarey, for appellant. Elbert Swan, for appellee.

BLACK, J. Appellee brought its action against appellant, Clark school township, of Perry county, Ind., to recover the price of a policy insuring the school township for three years against loss by fire on 20 school houses, and school furniture, fixtures, and apparatus therein, in said township, under the control,

care, and management of the trustee of said school township. There were two paragraphs of complaint: The first, to recover the price at which the policy was issued, which was alleged to be its value; the second, setting forth a warrant for said price, certified therein to be due from Clark township, payable out of the special school fund, for insurance on 20 school houses, to an agent named of the appellee, which warrant was assigned by indorsement in writing by said agent to the appellee. In each paragraph it was alleged that the appellant, by and through its trustee, applied for the insurance to said agent; that thereupon the appellee issued the policy to the appellant, and delivered it to said trustee for the appellant; that since the policy was so issued it had been, and still was, a valid and subsisting insurance on said property of the appellant; that said insurance was useful, suitable, and necessary for the benefit of the appellant, and was of the value stated as the price thereof; that it was delivered by the appellee to the appellant, and accepted by the latter, which had ever since received and retained the benefit thereof.

There was an answer in two paragraphs, the first being the general denial. A demurrer to the second paragraph of answer was sustained, and this ruling alone is assigned as error. In this paragraph it was alleged that at the time appellant incurred, or attempted to incur, said debt, "the fund to which the same was chargeable was in debt in excess of the funds on hand and of the current year's levy, and that the defendant's trustee did not post the notices in the said township that he would ask the board of commissioners of Perry county, Ind., for permission to incur said debt, nor did he ask the permission of the commissioners of said county, at any time, or for any purpose, to grant to said trustee any such privilege, but that he contracted said debt or pretended debt in express violation of the law of the state of Indiana." The appellant, by this answer, sought to base its defense upon the statute by which it is provided that "whensoever it becomes necessary for the trustee of any township in this state to incur, on behalf of his township, any debt or debts whose aggregate amount shall be in excess of the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred, such trustee shall first procure an order from the board of county commissioners of the county in which such township is situated, authorizing him to contract such indebtedness"; and "before the board of commissioners shall grant such order, the township trustee shall file, in the auditor's office of his county, a petition, setting forth therein the object for which such debt or debts are to be incurred and the approximate amount required, and shall make affidavit that he has caused notice to be given of

the pendency of such petition, by posting notices in not less than five public places in his township, at least twenty days prior to the first day of the session of said board." Horner's Rev. St. 1897, §§ 6006, 6007 (Burns' Rev. St. 1894, §§ 8081, 8082).

It has been settled that a township trustee has no power to bind his township by a contract in violation of these statutory provisions, but that when a trustee of a school township undertakes to bind the township by contracting a debt contrary to these provisions, and anything for which the trustee has authority to expend money from the special school fund has under his contract been received and retained by the school township which is beneficial to such township, there may be a recovery against the school township for the benefit so derived by it; the right to recover resting, not upon the contract, but upon the fact that the school township received and enjoyed the benefit of something suitable and necessary, which the trustee would have had authority of law, as such, to procure for the benefit of the school township, with money of its special school fund in his hands, without contracting a debt therefor. See *Boyd v. School Tp.*, 123 Ind. 1, 23 N. E. 862; *Boyd v. School Tp.*, 124 Ind. 193, 24 N. E. 661; *Killian v. State*, 15 Ind. App. 261, 43 N. E. 955; *Clinton School Tp. v. Lebanon Nat. Bank* (Ind. App.) 47 N. E. 349; *Helms v. State* (Ind. App.) 48 N. E. 264; *School Tp. v. Grossius* (Ind. App.) 50 N. E. 771.

We need not determine whether a violation of the statutory restriction was sufficiently stated in the answer, if the complaint showed a good cause of action. The demurrer searched the complaint, and a bad answer would be good enough for a bad complaint.

If the trustee of the school township had authority to expend money from the special school fund, for insurance, it must be expressed or implied in the statutes; for he is a special public agent, with restricted statutory authority. It is provided that the trustees of the several townships, etc., shall have power to levy a special tax in their respective townships, etc., "for the construction, renting or repairing of school houses, for providing furniture, school apparatus and fuel therefor, and for the payment of other necessary expenses of the school, except tuition," etc., and that the income from said tax shall be denominated the "special school revenue." Horner's Rev. St. 1897, § 4467 (Burns' Rev. St. 1894, § 5953). It is also provided that the trustees shall take charge of the educational affairs of their respective townships, etc., and build or otherwise provide suitable houses, furniture, apparatus, and other articles of educational appliances necessary for the thorough organization and efficient management of said schools, and that they "shall have the care and management of all property, real and personal, be-

longing to their respective corporations for common school purposes, except the congressional school lands," etc. Horner's Rev. St. 1897, § 4444 (Burns' Rev. St. 1894, § 5920). If the trustee has authority to purchase insurance against loss by fire, it is derived, we apprehend, under these statutes. In *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184, it was held that the trustee of a township could not render the civil township liable in an action against it by his contract which purported to be his promise as trustee of the township to pay for insurance on school houses of the township, the action not being against the school township, and the contract not purporting to be made by or on behalf of the school township. It was said that the township had no power to make a contract for the building of a school house, and that, if it had not such power, it required no argument to show that it had no power, unless specially conferred, to insure a school house. The case did not require a decision upon the question whether a school township might so contract through its trustee. We are of the opinion that, under the statutory provisions placing upon the trustee the duty of caring for and managing the school property, he has such implied authority that, in the exercise of his discretion, he may make reasonable expenditures from the special school revenue, by way of procuring insurance on such property against fire. The judgment is affirmed.

(20 Ind. App. 672)

CITY OF ALEXANDRIA et al. v. YOUNG.¹
(Appellate Court of Indiana. June 29, 1898.)

**DEFACTIVE STREETS—ACTION FOR DAMAGES—COM-
PLAINT—SPECIAL VERDICT—JUDGMENT—
EVIDENCE—NEW TRIAL.**

1. A complaint in an action for damages for personal injuries alleged the incorporation of defendant city; its contract with defendant company to construct a system of waterworks; that the company, in pursuance of that contract, dug a deep ditch across one of the traveled streets of the city; that plaintiff, while carefully passing along the street, in ignorance of the existence of the ditch, fell into it, and was injured; that the ditch was left open and unguarded; and because it was so negligently left unguarded and open in the nighttime, and without fault upon his part, he fell into the ditch, and was injured. *Held*, that plaintiff's freedom from negligence and defendant's negligence and joint liability are sufficiently set forth.

2. It is not the province of a jury, in returning a special verdict in a personal injury action, to find that one or the other party was negligent.

3. Where the facts found by a jury, and returned in a special verdict in a personal injury action, warrant the conclusion by the court that defendants were negligent, that such negligence contributed to plaintiff's injury, and that plaintiff was free from negligence, sufficient foundation for judgment against defendants is furnished.

4. In an action against a city and a company employed by it to construct a system of waterworks, for damages for an injury received by falling into a ditch dug by the company under its contract, the admission in evidence of mat-

ters of record of the proceedings of the city council relative to the construction of the waterworks, and of a bond given by the company to the waterworks company, and assigned by it to the city, is harmless.

5. In a personal injury action, evidence of declarations and complaints made by the plaintiff concerning his suffering at the time he made them is admissible.

6. A new trial will not be granted because of newly-discovered evidence where the evidence discovered would not be admissible on the trial.

Appeal from circuit court, Delaware county; George H. Koons, Judge.

Action by George W. Young against the city of Alexandria and others. From a judgment against the city of Alexandria and the Seckner Contracting Company, those defendants appeal. Affirmed.

Gregory, Silverburg & Lotz and Shannon & Rizer, for appellants. Wallingford & May, J. E. Wiley, and Leffler & Ball, for appellee.

HENLEY, C. J. The appellee was the plaintiff in the lower court, and prosecuted this action to recover damages resulting from an injury received by falling into an excavation or trench dug in a certain street in the city of Alexandria. The action was begun in the Madison circuit court, and, in addition to the appellants, one Walter Fleming and the Alexandria Waterworks were made defendants. The defendants separately demurred to the complaint, assigning as cause that the complaint did not state facts sufficient to constitute a cause of action. These demurrers were overruled, and the defendants each excepted to the ruling thereon. The defendants separately answered. These answers were each general denials, there being no other answers filed. The venue was changed to the Delaware circuit court, where there was a trial by jury, and a special verdict returned, wherein appellee's damage was assessed at \$3,000. Motions for judgment upon the special verdict were separately made by each party to the action. The motions of each of the appellants for judgment on the special verdict were overruled. The separate motions of the defendants the Alexandria Waterworks and Walter Fleming were sustained. The motion of appellee for judgment upon the special verdict against appellants was sustained. Appellants filed their joint and several motions for a new trial, which was overruled, as was also the motion in arrest of judgment. Thereupon the court rendered judgment against appellants in the sum of \$3,000. Appellants have jointly and severally assigned error as follows: (1) Error in overruling appellants' demurrer to appellee's amended complaint. (2) Error in overruling appellants' motion for judgment upon the special verdict of the jury. (3) Error in sustaining appellee's motion for judgment upon the special verdict. (4) Error in overruling appellants' motion for a new trial. (5) Error in overruling appellants' motion in arrest of judgment.

Counsel for appellants, in their argument,

¹ Rehearing denied.

first question the sufficiency of the complaint, which question was raised in the lower court by the separate demurrers of appellants directed thereto. The complaint alleges: That the Alexandria Waterworks is a duly-incorporated company under the laws of the state of Indiana. That the city of Alexandria is a duly-incorporated city under the general laws of this state. That about the 1st of July, 1895, said city of Alexandria advertised for bids for the construction of a system of waterworks for said city, and that the Seckner Contracting Company was one of the bidders for such work, and that said bid was duly accepted by the common council of said city of Alexandria. Appellant the said Seckner Contracting Company duly assented to said acceptance. That on the 13th day of August, 1895, the said city of Alexandria, by its common council, adopted an ordinance granting a franchise for the construction of said waterworks system to the Alexandria Waterworks, which waterworks were to be constructed in accordance with the plans and specifications on file in the city engineer's office. That the Alexandria Waterworks duly accepted said franchise and all of the terms of the said ordinance, and on the 15th day of August, 1895, the said Alexandria Waterworks and the appellant the Seckner Contracting Company entered into a contract whereby the Seckner Contracting Company was to construct said waterworks system, and to give its bond to the said Alexandria Waterworks for the faithful performance of such contract, and the Alexandria Waterworks did, on the 25th day of August, 1895, assign said bond to the appellant the said city of Alexandria, to secure the said city for the faithful construction of the said waterworks system in accordance with the said plans and specifications. That on or about the 1st day of September, 1895, the appellant the Seckner Contracting Company began work in the construction of the said waterworks system, and about the same time entered into a contract with one Walter Fleming, whereby said Fleming was to oversee the construction of trenches and the laying of pipes needed and required in the construction of the said waterworks system. That in the performance of the above contract the said Fleming constructed one of said trenches along and in Fairview avenue, in said city of Alexandria, and also another short trench on the arm at or near the junction of Fairview avenue and Adams street, in said city. That said short trench or arm was about 15 feet in length, and was a part of said waterworks system, and said trench, when completed, was of the depth of 6 feet and 2 inches, and of the width of about 2½ feet, and lay immediately on and across that part of said Adams street which was most used for travel by pedestrians. That said short trench or arm was left open, and wholly unguarded, on the evening and night of the 11th day of October, 1895, and that no

light or guard of any kind was placed at said short trench on said night and evening; and that appellee fell into said trench on the night of the 11th day of October, 1895, and at the time he so fell into said trench he had no notice or knowledge whatever of the construction or the existence of the same, but was at the said time lawfully pursuing his journey along said Adams street; and, the night being very dark and rainy, appellee was careful and cautious in pursuing his journey along said street at said time, and did everything to avoid an injury of any kind. That because of the said failure to have a light or guard of some kind at said trench, it having been left open and wholly unguarded, appellee had no means of knowing its location, or of guarding against falling into it, and because of said trench being so negligently left open and unguarded as aforesaid, appellee was accidentally, and without fault on his part, precipitated into said trench, wholly and entirely by the gross negligence of the defendants, and without any fault or negligence upon the part of the appellee. That the said Adams street is one of the principal streets of the said city of Alexandria, and is much traveled by the citizens of said city and by the public in general. That the appellants had notice of the excavation in time to have guarded the same before the accident occurred, and that the said city of Alexandria at all times retained the right to supervise and control the construction of said waterworks system. And that by reason of said fall and precipitation into said trench appellee was greatly injured, and permanently disabled. Appellee then specifically states in his complaint the kind and nature of the injuries sustained by him, his ability to earn money prior to said injury, and demands damages in the sum of \$15,000.

The complaint distinctly avers that appellants constructed a deep ditch across one of the traveled streets of the city, and that, in the nighttime, appellee, while carefully pursuing his way along the street, unmindful of the danger, and not knowing of such excavation, fell into the same, and received the injury for which damage is claimed. It is further averred that his said injury was caused wholly and entirely by the gross negligence of appellants; that the said trench or ditch was left open and unguarded by barriers in the nighttime, and "by means of said trench or arm being so negligently left open and unguarded by barriers in the nighttime, and by means of said trench or arm being so negligently left open and unguarded, plaintiff (appellee) was accidentally and without fault on his part precipitated into said short trench or arm." Appellants' negligence and appellee's freedom from fault are, we think, sufficiently alleged in the complaint. The allegations of the complaint also show a joint liability on the part of appellants to this appellee. *Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399.

It is next contended by counsel for appellants that the lower court erred in sustaining appellee's motion for judgment on the special verdict. The principal contention is that the verdict is insufficient to support the judgment, because there is no finding therein that the appellants were guilty of negligence, and that the words "negligence" or "negligently" nowhere appear in the verdict. "The conclusion of negligence is not for the jury where a special verdict is returned." *Board of Com'rs v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Railway Co. v. Lynch* (Ind. Sup.) 44 N. E. 997; *Railway Co. v. Roberts*, 18 Ind. App. 538, 47 N. E. 839; *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. 441; *Railway Co. v. Bush*, 101 Ind. 582; *Railway Co. v. Spencer*, 98 Ind. 186; *Railway Co. v. Burger*, 124 Ind. 275, 24 N. E. 981. The facts were placed before the court by the special verdict, and were sufficient from which the court could conclude that appellants had neglected a duty which resulted in appellee's injury, and to which injury appellee did not contribute. This was sufficient to uphold the judgment of the court.

Appellants objected to the introduction of many matters of record of the proceedings of the city council of the city of Alexandria. These proceedings all related in some manner to the construction of the waterworks plant in said city. The court also permitted appellee to introduce in evidence the bond given by appellant the Seckner Contracting Company to the Alexandria Waterworks, and assigned to the city of Alexandria. The American Surety Company was the surety on this bond. We are unable to see how appellants could have been harmed by the introduction of any of this evidence. It simply put before the court and jury all of the proceedings leading up to the actual work of constructing the waterworks plant, and its purpose was to inform the court and jury as to the relation which the various parties to this action bore to each other in such work of construction. A large part of this evidence might have been refused by the trial court because it was immaterial, and was not necessary to establish any of the essential averments of appellee's complaint, but its admission was harmless, and no reversible error can be predicated thereon.

The evidence of the witness William Houston, which is objected to by appellants, was, we think, properly admitted. This witness was permitted to testify as to the declarations and complaints of appellee made to witness in regard to appellee's suffering. It was said in the case of *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364: "Other witnesses were allowed to give the declarations and complaints of appellee to them in relation to his loss of sleep, appetite, and taste, freezing in summer time, and sufferings in other respects. These declarations and complaints were made at various times from the receiving of the injury until the bringing of

the action. They were not by way of narration of past sufferings, but had reference to the times when made. This evidence, we think, was competent and proper. For whatever appellee may have suffered mentally or physically during the period from the injury, as well as for the permanent loss of health, he is entitled to recover, if he is entitled to recover at all. And, to show the extent of the sufferings, his declarations and complaints at the time, or at any one time, are competent. How much weight should be given to such declarations is a question for the jury." See *Railway Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; 1 Greenl. Ev. § 102; *Town of Elkhart v. Ritter*, 66 Ind. 136; 1 Phil. Ev. 180, 182.

The thirty-fifth cause assigned in the motion for a new trial is based upon newly-discovered evidence, and is supported by the affidavit of a physician. In this affidavit it is made to appear that some five years prior to the happening of the accident by which appellee was injured, the said physician treated appellee for impotency, and that appellee's genital organs were at that time diseased. It is contended by appellants' counsel that this showing ought to entitle appellants to a new trial from the fact that \$1,000 is by the jury, in the special verdict, specifically allowed as compensation for injuries sustained by appellee to his genital organs, by which he became impotent. Waiving all other objections that might be made to the showing made by appellants under the cause we are considering, it is sufficient to say that the evidence of the physician as appears from the affidavit made by him, would not be competent evidence upon the trial of this cause if objected to by appellee, and we cannot presume that appellee would not protect himself, upon another trial, from the introduction of incompetent evidence. The facts found by the special verdict were all within the material and competent evidence, and under these facts we cannot say that the judgment was excessive. We find no error in the record for which the cause should be reversed. Judgment affirmed.

(20 Ind. App. 534)

TINSLEY et al. v. FRUITS.

(Appellate Court of Indiana, June 30, 1898.)

SALES—PRINCIPAL AND AGENT—WARRANTY—SUFFICIENCY OF COUNTERCLAIM—INSTRUCTIONS—ESTOPPEL.

1. In an action on notes for the price of a certain machine sold with warranty, a counterclaim averring such warranty, the failure of the machine to do the work for which it was intended, the efforts on the part of defendant to make it work, and the expenditure of certain sums of money in repairs, labor, etc., in such behalf, was sufficient on demurrer, as it contained all the essential averments of a complaint, and stated a cause of action in favor of defendant and against plaintiffs, growing out of the subject-matter alleged in the complaint, though it did not aver that such machine was worthless.

2. Plaintiffs sued on notes given for the price of a certain machine, and containing a provision that the title to such machine should remain in plaintiffs until such notes were fully paid. Defendant pleaded a counterclaim for damages for breach of warranty, on the theory that plaintiffs sold such machine as their own, and not as agents for the manufacturer, which theory was controverted by plaintiffs, who claimed that they were agents of the manufacturer, and as such negotiated the sale to defendant, and that they did not own the machine when sold. *Held*, error to instruct that the mere fact, if so found, that such sale was made by plaintiffs, whether as agents or principals, required the jury to disregard any and all evidence tending to prove that plaintiffs were not the owners of such machine at the time of such sale.

3. A provision, in notes given for the price of a chattel sold, that the title to such property should remain in the payees until such notes were fully paid, does not estop payees to deny their ownership of the property sold, in an action on such notes, as there can be no estoppel by mere inference.

4. The doctrine of estoppel has no application where no fraud, concealment, or attempt to mislead is charged.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Action by Harvey R. Tinsley and another, as co-partners, against Michael Fruits. From a judgment on a verdict in favor of defendant, plaintiffs appeal. Reversed.

M. W. Bruner, for appellants. W. P. Britton, James Wright, James M. Sellers, and Paul & Van Cleave, for appellee.

WILEY, J. Appellants were plaintiffs below, and sued appellee upon two promissory notes and a balance alleged to be due upon an account. The complaint was in three paragraphs; the first and second based upon the notes, and the third upon the account. The two notes sued on were given as part payment of a Keystone corn husker and fodder shredder, and each contained the following provision: "I further agree that the title to the No. 826 corn husker and shredder, for which this note is given, shall remain in said Tinsley & Martin's hands until this note is fully paid, unless the payees elect to make this note absolute." Appellee answered in two paragraphs, and filed a counterclaim in two paragraphs. The first paragraph of answer was a plea of payment. The second paragraph went to the first and second paragraphs of complaint. This paragraph admits the execution of the notes, and avers that before suit was brought, and without having been notified that appellants had elected to make said notes absolute, appellee tendered back to appellants said machine, and demanded the surrender of the notes sued on; that they declined to accept the same, and surrender the notes; that appellee cannot bring said machine into court on account of its great size and weight; and concludes with an offer to deliver it to appellants. The first paragraph of counterclaim averred the purchase of the machine by the appellee from appellants, that appellants warranted the

machine to do the work for which it was intended, and that it so failed to do the work. This paragraph of counterclaim then avers certain facts in regard to what appellee did to make the machine work; that he expended large sums of money in repairs, labor, etc.; and asks for judgment on account thereof. The theory of this paragraph is that appellants gave an express parol warranty of the machine, and that said warranty failed. The second paragraph of counterclaim is like the first, except it counts upon an implied warranty. Appellants addressed a demurrer to the second paragraph of answer, and the two paragraphs of counterclaim, which demurrers were overruled. Appellants replied to the second paragraph of answer and answered the first and second paragraphs of counterclaim by general denial. Trial by jury, a general verdict for appellants on the account, and for appellee on the notes. Over appellants' motion for a new trial judgment was rendered on the verdict. Overruling the motion for a new trial and the demurrers to the first and second paragraphs of counterclaim are the only errors assigned which counsel for appellants have discussed.

It is urged that neither paragraph of the counterclaim is good, because it is not averred that the machine purchased was worthless. If the same facts as stated in the counterclaim had been pleaded in an answer, appellants' objections would have been well taken, but a counterclaim does not fulfill the office of an answer. While any matter pleaded as a counterclaim must arise out of or be connected with the transaction set forth as a cause of action in the complaint, yet such facts must be sufficient to constitute an original cause of action against the plaintiff, or the pleading will be bad on demurrer, although the facts set forth might have been a good defense if pleaded by way of answer. *Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672; *Miller v. Roberts*, 106 Ind. 63, 5 N. E. 707; *Mills v. Rosenbaum*, 103 Ind. 152, 2 N. E. 313; *Standley v. Insurance Co.*, 95 Ind. 254; *Jones v. Hathaway*, 77 Ind. 14. A counterclaim, to be sufficient, must contain all the essential averments of a complaint, and must state a cause of action in favor of the defendant and against the plaintiff, growing out of the subject-matter alleged in the complaint. *Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919. We think the pleading we are now considering is sufficient, under the authorities cited.

The only remaining error assigned, which appellants have discussed, is the overruling of their motion for a new trial. There were eight reasons assigned for a new trial. The fifth cause was the giving of certain instructions tendered by the appellee. The first instruction, which appellants most earnestly contend was erroneous, is as follows: "Gentlemen of the jury, I instruct you that if you find from

the evidence in this case that on or about the 15th day of November, 1893, the plaintiffs * * * were a firm doing business under the firm name of Tinsley & Martin, and if you find that said firm * * * sold and delivered to the defendant * * * the corn husker and shredder in controversy, * * * and that Michael Fruits executed two other notes of \$100 each, at the same time, and like the notes set forth in plaintiffs' complaint, and that the plaintiffs have received payment from Michael Fruits for two of said notes and \$25 on one of the others, then I instruct you that the plaintiffs are estopped from denying that they sold said corn husker and shredder to Michael Fruits, and they are also estopped from saying that they were not the owners of said corn husker and shredder at the time of such sale; and if you find such facts to be true, then I instruct you that you should disregard any evidence that has been introduced before you tending to prove that said Tinsley & Martin were not the owners of said corn husker and shredder at the time of such sale, or tending to prove that said Tinsley & Martin did not make said sale." To apply this instruction to the facts to which it is addressed, and to correctly understand its full force and effect, it is necessary to state in brief what the record shows. It is the theory of appellants that the machine mentioned in the pleadings was sold by them to appellee, as agents of the Keystone Manufacturing Company, and that the contract of sale was in writing, and that such contract was the sole and only contract made. It is the theory of appellee, as disclosed by his counterclaim, that he purchased the machine direct from appellants upon their warranty, and that said warranty was in parol, and there had been a breach, etc. The only evidence on the question of sale and purchase, as disclosed by the record, was the testimony of the appellants and the appellee, and a written order signed by appellee, which appellants introduced in evidence. The controlling issue in the case was, who made the sale of the machine to appellee? The contention of appellants is that the sale was made by the Keystone Manufacturing Company on a written order from appellee, which was negotiated and procured by and through appellants as agents. If this was true, then appellee could not recover on his counterclaim against appellants. If we concede that the sale was made to appellee as just indicated, then, under the facts stated in the counterclaim, appellee could not recover, for the counterclaim proceeds upon the theory of the contract of purchase and sale having been made between appellants and appellee, and the express and implied warranty relied upon is based upon such sale. We fully recognize the rule that where an agent acts for his principal, and negotiates a sale under a written or verbal contract containing a warranty, the agent may also be bound by an independent contract of warranty; but that is not this case. Parties are bound by the theory upon which they try their case, and must re-

cover upon that theory or not at all. Appellee does not claim that he purchased the machine of the Keystone Manufacturing Company, through appellants as agents, and that, in addition to the warranty expressed in the contract, appellants made with him an independent express warranty, upon which they would be liable; but he rests his right of recovery upon a sale made directly to him by appellants, and their accompanying parol implied an express warranty. While the instruction is ingeniously drawn, it is not a correct exposition of the law applicable to the facts. A proper interpretation of it is a direction to the jury to disregard any evidence tending to prove that appellants were not the owners of the machine sold. The only way possible for the jury to determine that appellants sold the machine, and were the owners of it at the time, was to disregard all the evidence tending to prove that they were not the owners. What was the evidence? Appellants both testified that they were the agents of the Keystone Manufacturing Company; that as such they negotiated the sale to appellee; that the contract or order of sale was in writing; and that they did not own the machine when sold. Appellee admitted that he executed a written order for the machine, and that order was introduced and read in evidence. The order begins as follows: "Order for Keystone combined corn husker and fodder cutter." This order is dated at Crawfordsville, November 5, 1893, and is addressed to "Keystone Mfg. Co., Sterling, Ill." The formal order is as follows: "Gentlemen: Please deliver on cars at Sterling, to be shipped to me at Crawfordsville, in care of Tinsley & Martin, one No. 1 Keystone corn husker and fodder shredder," etc. The order contains an express warranty, and provides that the purchaser shall give notice in two days, if warranty fails. The order contains the following clause: "In consideration whereof the undersigned agrees to receive same on arrival, to pay freight and charges, and on delivery at depot to pay to your agents, Tinsley & Martin," etc. This order is signed by appellee, and on the back of it is a property statement signed by him. The evidence shows that the machine was shipped direct from the factory to appellee in care of appellants. He was notified of its arrival, and he went to Crawfordsville and got it. In his examination appellee admits that he did not make a contract for the machine when appellant Martin first talked about it, and fails to say that he ever made such a contract with appellants. On cross-examination appellee testified that Martin told him he was selling the machine for the Keystone Manufacturing Company. He then said: "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin." When shown the written order, he acknowledged that he gave the order, and that it was his signature. The only evidence in the entire record, upon which it was possible for the jury to determine as a fact, that the machine was the property of Tinsley & Mar-

tin was the statement of appellee: "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin." In view of all the facts in regard to the purchase and the sale, this language could have but one meaning, and that was that the negotiations between appellants and appellee, leading to the purchase of the machine by the latter, were had between Martin and appellee, and that the meaning of the expression: "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin,"—was, all oral negotiations leading up to the contract were between them. We can readily see how a jury might be misled by the expression used by appellee, and especially is this true in view of the language used in the instruction. Where a written contract is made covering the subject-matter involved, it is the rule everywhere that all oral negotiations leading up to it are merged therein, and this question is not covered by any of the instructions. The instruction under consideration tells the jury that if they find that appellants sold and delivered to appellee the machine described, they are estopped from saying that they did not see it, or that they were not the owners of it; and, if they did so find, they should disregard any evidence tending to prove that they were not the owners, etc. In this instruction the court omitted to state an essential element, and that was to explain to the jury that, if they found that appellants made the sale as agents for the Keystone Manufacturing Company, they could not regard that as a sale made by them as of their own property. The court failed to explain to the jury in any of the instructions the distinction between appellants' selling the machine as agents of the Keystone Manufacturing Company and selling it as and for themselves. The appellee having testified that he bought the machine of appellants, under this instruction the jury were evidently misled that, whether they made it as agents or principals, it would make no difference. The mere fact of the sale having been made by them, whether as agents or principals, under the instruction, excluded from the consideration of the jury all the evidence on behalf of appellants as to the facts under which they sold the machine.

Another objection to the instruction is that it seeks to invoke the principle of estoppel as against the appellants. The theory of the instruction is that, because there is a provision in the notes that the title to the property shall remain in the payees, etc., they are estopped to deny that they were not the owners when it was sold. We cannot think that such a clause in the notes precludes appellants from showing they were not the owners of the property. It is a mere inference, and there can be no estoppel by inference. *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381. It is subject to the further objection that it applies the principle of estoppel where

there is no fraud charged, where no one has been deceived or misled to his injury. It has been repeatedly held that there can be no estoppel without fraud. *Anderson v. Hubble*, 93 Ind. 570; *Pitcher v. Dove*, 99 Ind. 175; *Ward v. Insurance Co.*, 108 Ind. 301, 11 N. E. 361; *Kelley v. Fisk*, 110 Ind. 532, 11 N. E. 453; *Wisehard v. Hedrick*, 118 Ind. 341, 21 N. E. 30; *Maxon v. Lane*, 124 Ind. 592, 24 N. E. 683; *Albrecht v. Lumber Co.*, 126 Ind. 318, 26 N. E. 157. It is also a settled principle that the doctrine of estoppel can have no application where everything in relation to the transaction is equally well known to both parties. *Lash v. Rendell*, supra; *Fletcher v. Holmes*, 25 Ind. 458. Here there is no pretense that appellants concealed, or attempted to conceal, any facts from appellee in regard to the sale. Appellee gave a written order for the machine direct to the manufacturer. He was notified, and so admitted, that Martin told him they were selling it as the agents of the manufacturer. Hence the rule just announced applies, and there could be no estoppel. As the judgment must be reversed for the error in giving this instruction, the other questions presented by the motion for a new trial need not be decided, as they are not likely to arise in a subsequent trial. Judgment reversed, with instructions to the court below to sustain appellants' motion for a new trial.

(171 Mass. 478)

HILTON v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1898.)

MUNICIPAL CORPORATIONS—DEFECTS IN HIGHWAY —NEGLIGENCE—INSTRUCTIONS.

1. Under Pub. St. c. 167, in which the schedule of forms of action against a town for a defect in a highway contains an allegation of due care on the part of plaintiff, before he can recover for injury due to a defect in the street he must prove due care on his part, and, though this may be inferred from the absence of all appearance of fault, the court is not bound to charge that if plaintiff's injuries resulted from a defect in the highway, and there is no evidence of fault, the jury may infer due care, as it compelled the jury to pass on the question of the defect in the highway, even though they found want of due care on the part of plaintiff.

2. Where the evidence was direct and uncontradicted, and the only question was whether plaintiff, walking as she usually walked, looking straight ahead, on an icy sidewalk, after dark, was exercising due care, and the jury were instructed that due care was that degree which a person of ordinary prudence would exercise under the same circumstances, and that it depended on the situation, a charge that if the jury, in consideration of the circumstances attending the accident, should find no evidence of fault, due care might be inferred, was properly refused.

Exceptions from superior court, Suffolk county.

Action by Helen Hilton against the city of Boston. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

William H. Baker, for plaintiff. F. E. Hurd, for defendant.

LATHROP. J. On December 11, 1894, at 6 o'clock in the evening, the plaintiff fell upon a sidewalk and was injured. The testimony introduced on the part of the plaintiff, on the question of her due care, tended to show "that just before she fell she was walking as she usually walked, and was looking straight ahead towards Park street, the direction in which she was going." On the question whether there was a defect in the street, the evidence tended to show that there had been a snowstorm two days before the accident, and it was in dispute whether the sidewalk had been cleared, or whether a ridge of hard snow remained in the center.

The plaintiff made several requests for instructions, the fourth of which was the only one insisted upon at the argument, and it only need be considered. No exception was taken to any portion of the charge. The fourth request is as follows: "If you find that the plaintiff received the injuries complained of by reason of the defective condition of the highway in question, and if in consideration of the circumstances attending the accident, and the testimony offered in this case, you find no evidence of fault on her part, then, from the mere absence of such evidence, you may infer that she was, at the time she received the injuries complained of, in the exercise of due care." It is a well-settled rule in this commonwealth that, in order to recover for an injury on the ground of the negligence of another, the burden is upon the plaintiff to prove two propositions: First, that he was in the exercise of due care; and, secondly, that the defendant was negligent. These are two distinct propositions, and the jury must be satisfied affirmatively that the plaintiff has proved each. There are many cases in our Reports in which, although there was evidence, competent for the consideration of the jury, of the defendant's negligence, a verdict has been ordered for the defendant on the ground that the evidence did not show due care on the part of the plaintiff. These cases are so numerous that we content ourselves with citing a few of them: *Tully v. Railroad Co.*, 134 Mass. 499; *Chase v. Railroad Co.*, 167 Mass. 383, 45 N. E. 911.

The contention of the plaintiff that, if negligence on the part of a town or city is proved, less evidence is required to show care on the part of a person injured, is founded upon a doctrine which no longer exists. It was formerly considered that, in an action against a town for a defect in a way, it was unnecessary to allege that the plaintiff was in the exercise of due care. *May v. Inhabitants of Princeton*, 11 Metc. (Mass.) 442. Negligence on the part of the town was the gist of the action, and this was the main thing to be proved. The plaintiff put in evidence of his own care to negative his own negligence. As is said by Chief Justice Shaw, in the case last cited: "When a traveler on the highway has broken down, it is obvious

that this may be attributed to either one of two causes, viz. his own negligence or the defect in the highway. Proof which negatives the one tends to establish the other as the true and sole cause." But since the practice act of 1851 the schedule of forms in an action against a town for a defect in the highway contains an allegation of due care on the part of the plaintiff (St. 1851, c. 233; St. 1852, c. 312; Gen. St. c. 129; Pub. St. c. 167); and the commissioners on the statute of 1851, in their note to the form in such a case, refer to *May v. Inhabitants of Princeton*. While negligence on the part of the town is the gist of the action, the plaintiff must, since the statute of 1851, prove, as an affirmative proposition, the exercise of due care on his part.

In several cases, where the question has been whether there was evidence for the jury, it has been said that, while the burden of proof is on the plaintiff to show that he was in the exercise of due care, such care need not be proved by directly affirmative evidence; but if all the circumstances under which the injury was received were proved, and the evidence excluded fault on the part of the plaintiff, and there was nothing in the conduct of the plaintiff, either of acts or of neglect, to which the injury might be attributed, in whole or in part, due care might be inferred from the absence of all appearance of fault. *Mayo v. Railroad Co.*, 104 Mass. 137, 140; *Prentiss v. Boston*, 112 Mass. 47; *Hinckley v. Railroad Co.*, 120 Mass. 257, 262; *Smith v. Light Co.*, 129 Mass. 318; *Peverly v. Boston*, 136 Mass. 366; *Gaffney v. Brown*, 150 Mass. 479, 481, 23 N. E. 233.

While the request before us may have stated correctly an abstract proposition of law, if we omit the coupling with it of the proposition relating to the finding of a defect we are of opinion that the judge who presided in the court below was not bound to give it. It was not applicable to the case. The evidence was direct, and does not appear to have been contradicted, as to the way the plaintiff was walking. The only question was whether the plaintiff was in the exercise of due care, if she was walking as she usually walked, looking straight ahead, on an icy sidewalk, after dark. This question was submitted to the jury under instructions not objected to. "Due care" was defined to be "that kind and degree of care which a person of ordinary prudence and care would exercise in the same place, and under the same circumstances, and at the same time." The jury were also told that "due care depends upon the time, the place, the circumstances, the situation, and everything that may reasonably enter into the transaction and the proper determination of such a question as that." We think this was all that was required.

But, if this is not so, still we are of opinion that the judge was not bound to give the instruction requested. This called upon

the jury first to determine whether there was a defect in the highway, and then to infer from that and the attendant circumstances that there was no fault on the part of the plaintiff. It was within the province of the jury to find for the defendant, if, on the testimony and the attendant circumstances, they found that the plaintiff was not in the exercise of due care, without passing upon the question whether there was a defect in the highway. Exceptions overruled.

(170 Mass. 538)

KIMBALL et al. v. SWEET.

(Supreme Judicial Court of Massachusetts.
Suffolk. March 29, 1898.)

PROCESS—CROSS ACTIONS—NONRESIDENCE.

Pub. St. c. 164, § 1, provides that no personal action shall be maintained against one out of the commonwealth at the time of the service of summons, unless he has been a resident, or unless an effectual attachment is made on the original writ, except in cases in which it is otherwise specially provided. Section 2 permits an action in set-off, where an action is brought by one not an inhabitant of the commonwealth, by defendant in the first action. Section 3 allows each of several defendants in an original action to bring a cross action against the original plaintiff. Section 4 allows the writ in such a cross action to be served on the person who appears as the attorney of plaintiff in the original action. *Held*, that where the cross action was brought by two persons, only one of whom was defendant in the original action, section 4 does not apply.

Appeal from superior court, Suffolk county.

Action by James F. Kimball and another against Edward H. Sweet. From an order refusing a motion to dismiss the writ, defendant appeals. Reversed.

Freedom Hutchinson and William H. Preble, for appellant. Sherman L. Whipple, Hollis R. Bailey, and W. R. Sears, for respondents.

LATHROP, J. The question presented in this case arises on the following state of facts: Edward H. Sweet, a citizen of Rhode Island, brought an action in the superior court for the county of Suffolk against James F. Kimball, which action is still pending. In this action William H. Preble, Esq., was and is the attorney for the plaintiff. In the case now before the court the plaintiffs are James F. Kimball and Charles M. Howe, formerly co-partners, and the defendant is Edward H. Sweet, who is described in the writ as of Rhode Island. After the former decision in this case (*Kimball v. Sweet*, 168 Mass. 105, 46 N. E. 409), the plaintiffs were allowed to amend their writ by alleging that this was a cross action to the original action above described; that Mr. Preble was, and still is, attorney for Sweet; and that the demands in the two cases were of such a nature that the judgment or execution in the one case could be set off against the judgment or execution in the other. By an order of court,

service of the amended writ was had upon Mr. Preble, but no other service was made upon Sweet, nor was any attachment of his property made. Mr. Preble appeared specially for Sweet, and moved to dismiss the action for want of jurisdiction. This motion was denied, and the case is before us on the defendant's appeal.

We are of opinion that the superior court had no jurisdiction of the present action, and that it should have been dismissed upon the defendant's motion. Pub. St. c. 164, § 1, expressly provides: "No personal action shall be maintained against a person who is out of the commonwealth at the time of the service of the summons, unless he had before that time been an inhabitant of the commonwealth, or unless an effectual attachment of his goods, estate or effects is made on the original writ, except in cases in which it is otherwise specially provided." Section 2 allows an action in set-off where an action is brought by a person who is not an inhabitant of the commonwealth, by the defendant in the first action. Section 3 allows each of several defendants in the original action to bring a cross action against the original plaintiff. Section 4 allows the writ in such cross action to be served on the person who appears as the attorney of the plaintiff in the original action. Sections 1-3 clearly show that the cross action can only be between the parties to the original action. The question before us is as to the jurisdiction of the court over the defendant, and not as to the power of the court to allow a set-off where it has jurisdiction of all the parties. As the court had no jurisdiction over the defendant, the motion to dismiss the writ should have been granted, and the order overruling such motion must be reversed. So ordered.

(58 Ohio St. 616)

WEBER v. STATE.

(Supreme Court of Ohio. June 24, 1898.)

CRIMINAL LAW—SUSPENSION OF SENTENCE.

In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute, and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

On May 3, 1897, being at the April term of the court of common pleas of Franklin county, Jacob Weber, the plaintiff in error, pleaded guilty to an indictment for keeping a room for gambling; and the court sentenced him to pay a fine of \$400 and costs, and that he be confined in the county jail for the period of 10 days, and to said sentence added the following words: "But execution of the sentence to jail is hereby suspended." Afterwards, at the same term of court, on the 9th day of August, 1897, the court, on its

own motion, set aside the suspension of the execution of the sentence of imprisonment, for the reason that the said Jacob Weber had violated the conditions of said suspension by engaging in gambling, directly or indirectly, and ordered the sheriff to carry said sentence into execution, and ordered a capias to issue for that purpose. The court heard evidence, and a bill of exceptions was taken, setting out all the evidence introduced, and exception taken to the action of the court. The circuit court affirmed the proceedings of the court of common pleas, and thereupon a petition in error was filed in this court, seeking to reverse the judgments of the lower courts. Affirmed.

Cyrus Huling, for plaintiff in error.
Charles W. Voorhees, Pros. Atty., and Henry A. Williams, for the State.

PER CURIAM. The power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. The suspension, being in favor of the prisoner, is for his benefit, and is valid, whether consented to by him or not. When the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and, so long as he complies therewith, the suspension will stand. But when the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed. Cases cited by counsel are to the effect that the suspension may be set aside at a subsequent term; but this case does not require us to go to that extent, because here the suspension was set aside at the same term at which sentence was passed. Judgment affirmed.

(58 Ohio St. 637)

STATE ex rel. RENNER v. GUILBERT, State Auditor.

(Supreme Court of Ohio. June 24, 1898.)

DAIRY AND FOOD COMMISSIONER — EMPLOYMENT OF ATTORNEY.

The dairy and food commissioner has no power to employ counsel and fix their compensation, except upon the recommendation of the attorney general, and upon the written consent of the governor and auditor of state.

(Syllabus by the Court.)

Petition in mandamus by the state, on the relation of Otto J. Renner, against Walter D. Guilbert, auditor of state. Writ refused, and petition dismissed.

Otto J. Renner, an attorney, having been employed by the dairy and food commissioner, under section 4 of the act of April 12, 1898 (93 Ohio Laws, 103), and having rendered certain services under said employment, presented his bill therefor to the au-

ditor of state, and demanded a warrant on the state treasury in payment. The auditor of state refused to issue the warrant, and thereupon Mr. Renner filed his petition in mandamus in this court to compel him to issue such warrant. The auditor of state refused to issue the warrant, on the ground that Mr. Renner had not been employed upon the recommendation of the attorney general, and upon the written consent of the governor and auditor of state, as required by section 202, Rev. St., as amended April 19, 1898.

George K. Nash and J. L. Lott, for relator.
F. S. Monnett, Atty. Gen., for defendant.

PER CURIAM. By said section 4 of the act creating the office of dairy and food commissioner, such commissioner is empowered to employ such counsel as may by him be deemed necessary for the proper enforcement of the laws, the compensation to be fixed by the commissioner. But by section 202, Rev. St., as amended April 19, 1898, it is provided that "it shall not be lawful for any state board or state officer to employ any attorneys or counsel, except upon the recommendation of the attorney general, and upon the written consent of the governor and auditor of state." These two statutes are in pari materia, and should be read as one statute; and, when so read, the provision is that the dairy and food commissioner, in the employment of counsel, and fixing their compensation, must act upon the recommendation of the attorney general, and upon the written consent of the governor and auditor of state; and he has no power, without such recommendation and written consent, to employ counsel to transact any business for his department. While the attorney general is to recommend, he has no power of appointment. The power to appoint rests in the dairy and food commissioner, but such appointment must be made by him upon the recommendation of the attorney general and the written consent of the governor and auditor of state. Writ refused, and petition dismissed.

(151 Ind. 260)

STATE ex rel. HARRISON v. MENAUGH et al.¹

(Supreme Court of Indiana. July 1, 1898.)

TOWNSHIP OFFICERS—ELECTIONS—CONSTITUTIONAL LAW—HOLDING OVER TERMS OF OFFICE—TITLE OF ACT.

1. Under Const. art. 2, § 14, providing that township elections may be held at such times as may be appointed by law, Laws 1897, p. 64, changing the time of holding the election of township trustees from the general election in November, 1898, to the general election in November, 1900, and every four years thereafter, is a valid exercise of legislative power.

2. Laws 1897, p. 64, changed the time of holding an election for township trustees from the general election in November, 1898, until the general election in 1900. Const. art. 15, § 2, prohibits the legislature from extending tenure of office for more than four years. Article 15, § 3, provides that incumbents of certain offices

¹For opinion on petition for rehearing, see 51 N. E. 357.

elected for a term of years shall hold office until their successors are elected and qualified. *Held* that, though the law of 1897 did not provide for an election of town trustees between the years 1894 and 1900, the extension of the time of office of the township trustees was by virtue of the constitution, and not by the terms of the law of 1897, so as to render it unconstitutional.

3. The title of the act of February 25, 1897 (Laws 1897, p. 64), provided for the changing of the time of electing township officers. Section 1 thereof changed the time of electing township trustees, and section 2 provided that the time of holding elections of justices of the peace and constables and other officers of the township should remain unchanged. *Held* to sufficiently express the subject of the act in the title.

Hackney, C. J., and Howard, J., dissent.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Petition for mandamus, on relation of Joseph R. Harrison, against Benjamin F. Menaugh and others. From a judgment, relator appeals. Affirmed.

Marshall, McNagney & Clungston, for appellant. A. A. Adams, Hogate & Clark, C. M. McCale, W. W. Spencer, E. P. Ferris, and B. E. Gates, for appellees.

JORDAN, J. This action was instituted by the relator to obtain a writ of mandate against appellees to compel them to take the necessary steps in order that an election might be held in Columbia township, Whitley county, Ind., on the first Tuesday after the first Monday in November, 1898, for the purpose of electing a trustee for that township. Each of the appellees filed a separate demurrer to the complaint, which the court sustained; and, the relator refusing to amend, judgment was rendered against him for cost. Sustaining these several demurrers constitutes the errors assigned in this court.

The only questions raised and discussed by the parties to this appeal relate to the constitutional validity of an act of the legislature approved February 25, 1897 (Laws 1897, p. 64). The title of this statute, and the first section thereof, are as follows:

"An act providing for changing the time of electing certain township officers, fixing the time when they shall qualify and assume the duties of their respective offices, providing for separate ballots and ballot boxes, and repealing all laws and parts of laws in conflict therewith.

"Section 1. Be it enacted by the general assembly of the state of Indiana: That the time for holding the election of township trustees and assessors shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and at the general election on the first Tuesday after the first Monday in November of every fourth year thereafter. Said township trustees and assessors shall qualify as now provided by law, and enter upon the discharge

of the duties of their respective offices at the expiration of ten days after such election."

Section 2 provides that the time of holding the election of justices of the peace, constables, and other officers of the township shall remain as now fixed by law.

Section 3 declares that "the election of said township officers shall be conducted under the provisions of the law governing said general elections."

The fourth section relates to the ballots and ballot boxes to be used at the election of township officers.

The fifth section repeals all laws in conflict with the act.

It is insisted by counsel for appellant that, as this act is invalid by reason of its being repugnant to the constitution, therefore the law of 1893 (Laws 1893, p. 192; Burns' Rev. St. 1894, § 6290), whereby the time of holding the election for township officers was changed from April to the first Tuesday after the first Monday in November, 1894, and every fourth year thereafter, is still in force, and consequently the election of township trustees must be held at the November election in 1898. It will be observed that the act of 1897, *supra*, applies only to township trustees and assessors, and changes the time of the election of these officials from the general election in November, 1898, as provided for by the act of 1893, to the general election in November, 1900, and every fourth year thereafter, and further provides that these officers shall qualify and enter upon the discharge of the duties of their respective offices at the expiration of 10 days after such election. The time of electing justices of the peace, constables, and such other township officers as may be provided for by law is left unchanged, and remains as fixed by the act of 1893, *supra*. If the act of 1897 is a valid exercise of legislative power, no election of township trustees and assessors can be held by reason thereof until the general election in November, 1900, unless the legislature at its next session provides for one to be held at an earlier time.

Appellant's learned counsel challenge the constitutional validity of the law in controversy upon the ground that it extends the term of trustees elected in 1894 beyond the period of four years,—the time allotted by the constitution for the tenure of an office created by the legislature; or, in other words, they virtually contend that, as section 2 of article 15 of the constitution inhibits the general assembly from creating any office the tenure of which shall be longer than four years, by this inhibition the legislature has no power to extend the term of a township trustee beyond the period of four years, which it is contended the act of 1897, as a necessary result, does, in respect to trustees elected at the November election in 1894, and therefore it is in violation of this provision of the constitution. Counsel assert that as, under the provisions of the act in question,

the election of trustees being postponed until November, 1900, the result will be that the present incumbents will hold for two years beyond the constitutional limit. They say: "Of course, this act does not expressly appoint the present incumbents, but it does produce that result; and we contend that, in the consideration of the act, we must look to the results, and, where the results would be absolutely repugnant to the constitution, a law cannot be upheld." It is conceded that under article 2, § 14, of the constitution, the right to provide for or fix the time for holding township elections is reserved for the legislature; but the contention seems to be that this provision of the constitution contemplates that elections for township officers must at least be held once in every period of four years, and therefore the legislature has no power to enact a law like the one in dispute, which operates in changing or postponing the time for electing trustees beyond the quadrennial period.

Before reviewing the cardinal question involved, we may say that, if the objections urged by appellant against the validity of the act of 1897 can be sustained, then the effect of such holding would certainly result in striking down the act of 1893, under which the relator seeks to compel appellees to hold an election in November, 1898. Unquestionably, it can be said of the latter act that it is impressed with the same infirmities which are alleged to exist against the statute of 1897. It expressly changed or postponed the time of electing trustees and other township officers from the first Monday in April, 1894, as provided by the amendatory act of 1889 (Laws 1889, p. 425), to the time of holding the general election in November, 1894, and every fourth year thereafter, and thereby, if the argument of counsel for appellant is sound, extended the holding of the trustees elected in April, 1890, three months in excess of four years. It will be seen that trustees elected at the April election, 1890, by reason of the provision of the act approved March 9, 1889 (Laws 1889, p. 344), entered upon the discharge of their duties on the first Monday in August of that year, and the time of electing their successors was fixed by the act of 1893 on the first Tuesday after the first Monday in November, in 1894. Thus, if the reasoning of appellant can be accepted as correct, it operated to extend their term three months, at least, over or beyond the constitutional limit of four years; and, in accordance with the insistence of counsel, for this reason the act of 1893 must be condemned for violating the constitution in like manner as does the act of 1897, and, without further legislation, the law of 1889 would control, and the time for holding an election under the latter would not again occur until April, 1902. But this would not be the only result which would follow a decision of this court adverse to the validity of the

act of 1897. The act of 1898 being unconstitutional and void under appellant's contention, consequently there was no legal authority for electing township trustees and assessors at the November election in 1894, and therefore the present incumbents would not be legally entitled to hold their offices, and could be ousted therefrom, and those whom they succeeded might be, if they desired, reinstated into the offices which they, as it might be said, without authority of law, surrendered; and no doubt numerous suits would be instituted on the part of trustees and assessors elected in 1890 against present incumbents, to obtain possession of the respective offices, together with the past emoluments thereof. Passing these features of the case, however, as of no present consequence, in view of our ultimate conclusion, they being mentioned merely to show the deplorable results which would follow an adverse decision on the validity of the act in question in the event our views on the law constrained us to so decide, we proceed to consider and determine the real question in controversy between the parties.

It becomes necessary for us to refer to and examine certain provisions of the constitution which the parties to this appeal insist have a material bearing upon the decision of the questions presented. It must be remembered that, under section 1 of article 4 of the state constitution, all legislative authority is lodged in the general assembly; and, as regards this authority, that body is considered supreme and sovereign, subject to no restrictions except those which the state's constitution expressly or impliedly imposes, and the restraints of the federal constitution and the laws and treaties passed and made pursuant thereto. Aside from these inhibitions or restrictions, the legislature may be said to be unfettered in the exercise of the power with which it has been invested. This doctrine has been repeatedly affirmed in many of the decisions of this court. See *Beauchamp v. State*, 6 Blackf. 299; *Beebe v. State*, 6 Ind. 501; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Mount v. State*, 90 Ind. 29; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253; *State v. McClelland*, 138 Ind. 395, 37 N. E. 799; *Townsend v. State*, 147 Ind. 624, 47 N. E. 19.

The sole contention of appellant, as previously stated, is that the statute in question is antagonistic to the fundamental law of the state. As against this attack upon an act of the legislative department, this court must indulge all reasonable presumption in favor of its validity; and, guided by a well-settled rule, we cannot consistently declare the statute in controversy invalid unless it is clearly, palpably, and plainly shown to be violative of the constitution, so as to remove all reasonable doubts that may exist in the mind of the court in respect to its

alleged invalidity. *State v. McClelland*, supra; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469; *Townsend v. State*, supra. Being therefore required to give the benefit of all reasonable doubts in favor of the validity of the act of the lawmaking power, it is consequently incumbent upon him who assails its validity to affirmatively and clearly establish his charge to the exclusion of all such doubts. Especially must this rule prevail in view of the fact that the legislature is invested with plenary power for all purposes of civil government. Therefore an inhibition to exercise a particular power is an exception, and the burden must rest upon the party who questions the validity of a statute to show that it is forbidden. *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76, and cases cited; *State v. McClelland*, supra; *Cooley*, Const. Lim. 105.

It was well said by Chief Justice Black, in *Sharpless v. Mayor*, 21 Pa. St. 147, on page 161 of the opinion, as follows: "The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument. We become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away. If we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely." It may be true, perhaps, as counsel for appellant would seem to insist, that the great power conferred upon the legislature may be, and sometimes is, abused, but the remedy for this evil lies in an appeal to the people, who, in their sovereign capacity, can correct it, and not by appeal to the judiciary. There is no reason for assuming that the mere abuse by the legislature of its power was intended to be corrected by the courts. *Brown v. Buzan*, 24 Ind. 194; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595. If the latter should assume to protect the people against the abuse of power upon the part of their own servants or representatives, it would be the equivalent of attempting to protect the people against their own abuse. We have repeatedly affirmed that the question whether an act of the general assembly is politic, expedient, or necessary is one of legislative discretion, which is not subject to judicial review; and we have not the liberty to declare a statute void because it is not in harmony with our opinions in respect to policy, expediency, or justice. If the people are aggrieved by the action of their representatives in the general assembly, the way to redress the wrong is open to them at the next biennial election. The question in this case with which we have to deal is not whether the power to change or repeal a statute relative to the

time of the holding of township elections has been conferred upon the legislature, but whether such power has been restricted or withheld by the organic law of the state. Section 14 of article 2 of the constitution provides that "all general elections shall be held on the first Tuesday after the first Monday in November; but township elections may be held at such time as may be provided by law," etc. Section 3 of article 6 provides that "such other county and township officers as may be necessary shall be *elected or appointed* in such a manner as may be prescribed by law." (Our italics.) Section 2 of article 15 reads as follows: "When the duration of any office is not provided for by this constitution, it may be declared by law. * * * But the general assembly shall not create any office the tenure of which shall be longer than four years." The express restriction imposed by this last section is that the general assembly shall not create any office the prescribed term of which is longer than four years. Section 3 of the same article provides that "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." Tested by any or all of these provisions, and it is evident, we think, that no express or implied antagonism can be held to exist between any of them and the statute in dispute. We are of the opinion that the constitution will be searched in vain to discover any restriction against the enactment of a statute of the character or purport of the one here involved. That the creation of the office of township trustee, under our constitution, is a matter which is left wholly with the legislature, is undisputed. It may or may not, in the exercise of its discretion, create such an office; but, if it chooses to do so, the tenure prescribed cannot be in excess of four years. Within this limit, the legislature, in its discretion, may enlarge, abridge, or otherwise change the term of the office, or abolish it entirely, and repeal all laws pertaining thereto. *State v. Bell*, 116 Ind. 1, 18 N. E. 263; *State v. Bogard*, 128 Ind. 480, 27 N. E. 1113.

The electors of this state have no unalterable right to elect township trustees at the polls, for, as we have seen, the legislature, under the constitution, has the power to provide that they may be chosen by election or appointment. The constitution in no uncertain terms declares that "*township elections may be held at such time as may be prescribed by law.*" (Our italics.) The power to fix the time at which the people may elect township officers is by this provision of the constitution left entirely with the legislative department. This power is a continuing one, and surely it cannot be said

to be exhausted by being once exercised. The legislature may from time to time direct when the election shall take place. That the general assembly may, unless restricted by the constitution, amend, change, or repeal the acts of its predecessors, is a right which cannot be successfully questioned. Its power to make a reasonable change in the time of holding township elections from that fixed by a previous law is certainly a legitimate exercise of the power with which it is invested. *Wall v. State*, 23 Ind. 150; *State v. Haworth*, 122 Ind. 462, 23 N. E. 946; *Bloomer v. Stolley*, 5 McLean, 158, Fed. Cas. No. 1,559; *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778. In *State v. Haworth*, supra, it is said: "To deny power to change is to affirm that progress is impossible, and that we must move forever 'in the dim footsteps of antiquity.' But the legislative power moves in a constant stream, and is not exhausted by its exercise in any number of instances, however great." In fact, the power of the legislature to fix or change the time of electing township trustees has always been recognized, and not, to our knowledge, until now has it ever been called in question. Formerly such elections were held in April, then changed to October, then back again to April, and subsequently, by the act of 1893, to November. The power or right of the legislature to change the time of electing trustees or other township officers from the time fixed by a former law being recognized, as it must be, as a continuing and existing right or power, the mere fact that the legislature, in the exercise thereof, may deprive the electors for a reasonable time of electing successors to present incumbents, will not alone operate to render the act providing for the change unconstitutional, and thereby invalid.

Counsel for appellant seem especially to base their contention on section 2 of article 15 of the constitution, which, as we have seen, prohibits the legislature from creating any office the tenure of which shall be longer than four years, and their insistence is that this restriction will prevent the act in question from being upheld. It is manifest, we think, that this contention is wholly untenable. An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit. It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the time of holding an election for township trustees, etc., shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day "of every fourth year thereafter." The trustees and assessors elected thereunder are thereby authorized to qualify as provided by existing laws, and enter upon the discharge of their official duties at the expiration of 10 days after such

election. These provisions of the law do not appear to us to be impressed with any constitutional infirmities. The change or postponing of the time of electing these officers from the general election in 1898 to the next general election cannot be said to be so unreasonable as to render the law open to judicial condemnation on that ground; especially in view of the fact that the members of the general assembly to be elected at the coming election in November can change the time of the election to an earlier date. The act does not in any manner profess nor attempt to extend the tenure of the trustees elected in 1894, nor of those to be elected thereunder in 1900, beyond the constitutional limit of four years. If it provided that the election should be held in 1900 and every fifth or sixth year thereafter, quite a different question would be presented. The statute in question makes no reference to present incumbents. It neither pretends nor attempts to abridge or enlarge their tenure. In no sense, under its terms or provisions, can it be said to be retrospective, but is wholly prospective, and in no manner does it take into consideration the question as to the holding of any of the present incumbents of the office; and the question as to whether they will hold over under the provisions of section 3 of article 15 of the constitution, or some other provision of the law, until their successors are elected and qualified, remains, under this act, wholly intact. Consequently, if incumbent trustees are permitted to hold beyond four years, it cannot, in legal contemplation, be attributed to the provisions of the act in controversy, but will be due to the force and effect of the provision of the constitution last mentioned, which, as we have seen, provides that the prescribed tenure of any office under the constitution, or any law, other than a member of the general assembly, "*shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified.*" (Our italics.) Certainly, what results from the force and operation of the constitution itself cannot be said to be unconstitutional. There is some question, it is true, as to whether at common law an officer was entitled to hold beyond his prescribed term. But the general rule of the common law seems to be that, when the term of an office to which one is elected or appointed expires, the power of the incumbent to perform the duties thereof is terminated. *Mechem*, Pub. Off. § 396, and authorities there cited.

It is elementary that the law abhors vacancies in public offices, and great precaution is usually taken to guard against their occurrence; and courts of this country have not adhered to a strict rule, and, in the absence of some express or implied legal restriction, the officer is held to be entitled to hold his office until he is superseded by the election and qualification of another person. *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, and au-

thorities there cited; Mechem, Pub. Off. § 397; Throop, Pub. Off. § 308. It was no doubt the design of the molders of our fundamental law, by incorporating therein a provision that public officials should hold for their prescribed constitutional or statutory terms, as the case might be, and until their successors are elected and qualified, to guard against the possibility of the office becoming vacant, and the powers and duties of the incumbent being terminated, before some one had been duly selected and qualified, as provided by law, to succeed him. See *Fesler v. Brayton*, 145 Ind. 71, 77, 44 N. E. 37. In consideration of this constitutional provision, the electors of this state, when, by their ballots, they designate a person to fill a public office the tenure of which is prescribed either by the constitution or some statute, must be presumed to understand and know that the contingent holding of the officer until his successor is elected and qualified is as much a part of the term for which he is elected as is that which is expressly prescribed and fixed. *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773; *State v. Bogard*, supra. Therefore the contention of appellant that the act in question operates to continue the present incumbents in office until 1900, in opposition to the will of the people, is of no merit and without force. *Mitchell, C. J.*, speaking for the court, in *State v. Harrison*, supra, in respect to this provision of our constitution (on page 442 of the opinion, 113 Ind., and page 387, 16 N. E.), said: "It is certain, therefore, that all offices to which the above constitutional provision applies are held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of the duly elected and qualified successor attaches, as before and during such term." Continuing (on page 447 of the opinion, 113 Ind., and page 390, 16 N. E.), he said: "After the expiration of the term fixed by the general assembly, the tenure of the officer is not under or by legislative approbation or authority, but by the continuing and superior authority and approbation of the constitution." See, also, upon this point, *Commonwealth v. Hanley*, 9 Pa. St. 513.

Reliance is placed on the case of *State v. Wells*, 144 Ind. 231, 41 N. E. 461, and 43 N. E. 133, and it is cited by appellant to sustain the invalidity which he imputes to the statute in dispute. The decision in that case, however, in view of the question there involved, cannot be invoked as an authority in support of his insistence, but some of the reasoning in the opinion in that case may be said to "fight" on the side of the appellees in this appeal. It is there said: "Certainly, a change in the date of an election cannot affect the term of office to be filled. If the office becomes vacant by the change of date of filling it, the constitution makes ample provision therefor by continuing the old incumbent in office until his successor is elected and qualified." Of course, the word "va-

cant," as employed by the writer of the opinion in that case, was used in the sense or meaning of the expiration of the prescribed term of the office. The question involved in the *Wells Case* was, to an extent at least, of like character to the one in controversy in *Griebel v. State*, 111 Ind. 369, 12 N. E. 700. It was further said in the *Wells Case* that there could be no election of township trustees except at the time provided by the act of 1893. The decision in that case rests upon the validity of the act of 1893, and its effect was to affirm, impliedly at least, the validity of that statute. It is certain that a decision by this court adverse to the validity of the law of 1897 would result in uprooting the decision in the *Wells Case*, and would, as heretofore said, pave the way to ousting present incumbents, and to the reinstatement of the trustees and assessors elected at the April election in 1890.

Counsel for appellant have referred us to *People v. Bull*, 46 N. Y. 57. The decision in that case is in no manner helpful to the appellant's side of the issue in the case at bar, for the question there raised was in respect to the power of the legislature, under the constitution of the state of New York, at the expiration of the term of the incumbent of an elective office, to extend, by an express enactment, his term for three years beyond that for which he had been elected. It was therein held that it was not competent, under the constitution of that state, for the legislature to put or continue a person in office in that manner, without an election by the people. In that case, *Folger, J.*, speaking for the court, in the course of the opinion, on page 68, said: "The constitution empowers the legislature, in the clause first above quoted, to direct the times and manner of the election. It is a continuing power, and the legislature may from time to time, as it sees occasion, direct when and how the election shall take place." While it is true that the case of *People v. Bull*, supra, does in fact deny that the legislature, under the then-existing constitution of New York, had the power, by express enactment, to lengthen the tenure of the incumbent of the office, still it also affirms the constitutional right of that body to fix and change, at its discretion, the time when the charter election shall be held; and, to this extent at least, the case is an authority in support of the right of the legislature, under our constitution, to change the time of holding township elections.

A defect in the argument of appellant, to an extent at least, is that he assumes that the act of 1897 extends the term of the office of township trustees, and his assault on the validity of the law proceeds upon the ground of his assumption. The legislature of 1890 changed the time of the annual election of county and township officers, and provided for their biennial election, declaring in the act that the first election thereunder should be held on the second Tuesday in October,

1870, and on that day biennially thereafter. Laws 1869, p. 57. It is a fact well known that many of the county officers throughout the state, whose successors, in the absence of the change in the time of holding the election, would have been elected at the annual October election in 1869, held over, under the provision of the constitution, until their successors were elected, in October, 1870, and qualified, thereby holding and discharging the duties of their respective offices for a year and over beyond the tenure prescribed by the constitution. And yet we have no recollection that the validity of that act of the legislature was ever called in question on the ground that it operated to extend the term of the incumbents holding over beyond the time fixed by the constitution; and the statute stood unchallenged, we believe, until superseded by the law of 1881. Rev. St. 1881, § 4678 (Rev. St. 1894, § 6190). If the insistence of appellant in respect to the act of 1897 is correct, then it necessarily would follow that the legislature, in 1869, was powerless to change from an annual to a biennial election, and the people would have either been compelled to change the constitution, or submit forever to the extra expense of holding annual elections. For a like reason, the legislature would have been fettered and devoid of power to change township elections from April to November, as it did in the act of 1893. The mere mention of a proposition denying the right or power of the legislative department in this respect ought to suffice to expose the weakness thereof.

If it were necessary to look beyond the decisions of this court for support of the ultimate conclusion reached in this appeal, the case of *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941, is directly in point. The constitution of Ohio provides for the election of a clerk of the court of common pleas, who, as therein declared, shall hold his office for the term of three years, and until his successor is elected and qualified. The legislature of that state, in March, 1893, by an act, provided that the clerk of the court of common pleas should be elected triennially, and hold his office for three years, his term being fixed by the act to begin on the first Monday in August after his election. The contention in that case was that the act was invalid because it operated to extend the term of incumbents beyond the time fixed by the constitution. This the court denied, and sustained the validity of the law, saying, in the course of its opinion, on page 127, 51 Ohio St., and page 943, 36 N. E.: "The assumption, we think, is not warranted. The act in question does not purport to extend the term or the incumbent, nor does it in effect do that. The result of this legislation upon the incumbent depends wholly on the constitution. If, by virtue of section 16 of article 4, a vacancy is created, then the term of the incumbent is not extended. If

under that section no vacancy ensues, it is the force and effect of the constitution, and not of the statute, which extends the term." The decision of the supreme court of Missouri in *State v. McGovney*, 92 Mo. 428, 3 S. W. 867, is also in point, to sustain the right of the legislature to make changes in the times of electing public officers.

Other minor objections are made against the validity of the act, among which is that the subject-matter thereof is not sufficiently expressed in the title. There is no merit in this contention, for it is evident that, under the many decisions of this court, the title of the act is sufficient. The law does not, as insisted, attempt to fix the time of electing justices of the peace, constables, and other officers of the township; but, as previously said, it leaves the time fixed for the election of such officers unchanged.

From what we have said, and by force of the authorities cited, the conclusion must necessarily follow that, if the incumbent trustees hold and discharge the duties of their offices beyond the term of four years by reason of their successors not being elected and qualified, they will be permitted to do so under the express warrant of the constitution, and not by the act of 1897. It follows that the law in question is, and we so hold, a valid exercise of legislative power; and its validity is therefore sustained, and there can be no election of township trustees and assessors thereunder until the time therein fixed and provided. The judgment is affirmed, at the cost of the relator.

HACKNEY, C. J. (dissenting). I cannot concur in the conclusion of the majority of the court. I am fully convinced that the general assembly, by the act of 1897, exercised a right expressly denied to it by the constitution. The denial of authority is in these words: "The general assembly shall create no office the term of which shall be longer than four years." Const. art. 15, § 2. This clause has frequently and properly been held to apply to the office, and not to the officer. *Baker v. Kirk*, 33 Ind. 517; *Parmater v. State*, 102 Ind. 90, 3 N. E. 382; *State v. Barlow*, 103 Ind. 563, 3 N. E. 245; *Jones v. State*, 112 Ind. 193, 13 N. E. 416; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384; *Bell v. State*, 129 Ind. 1, 28 N. E. 302. In considering it, to avoid confusion, we must look to it as affecting the office, and not as giving or denying any right to the officer. To interpret this clause of the constitution, we are required to ascertain the intent of the people in adopting it,—the thought which they expressed. *Brewing Co. v. Claypool*, 149 Ind. 193, 48 N. E. 228. "If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it." *Prigg v. Pennsylvania*, 16 Pet. 612; *State v. Arrington*, 18 Nev. 412, 4 Pac. 735; 6 Am. & Eng. Enc. Law (2d Ed.) p. 921. "No

court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them." *Prigg v. Pennsylvania*, supra.

What, then, were the objects of the tenure clause? It is most certainly a limitation upon the power of the general assembly. It relates to office. It has reference to time, and is definite in the period prescribed: This clause, in similar form, has found its way into the constitution of several of the states, notably California, Florida, Kansas, Nevada, Oregon, and Texas. Its purpose could not have been an idle one. The framers were engaged in a more serious undertaking than in mere empty phrase-making. They were certainly providing a bar against the loss of some right to the people from the encroachment of the legislative department of the government. That right, considered with reference to the period of time named, could only have meant the right to choose their public servants at least once in four years. There was wisdom in this purpose, for it would prevent the general assembly from building up a favored class of office holders without responsibility to the people, and whose tenure would depend alone upon the perpetuity of the party controlling the assembly. This purpose would cut off that train of evils which would follow from an official class using its offices in the interest of party, and for its own perpetuity. The clause, interpreted in the light of this purpose, is wise and effective, and no other provision supplies its place. Rejecting this purpose as one of the objects of the clause, and the general assembly is left free to visit upon the people all such evils. Tenure, then, as applied to the office, must mean the period bounded by the appointments or elections to the office. In this meaning it must be assumed, it was designed that the general assembly should not violate it directly or indirectly. That, after creating the office and providing for elections once in four years (the constitutional limit), the act of 1897, postponing an election for two years, violated the constitution, seems too plain for serious difference of opinion. Can it be doubted for a moment that an act fixing the period between elections to an office of legislative creation at six years would be unconstitutional. That it would was held in the recent case of *Brewing Co. v. Claypool*, 149 Ind. 193, 48 N. E. 223. If such an act would fall, why, after creating the office and providing the full tenure, may such tenure be enlarged by a second act? Nor is there sound reason in the conclusion that, in computing the time, that which has already been occupied by legislative sanction should not be added to the new time. What difference in the result can be said to exist where six years time has been provided by one act, and where four years has been provided by one act, and another increase

such time two years? Certainly, no difference, unless the first should be void as to the whole time, and the last only as to the two years added time. Looking to the objects to be attained by the tenure clause, can we say that its purpose is satisfied when the general assembly provides a tenure of four years, places an occupant in the office, and then takes away the means of electing a new occupant at the close of the period of that tenure? By postponing the exercise of that privilege for two years beyond the four-years limit, the time bounded by the periods of electing is enlarged to six years as certainly as if the act had declared originally that elections to the office shall occur but once in six years. It is not creditable to the wisdom of the framers of the constitution to say that they intended to limit the tenure period to four years, as a limit upon the legislative authority, and, at the same time, intended that the general assembly might, by intentional jugglery or innocent oversight or misconception, so evade the provision as to render it meaningless. Nor can it be said with reason that the framers intended by one provision to create a limitation, and by another to strike it down. If one or more of the objects of the clause are defeated by the legislation, our duty is plain, and we must declare the object paramount to the will of the general assembly. It is true that the act does not expressly provide that the tenure is enlarged; but it enlarges it indirectly as certainly as if it directly provided that the tenure should be enlarged. As to the office of trustee,—indeed, as to most offices,—the general assembly has not said "the tenure shall be" so long, or "the term shall be" so long; but it has usually been provided that at a given period an election to the office shall be held, and elections thereto shall be held thereafter once in two or four years. The idea thus adopted is that tenure and periods bounded by elections are one and the same. Keeping in mind the conclusions that the tenure clause relates to the office and to the periods within which the people reserved the right to elect to such offices as the general assembly might create, it seems, inevitably, that this act has done indirectly that which could not have been done directly. Nor do we regard the fact that the effect is not permanent as controlling. If the enlargement of the tenure for two or more periods or for all periods is a violation of the constitution, it follows that the enlargement of one period is likewise a violation.

Considering the question with reference to those provisions of the constitution conferring upon the general assembly the power to create the office of trustee, and to provide the times of election (article 6, § 3; article 2, § 14), we find no support for the proposition that the tenure clause may be disregarded. These various constitutional provisions, construed as other laws or instruments, should be made to stand together, as constituting a

consistent whole, if possible. So construing them, it must be held that, while the general assembly may create the office and prescribe and change the times of electing thereto, this must be done within the limits of the expressed inhibition of the constitution. It must be done so as to not enlarge the tenure limit; so as not to deprive the people of the privilege of electing to an office of this character at least once in four years. Nor will it do to say that, in exercising the right to change the time of electing, it may become necessary or indispensable to extend the tenure. Since terms may be made of different duration, within the four-years limit, and since laws may be enacted to take effect in the future, there is no objection to a provision for a short tenure to fill the interregnum between the expiration of the discarded term and the taking effect of the new.

Considering the questions before us with reference to the hold-over clause of the constitution, I find no authority for the violation of the tenure clause. It is that "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for a given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." Const. art. 15, § 3. It is contended with much learning and ability that his provision of the constitution saves the legislation under consideration from the inhibition of the tenure clause. This provision, unlike that of the tenure clause, has reference to the officer and his right to hold the office for the term prescribed by law, and until a successor is elected and qualified. It has no reference whatever to the periods between which the people may deny the right to elect their officers. One provision has reference to the office, and not to the officer; and the other has reference to the officer, and not to the tenure of the office. It is true, as held in some of the cases, that when one is elected to an office, except that of legislator, he is elected for the prescribed term, and until a successor is elected and qualified, although that may result in a holding of more than four years; but that is neither excuse nor authority for holding that the general assembly may enlarge the four-years tenure,—may deny the people the right of choice for more than four years. The hold-over clause was designed to save the public service from embarrassment by the failure of the people to elect, or the failure of their choice, from death or other causes, to qualify and assume the duties of the service. It was not designed as authority, and is not even a reasonable pretext, for an act directly or indirectly enlarging the tenure beyond the limit of four years. Upon this construction of the hold-over clause, we have no question before us involving that provision, since we have no question of a vacancy and no question of

rival claimants to the office, and we decide nothing as to any right to hold over. The exact question here is as to whether the general assembly may by an act, directly or indirectly, enlarge the tenure of an office of its own creation beyond the period of four years. If it may do so for two years, it may do so for four years or ten years, and until some succeeding session of that body concludes to accord to the people the right guaranteed by the tenure clause to elect their officers. That there are dangers which may result from the denial to the people of the opportunity, within reasonable periods, to elect public officers, is plainly seen. That such possible dangers gave rise to the tenure clause of the constitution I have no doubt. And that the construction of that clause which I maintain is a guaranty against such dangers supplies the strongest reasons in support of that construction.

The case of *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941, relied upon by appellees, involved an act providing for the beginning of an official term after the expiration of the term of the incumbent, the right of the incumbent, under a constitutional hold-over provision, to continue in the office until the beginning of the newly-fixed term, and the claims of one elected to the office under the new law to take the office before the beginning of the term for which he was elected, namely, upon the expiration of the old term. As we have already shown, none of these questions are before us. The act there in question did not postpone or deny the right of the people to elect, and there was no question made as to the enlargement of the tenure of the office in question beyond constitutional limit. The questions there decided might be pertinent if we were called upon to decide as to the right of the incumbents of the office of trustee to hold over until a successor should be elected and qualified, but they are not pertinent to the questions before us. The case of *Christy v. Board*, 39 Cal. 1, also cited and relied upon by the appellees, involved a law postponing for two years the election of certain commissioners, the prescribed tenure of whose office was two years. Notwithstanding repeal of the law for an election at the end of the two-years term, votes were cast for successors to the incumbents. The court held that it was within the power of the general assembly to postpone the election, since the power was given to fix the times of election, but that such power must be exercised with reference to the four-years tenure clause of the constitution, which is like our own. It will be seen, therefore, that the case did not involve the tenure clause further than the repeated expressions of the court that such postponement must not exceed the limit of such clause. By the act there in question the people were not denied the right to elect commissioners within the four-years limit, but, observing the limit, the tenure was extended

to but four years. The reasoning of the court is in harmony with our conclusion. The case of *Jordan v. Baily*, 37 Minn. 174, 33 N. W. 778, is another case cited by the appellees as supporting their contention. That case involved a law postponing the time of electing for two years, the term having been four years, and the constitutional tenure limit having been seven years. The act did not reach the constitutional limit by one year, and the people were not deprived of the right to elect within the period reserved by the constitution. Anything said in these cases or others as to extending the terms of incumbents, as to vacancies, and as to holding over, we do not regard as bearing upon the question before us; and upon the question here for decision the cases are clearly distinguishable from this. I realize the full meaning of the rule that the judge should be satisfied beyond a reasonable doubt that the constitution has been violated before he should hold that the general assembly has exceeded its authority. However, it is not questioned that I have correctly interpreted the tenure clause; and I see no reasonable ground for contention that this clause is not involved before us. The inquiry must be, then, has the act violated it? To my mind there is but one answer. I am not to be deterred from giving this answer because the consequences may possibly be to continue in office the incumbents even beyond the time intended by the act. If the act is invalid, its authors must be held to account for the consequences. The constitution is the paramount law, and by it the acts of every department of the government must be tested. If I permitted this legislation to stand against the inhibition of the constitution, I should feel that I had violated that sacred law. I conclude, therefore, that the act of 1897 violates the tenure clause of the constitution, and is void.

The invalidity of that act, however, does not fully support the appellant's theory that the election should be held in November, 1898, since that theory implies the validity of the act of 1893 (Laws 1893, p. 192), which postponed the elections for trustee from April, 1894, to November, 1894, in exactly the same manner that the act of 1897 postponed the election from November, 1898, to November, 1900. Counsel for the appellees insist that the objections urged by the appellant to the act of 1897 obtain as against the act of 1893, and with this insistence we all concur. The violations of the constitution are of the same character, and differ only in degree; one being a postponement of two years, and the other of seven months, beyond the constitutional period for the tenure of said office. The theory of the petition affirmed the invalidity of the act of 1897 and the validity of the act of 1893 by seeking to require an election under it. We are therefore unable to avoid the consequences of this theory. Counsel for the appellant contend that, the people having elected under the act of 1893,

the appellees are estopped to deny its validity, and assert that this court so held with reference to the apportionment law in *Fesler v. Brayton*, 145 Ind. 71, 44 N. E. 37. In this position, I respectfully submit, counsel are in error. It is the general rule that the constitutionality of an act may be questioned at any time by any one having an interest, excepting that, where to do so, he would gain an unconscionable advantage from retaining benefits derived from such acts, and escape the liabilities therefor. An unconstitutional law is as no law; it is as waste paper. The case of *Fesler v. Brayton*, supra, was not decided upon the ground of estoppel, but was decided upon an exception to the general rule, which was that a law could not be declared in violation of the constitution when to do so would defeat the constitution itself, in abrogating the form of government declared by the constitution.

These conclusions should result in affirming the judgment of the circuit court. Whether the incumbents of the office shall hold until the regular election period in April, 1902, whether they, having been elected under an invalid law, hold de facto, as against appointees, or whether the general assembly may provide for the exigency which these invalid laws have created, it is not for us to suggest.

HOWARD, J., concurs in the foregoing.

(20 Ind. App. 589)

WHITE et al. v. SHIRK et al.

(Appellate Court of Indiana. July 1, 1898.)

MORTGAGES—FORECLOSURE SALE—DISPOSITION OF SURPLUS—RIGHTS OF JUNIOR LIENORS—EXTINGUISHMENT OF LIENS—DUTIES OF SHERIFF.

1. A complaint against a sheriff for misappropriation of a surplus arising on a sale of land under a senior mortgage averred that plaintiff was a junior incumbrancer, whose mortgage had been foreclosed, and that his claim was in the form of a sheriff's certificate of purchase; that the suit to foreclose the senior mortgage was brought subsequent to his purchase; that he was a party thereto; and that the court therein decreed that he held the next oldest lien on the land, evidenced by said certificate, and was entitled to redeem within a year. *Held*, that the averments were sufficient to raise the question of priority of liens, without setting out all the steps by which plaintiff's lien was acquired.

2. A writ under which land was sold, which stated that plaintiff held a lien thereon next in order to that under which the land was sold, is sufficient notice to the sheriff of plaintiff's rights, and no further demand is necessary to entitle plaintiff to any surplus arising on the sale.

3. A junior lien on land is not extinguished by foreclosure and sale thereunder, and a purchaser at such sale is a lienor, and entitled to any surplus arising on a subsequent sale of the property under a mortgage to which his lien is next in order of priority.

Appeal from circuit court, Tipton county; T. M. Butler, Special Judge.

Suit by Elbert H. Shirk and others against Samuel White and others. From a judg-

ment overruling a demurrer to the complaint, defendants appeal. Affirmed.

Waugh, Kemp & Waugh, for appellants.
Gifford & Coleman, for appellees.

COMSTOCK, J. Suit on sheriff's bond. Appellants severally demurred to the complaint, which demurrers the court overruled, and, appellants refusing to plead further, judgment was rendered against them on demurrer.

The only question presented by this appeal, under the assignment of errors, is the sufficiency of the complaint. The complaint, in substance, alleges that, at the dates mentioned therein, appellant White was the duly elected, qualified, and acting sheriff of Tipton county, Ind., and that his co-appellants were sureties on his official bond, which bond was in the usual statutory form; that on the 26th day of May, 1894, one John B. Reider obtained a decree of foreclosure of a mortgage executed August 23, 1893, in the Tipton circuit court, on the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 81, Tp. 23 N., range 5 E., in said county, in a certain action wherein said Reider was plaintiff, and Ell W. Cloverdale and Mary M. Cloverdale, his wife, were mortgagor defendants; that on the 26th day of August, 1895, plaintiff purchased said real estate at the sale by said sheriff under said foreclosure for the full amount of the principal, interest, and costs, paying therefor \$707, receiving from the sheriff a certificate of purchase; that on the 7th day of March, 1896, Robert, William, and John Pickens and Abraham Kemp obtained a judgment and foreclosure against said lands in the sum of \$825, in said Tipton circuit court, on a mortgage executed by said Cloverdale and wife to one Anna Openheimer, December 29, 1890. Plaintiffs were parties defendants to the foreclosure proceedings of Pickens et al. of said Openheimer mortgage, which had been sold and assigned to said Pickens et al. prior to said foreclosure, and in the decision rendered in said cause it was decreed that the claim of said plaintiffs was in the form of a sheriff's certificate, and the right of redemption decreed within the year, as against the decree in favor of said Pickens et al., which was for the sum of \$823.66 and costs. Afterwards, to wit, on the 16th day of May, 1896, said real estate was sold to satisfy the judgment and decree in favor of said Pickens et al. against Cloverdale et al., by said sheriff, said Kemp being the purchaser for \$1,163.34. At the date of the last sale referred to, said Pickens et al. had caused to be issued and placed in the hands of the said sheriff an execution on a personal judgment recovered December 14, 1893, in favor of said Robert, William, and John Pickens and Abraham Kemp against said Cloverdale. After the payment of the judgment on the Openheimer mortgage, there remained in the hands of said sheriff, derived from said sale, the

sum of \$300, which said sheriff applied to the satisfaction of the execution issued on the personal judgment in favor of Pickens et al. against said Cloverdale, and refused to apply the same upon their claim by virtue of the certificate of purchase. Plaintiffs further averred that the said land had never been redeemed from their purchase of the same on the said Reider foreclosure, and that on the said 26th day of May, 1896, plaintiffs presented the said certificate of purchase to the sheriff of said county, and received from him a deed of conveyance to the said land; that they took possession immediately thereafter, and still remain in the possession of the same; that said sheriff issued to said Kemp a certificate of purchase, and that plaintiffs, in order to protect their rights, will be compelled to redeem from said sale, paying said Kemp the full amount of his bid, together with 7 per cent. interest from the date of purchase; that there had been a breach of the conditions of said bond in the failure of the sheriff to pay the plaintiffs the sum of \$300 in his hands as sheriff, which these plaintiffs were entitled to by reason of holding the next oldest lien upon the real estate described in the plaintiffs' complaint to the one upon which the said \$300 was redeemed.

Appellants' learned counsel insist that the law does not require the sheriff to pay over said surplus to appellees upon the grounds assigned as a breach of the bond, and that a liability upon any other ground would not avail appellees. The latter part of the proposition is, of course, correct. Appellants' counsel claim that the complaint is bad because it does not state who was the owner of the land when Reider obtained his decree of foreclosure, nor who executed the mortgage, nor that a decree was issued on said judgment. The complaint states that said Cloverdale and wife were parties to the foreclosure, and that plaintiffs (appellees) became purchasers of said real estate at sheriff's sale, etc. The complaint alleges, too, as above set forth, that appellees were parties to the proceedings in which the Openheimer mortgage was foreclosed, and that the court, in the order made therein, decreed that they held the next oldest lien on said real estate, evidenced by the certificate of said sheriff, and that they had the right to redeem within the year. These averments were sufficient, without setting out all the steps by which that lien was acquired. The right to, and priority of, liens are the matters in controversy.

It is further contended that the complaint is insufficient because it does not aver that said sheriff was notified that appellees had a lien on the land to the payment of which they claim the said excess should have been applied, nor that any demand was made upon him for the money; that without said notice it was the duty of the sheriff to apply said surplus to the payment of the junior execu-

tion in his hands at the time of the sale,—citing Burns' Rev. St. 1894, § 774 (Horner's Rev. St. 1897, § 762). The writ under which he made the sale contained notice of appellees' rights as lienholders. These rights had been adjudicated, of which rights the writ informed the sheriff. It was his duty to apply the money realized from the sale upon the proper writ.

The objections, which we have been considering, to the complaint, we regard as technical, rather than meritorious. The controlling question presented by the appeal is contained in the proposition of appellants' counsel that the law did not require the sheriff to pay over said surplus to appellees. In *Clapp v. Hadley*, 141 Ind. 28, 39 N. E. 504, a party held two mortgages of different dates on the same land, given by the same person, and foreclosed them on the same day, in the same court, neither decree containing any reference to the other. He caused the land to be sold on the decree foreclosing the junior mortgage, purchased it himself, paid the costs, and receipted in full for the amount of the decree. A few days later he caused the same land to be sold on the decree foreclosing the senior mortgage, and bought in the land, but the amount of his bid exceeded the amount due him on the decree. The mortgagor claimed the surplus. The court held that the mortgagee was entitled to the surplus in an amount equal to the amount of the decree on the junior mortgage. In the course of the opinion the court says (page 30, 141 Ind., and page 505, 39 N. E.): "In the recent and well-considered case of *Robertson v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, and 29 N. E. 781, it was held that the holder of a certificate of purchase under a junior lien was not an owner, but that he was a lienor, with the judgment under which he purchased as the basis of his lien. See, also, *Jewitt v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106. We conclude, therefore, that appellant's junior lien was not extinguished, as against the appellee, though it was required to surrender priority to the senior decree and purchase. * * * If there had been other and still younger liens, their holders could not, in good conscience, have asked to supersede the appellant's junior lien in the distribution of the surplus arising from the sale under the senior lien." See, also, *Hart v. Wingart*, 83 Ill. 282; *West v. Shryer*, 29 Ind. 624.

We think the foregoing case decisive of the question before us. The sheriff misapplied the money in question by paying to one not entitled thereto. The money should have been applied to the next oldest lien. His writ informing him of the lien of appellees, no demand from them was necessary before the commencing of the suit, he having already, in violation of his official duty, made a wrong application of the money. *Clapp v. Hadley*, 141 Ind. 28, 39 N. E. 504, upon second appeal 147 Ind. 244, 46 N. E. 533. Judgment affirmed.

(20 Ind. App. 576)

LOUISVILLE & N. R. CO. v. WILLIAMS.

(Appellate Court of Indiana. July 1, 1898.)

RAILROADS—CROSSINGS—CONTRIBUTORY NEGLIGENCE—FAILURE TO GIVE SIGNALS—DAMAGES—PERMANENT INJURIES—PERIL TO LIFE.

1. In an action against a railroad company for personal injuries received at a crossing, there was evidence that the train was running 35 miles an hour, and gave no warning; that plaintiff stopped and listened 300 and 150 feet from the crossing, and heard nothing; that when within 50 feet, and as soon as she could look both ways, she did so, looking in the wrong direction first, and, when she looked in the right direction, the train was on her; that the view was obstructed by a cut up to the right of way in the direction from which the train was coming; that the wind was blowing so as to carry the noise of the train away from plaintiff; that, if plaintiff had stopped at any point between the beginning of the cut and the crossing, she could not have heard the train. After plaintiff stopped the last time, she started her horse on a trot. *Held*, that it could not be said, as a matter of law, that plaintiff was guilty of contributory negligence.

2. An instruction warned the jury that the negligence of defendant railroad company in failing to give the statutory signals at a crossing where plaintiff was injured did not excuse want of due care on the part of plaintiff. *Held*, that it was proper to further instruct that, in determining plaintiff's conduct, the jury might consider the evidence as to locality and obstructions, if there were such, and also "the failure of defendant, if that be true, to sound the whistle and ring the bell as required by statute," where there was evidence that, in approaching the crossing, the view was entirely obstructed in the direction from which the train was coming.

3. An instruction leaving it with the jury to assess damages for permanent injuries is proper, though there is no direct evidence that the injury is permanent, where there is evidence from which the jury might conclude that the injuries were of a permanent character.

4. It is proper to instruct that the jury, in estimating the damages for a physical injury sustained by plaintiff, may take into account the peril to his life at the time of the accident, where they are also told that they may assess such damages as will fairly compensate him for the injuries.

Henley, C. J., and Wiley, J., dissenting.

Appeal from circuit court, Posey county; O. M. Welborn, Judge.

Action by Nellie Williams against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gilchrist & De Bruler, for appellant. G. V. Menzies, for appellee.

ROBINSON, J. Appellee recovered a judgment for alleged personal injuries caused by appellant's negligence. The error assigned is the overruling of appellant's motion for a new trial. The only reasons for a new trial which are discussed by counsel are that the verdict is not sustained by sufficient evidence, and the giving of certain instructions and the refusal to give others requested by appellant. The jury returned a general verdict, and with it answered three interrogatories, which in no sense conflict with the

general verdict. It is earnestly argued that, on the evidence of appellee herself, she was guilty of contributory negligence in approaching the crossing. But a careful review of all her evidence and all the other evidence in the case leads us to the conclusion that we cannot say, as a matter of law, she was guilty of such negligence without weighing the evidence, and this we cannot do. What appellee says she did at the time must be taken in connection with all the other facts and circumstances in the case. The jury may have concluded from all the testimony, and could have done so, that the train was running about 35 miles an hour; that it neither sounded the whistle nor rang the bell at any time as it approached the crossing; that appellee stopped and looked and listened for a train at two different points within 300 feet of the crossing, the last about 150 feet, and saw and heard nothing either time; that when within 50 feet of the crossing, and as soon as she could look both ways, she did so; that, not knowing from which direction a train might be coming, she looked in the wrong direction first, and, when she did look in the right direction, the train was upon her; that there were obstructions, consisting of picket fence, corn, briars, weeds, and brush, partially obscuring the view in the direction from which the train was coming, after she reached the end of the cut; that the cut extended up to the right of way; that some wind was blowing in a direction which would carry the noise of the train from her as she approached the crossing; that, when a person is on the highway in this cut, it depends on how the wind is blowing whether he can hear an approaching train; that a person going down the hill into the cut in a buggy could not hear the train until the person got to the end of the cut, unless the train was down in front of the person; that a person cannot see the railroad track on the left until near the end of the cut; and that he cannot see up the railroad track until he comes out of the cut. The jury answered, in an interrogatory returned with the general verdict, that, if appellee had stopped at any point from the top of the hill to the crossing, she could not have heard the noise of the approaching train. The evidence is conflicting as to how far up the track she could see had she stopped within 50 feet of the track. The jury had the right to find the speed of the train and the speed at which appellee was going, and they did find she could have heard the noise of the train at no time. She had stopped twice on approaching the crossing. She saw no train, and heard none. Whether she should have stopped a third time, immediately before entering upon the track, is a question about which there may well be a difference of opinion. The jury answered the question by its general verdict. This court cannot take the same testimony, shorn of much of its pro-

bative effect, and decide the same question another way.

It is not the intention to go contrary to any rule laid down by the supreme and this court. It is no longer a question in this state of what the rule is, but what is its application to the particular case. In every such case submitted to a jury, the ultimate question they are called upon to decide by a general verdict, and which they do decide, and which it had been held over and over they may decide, is whether the complaining party acted as a reasonably prudent person would act under like circumstances. The jury and the trial court had, as no other tribunal can have, all the facts and circumstances placed before them, and they have answered the question in appellee's favor. That appellee did not stop the third time, and look and listen for a train, or that she started her horse in a trot after she stopped the last time, is not the decisive test. It is no more than an important and material fact to be considered by the jury in applying that which is the decisive test, namely, did appellee, under all the circumstances surrounding her at the time, act as a reasonably prudent person would have acted. Thus, in a case where the evidence tended to show that a person did not look in the direction a train was approaching, and that, if she had looked, she could have seen it in time to have avoided injury, the court said, and the doctrine is approved by the supreme court, that "the fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence; but her omission to do so was not in law decisive against a recovery." *Railway Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218. Whether she should have stopped or driven in a walk must be taken in connection with the precautions she had already taken; that she heard neither whistle, bell, nor the noise of a train; that she saw nothing and heard nothing indicating an approaching train. What she should have done under all the circumstances was a question about which reasonable men might differ. Thus, it is said: "It is plain, however, we think, that in very many cases the question as to whether a person injured at a crossing exercises ordinary care under the particular circumstances is one for the jury. The court cannot adjudge that negligence exists as a matter of law in any case, unless the facts are undisputed and the conclusions to be drawn therefrom are indisputable. The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might fairly be drawn from conceded facts." *Railway Co. v. Grames*.

136 Ind. 39, 34 N. E. 714, and cases cited; *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106; *Board v. Bonebrake*, 146 Ind. 311, 45 N. E. 470. It cannot be denied that in many cases a court may adjudge, as a matter of law, upon the undisputed facts in the case, that negligence does or does not exist. But, as is said by Judge Cooley in his work on Torts (2d Ed., p. 805), "in the great majority of cases the question of negligence on any given state of facts must be one of fact." In the case at bar it cannot be said, after a careful review of all the evidence, that the facts going to show contributory negligence are undisputed, nor can it be said that the conclusions to be drawn from these facts are indisputable. The trial court properly submitted the question to the jury, and the conclusion reached by them ought to stand.

It is well settled that there is a large class of cases where the court will say upon the undisputed facts that the injured party was guilty of contributory negligence; and it is also well settled that there is another large class of cases where the court will say that the injured party was not negligent; and it is equally well settled that between these two is another class, where different conclusions may be drawn from a certain state of facts, and it is uniformly held that this class belongs to the jury under proper instructions from the court. As has been forcibly said in *Railroad Co. v. Stout*, 17 Wall. 657: "Certain facts we may suppose to be established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain." The above language is quoted with approval in *Railroad Co. v. Collarn*, 73 Ind. 261. See, also, *Railroad Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Railroad Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31.

The eleventh reason for a new trial questions the eighth instruction given to the jury at appellee's request. This instruction is as follows: "In determining the question of plaintiff's conduct before and at the time she approached the crossing, you may consider the evidence as to the locality and obstructions, if there were such, which obstructed or interfered with plaintiff's view, or pre-

vented her from seeing an approaching train; also anything, if there was such, which interfered with her hearing the noise made by a train in motion; also the failure of defendants, if that be true, to sound the whistle and ring the bell, as required by statute." Appellant requested the court to instruct the jury that the question whether there was or was not a failure on the part of appellant's servants to blow the whistle for the highway crossing, as required by the statute, could not be considered by the jury in determining whether appellee was at the time exercising due care. The question is thus presented whether, in cases of this character, the failure to give the statutory signals can be considered in determining the question of the contributory negligence of the injured party. Upon principle, the eighth instruction is right; nor is it at variance with the adjudged cases. The court had warned the jury that the negligence of the company in failing to give the statutory signals did not excuse the want of due care on the part of appellee. The instruction must be considered as a whole. It cannot be said, as argued by appellant's learned counsel, that, under the instruction, the jury might decide that appellee was not guilty of contributory negligence because the statutory signals were not given. The instruction does not tell the jury that, if they find certain facts to exist, they would show want of contributory negligence, but they were told that, in determining the question of appellee's conduct before and at the time she approached the crossing, they might consider certain things; among others, the failure to sound the whistle and ring the bell, as required by statute. They were told in other instructions what that conduct should be in order to entitle her to recover.

In *Railway Co. v. Martin*, 82 Ind. 476, the court said: "The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of the crossing. He was misled by the defendant's negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing towards the crossing within a distance of eighty rods." In the case of *Railroad Co. v. McLin*, 82 Ind. 435, the court said: "He [the party injured] looked and listened, but could neither see nor hear an approaching train. No bell was ringing, no whistle sounding. Everything indicated the absence of danger. He had a right to know, for such is the law, that it is quite as much the duty of the appellant to give timely warning of the approach of its cars to the crossing as it was his duty to listen for such warning. He listened, but there was no warning. He looked, but no train or danger could be seen. This was all the law, under the circumstances, required. While it is true that the failure of the appellant to give warning did not relieve

the appellee's son from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not." In *Railway Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37, it is said: "In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance, and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred; and, while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet, in determining whether she did use such care, her conduct is to be judged in the light of such presumption." In *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, where the injured party entered upon the track through an open gate, the court said: "He had no right, however, to recklessly omit to use his senses of sight and hearing, and rely entirely upon this presumption; but he did have a right to presume that there were no approaching trains." In *Railroad Co. v. Boggs*, 101 Ind. 522, the doctrine is approved that if a railroad company creates an appearance of safety, and a traveler, influenced by the appearance, enters upon the track, and is injured, he may maintain an action for the injuries. In that case the court said: "We have seen that the traveler has a right to presume that the law will be obeyed, and, acting upon this presumption, he has a right to assume that the company will not move one train so close upon another as to render of no avail the provisions of the statute." In *Railway Co. v. Conoyer* (Ind. Sup.) 48 N. E. 352, the court, by Jordan, J., said: "Counsel seem to ignore the fact that the charge included, not only the sense of hearing, but that of sight as well, and, substantially and in effect, advised the jury that a person approaching a railroad crossing has the right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, under the circumstances, after having exercised due care, and employed his senses of seeing and hearing, to ascertain if a train is approaching, and thereby avoid danger, can neither see nor hear an advancing or moving train, he is justified in presuming that he can pass over the crossing in safety. This brought the instruction well within the rule asserted by the authorities. See *Railway Co. v. Martin*, 82 Ind. 476; *Miller v. Railway Co.*, 144 Ind. 323, 43 N. E. 257; *Elliott, R. R. § 1158*."

Counsel for appellant ask a reversal of the case at bar upon the authority of *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. 892. The two instructions held erroneous in that case were the second and fifth. The court, speaking of the second instruction, said: "The second instruction could have led the jury to no other conclusion, if the

view was in some way obstructed between that part of the highway over which the appellee was approaching the crossing and the railroad, and there had been a failure to sound the whistle attached to the locomotive engine, or ring the bell within eighty rods of the crossing, than that she was not guilty of contributory negligence, even though she drove upon the crossing without stopping to look and listen for an approaching train." In view of this criticism of that instruction, it was clearly unlike the instruction in the case at bar. As to the fifth instruction given in the *Howard Case*, the court said: "By the fifth instruction the jury are told that, if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, and, as a logical sequence (if it were a circumstance in that direction), the jury were told that they might find therefrom that it was sufficient to establish the fact, as it was for them to determine as to the weight of the evidence." It would be a strained construction of the language used in the instruction in the case at bar to say that the above language is applicable. Taking all the instructions set out in the *Howard Case* together, it is evident from what is there said that the court was expressly denying the theory advanced by counsel that a reliance upon the duty of the railroad company to give the statutory signals would excuse the injured party from the duty to look and listen for an approaching train before going upon the crossing. This is the view of that opinion expressed by the supreme court in the case of *Miller v. Railway Co.*, 144 Ind. 323, 43 N. E. 257. The opinion in the *Howard Case* criticises the case of *Railway Co. v. Martin*, supra, and says that it is not in harmony with the earlier cases, and is out of line with the more recent cases, and cannot be regarded as authority. No criticism is made, however, of the case of *Railroad Co. v. McLin*, 82 Ind. 435, which is a much stronger case than the *Martin Case*. In the case of *Miller v. Railway Co.*, supra. Hackney, J., speaking for the court, expresses doubt as to the entire justice and propriety of the criticism of the *Martin Case* in the *Howard Case*, and says: "We do not understand the *Martin Case*, or the *Harrington Case*, 131 Ind. 426, 30 N. E. 37, to hold that one using a highway at a crossing of a railway may do so without any care for his own safety or the safety of those using the railway, or that he may repose a blind confidence in receiving the warning signals required to be given by locomotive engineers, and pursue his course without looking or listening for the approach of trains. We have no reason to doubt the soundness of the rule in the *Harrington Case*, nor that of the *Martin Case*, so far as it announced the right of the traveler to believe that the railway company would obey the law." The doctrine laid down in the *Martin Case* was

expressly approved in the case of *Railway Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, and 38 N. E. 594. And the rule declared in *Railroad Co. v. McLin*, supra, is followed in *Railroad Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. See *Railroad Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801. In view of the authorities, the question presented by the instruction is not free from difficulty. It is not the purpose to criticize or go contrary to the rulings of the supreme court upon the question, but to follow the rules declared by that court. And as that court, in a later case, directly criticised the *Howard Case*, and at the same time has approved the doctrine in the *Martin Case*, and has also approved the doctrine of that case in other cases, and as the *McLin Case* has never been overruled, but has been cited with approval, we can but conclude that the instruction given by the trial court is in harmony with, and is sustained by, the rule as now held by the supreme court.

It is settled beyond question in this state that a person who is approaching a railroad crossing, and does not look and listen for an approaching train, but heedlessly attempts to cross the tracks because he hears no signals, is guilty of contributory negligence. The law says the company must give these signals, and it also says that the traveler must listen for them. Suppose he is in a place where he cannot see, but where the signals could be heard, and he stops and listens, and hears no signals, because none are given; his conduct under such circumstances must be that of a reasonably prudent man. If the signals were given, and he could have heard them, it is held he did hear them; and this fact must be considered in determining the question of his conduct at the time he approached the crossing. The same reasoning, equally as sound, concludes that if he listened for signals, and heard none, because none were given, that fact should be considered in determining his conduct. "The omission," says the supreme court, "is calculated to mislead the traveler, and to assure him that the coming of the train is not imminent." *Railroad Co. v. Boggs*, 101 Ind. 526; *Pierce*, R. R. 350.

It is argued that the court's instruction to the jury on the question of damages is erroneous, for the reason that it left it with the jury to assess damages for a permanent injury, when there is no evidence in the record tending to show a permanent injury, and for the further reason that the instruction told the jury they might consider the peril to appellee's life at the time of the accident, as an element of damages. There was no direct evidence that the injury is permanent, but there is evidence from which the jury could have concluded that appellee's injuries are of a permanent character. In cases of this kind it is often impossible to say whether the injury will be permanent. The jury were left to say whether the injury is tem-

porary or permanent, and, under the evidence, they could have concluded either. It was not unreasonable to say, upon the evidence, that appellee's injury would be permanent. See *Railway Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373. As to the second objection to this instruction, appellant's counsel admit that "it is true that in *Railroad Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178, a similar instruction seems to have been sustained." In the case cited, the instruction was objected to because it stated that the jury should "take into account the peril, if any there was, to plaintiff's life." The instruction in that case, as in the case at bar, told the jury that they might assess such damages as would fairly compensate the appellee for injuries. As we construe the instruction in question, it is, in effect, identical with that in the case of *Railroad Co. v. Brunker*, supra. Judgment affirmed.

HENLEY, C. J., and WILEY, J., dissent.

(171 Mass. 504)

RITCHIE v. RITCHIE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1898.)

RIGHTS OF REMAINDER-MAN.

Testatrix devised land to a devisee for life, and to his children if any he have, otherwise to his three brothers or their survivors. Devisee included the land in an assignment for creditors, and the assignee conveyed it to devisee's wife, and she conveyed to her son-in-law, who reconveyed to her, and she again conveyed to her daughter. It was thereafter sold for taxes, and her daughter and the purchaser reconveyed to her, and she claimed the fee during all the time she was in possession. Held, that devisee held subject to a contingent remainder, which was protected by Pub. St. c. 126, § 8, providing that no expectant estate shall be defeated or barred by alienation or other act of the owner of the precedent estate, nor by the destruction of such estate by disseisin, forfeiture, surrender, or merger, and that devisee's wife held simply the life estate.

Appeal from superior court, Suffolk county.

Suit by Susan D. Ritchie against Albert F. Ritchie and others to quiet title to real estate. From a decree in favor of defendants, plaintiff appeals. Affirmed.

H. P. Harrison and G. Philip Warden, for appellant. Dana B. Grove & Sons, for respondents.

LATHROP, J. Caroline J. Ritchie died seised of a parcel of land, divided into three estates, and situated on Marginal street, in that part of Boston called East Boston. By her will, dated January 3, 1885, and admitted to probate on January 30, 1888, she devised this land to her son Elliot Ritchie, "to have and to hold to him for and during the term of his natural life, he paying all taxes, insurance, and keeping the estate in good order and repair. At his death I devise said estates to any child or children that he may

leave, if any; and, if he leaves no child, then I devise said estates to his three brothers, or the survivors or survivor of them, or to the issue of any deceased brother by right of representation." The plaintiff is the wife of Elliot Ritchie, and the defendants are his three brothers. The agreed facts state that "Elliot Ritchie is supposed to be living, but is now in parts unknown." It is not stated when he went away. The plaintiff claims to own the land in fee under the following circumstances: Elliot Ritchie became an insolvent debtor in July, 1892, and assignees of his estate were duly appointed. On January 3, 1893, these assignees conveyed to the plaintiff, in her right, all their right, title, and interest in the premises; and, immediately after the conveyance, the plaintiff took possession of the premises, and has ever since collected and received the rents and profits therefrom, and has paid all taxes that have since been assessed upon said property, except for the year 1896, and has made repairs. In 1892 the three estates were sold by the tax collector of the city of Boston, on account of the nonpayment of the taxes of 1891, to one Stephen P. Weld. He conveyed two of the estates to the plaintiff on December 17, 1894, and on February 20, 1895, he conveyed the remaining estate to her. On June 20, 1893, the plaintiff conveyed the premises to her son-in-law, who reconveyed to her on July 13, 1893. On the last-named date, the plaintiff conveyed the premises to her daughter, who reconveyed the same to her mother on February 10, 1897.

It is clear that the plaintiff, by the purchase from the assignees of her husband's estate in insolvency, acquired only his life estate, with all the burdens imposed by the will, among which was the paying of taxes. It was her duty, therefore, when she acquired possession of the land to pay the taxes which had accrued, or, if the land had been sold for taxes, to redeem it. She had no right to wait until the right to redeem from the tax sales had passed, and then seek to acquire a new title by obtaining conveyances from the purchaser at the tax sales. Nor could she, by going through the form of a conveyance to her son-in-law, and afterwards to her daughter, so that she had not the record title to the premises when the conveyances were made to her by Weld, gain any better title than if she had retained title to the premises. There is nothing to show that these conveyances were made in good faith and for a valuable consideration, while it does appear that during all the time from June 20, 1893, to February 10, 1897, when the record title was in her son-in-law or in her daughter, the plaintiff was in possession of the premises, collecting the rents and profits therefrom, and paying the taxes.

The case falls within Pub. St. c. 126, § 8, which reads thus: "No expectant estate shall be defeated or barred by an alienation or other act of the owner of the precedent

estate, nor by the destruction of such precedent estate, by disseisin, forfeiture, surrender, or merger." This statute first appeared in Rev. St. c. 59, § 7, and was re-enacted in Gen. St. c. 89, § 10. By the will of Mrs. Ritchie, the defendants took remainders in the estate contingent on the death of Elliot Ritchie leaving no child. That a contingent remainder is protected by the statute is clear from the language of the commissioners' report to the legislature in 1885. If we were to draw inferences from the agreed facts, we might say that the plaintiff has been unsuccessful in her ingenious scheme to defraud the defendants. We content ourselves, however, with saying that, on the agreed facts, the judge below was clearly right in dismissing the bill. Decree affirmed.

(58 Ohio St. 577)

PICARD et al. v. HUGHEY et al.

(Supreme Court of Ohio. June 21, 1898.)

GAS COMPANY—AMENDMENT OF CHARTER—ELECTRICITY.

Where a corporation organized under the laws of this state to manufacture and furnish gas to light the streets and public and private buildings of a municipal corporation amends its charter so as to authorize it to employ for that purpose both gas and electricity in connection with gas, such additional powers should not be deemed to change substantially the original purposes of its organization, and is, therefore, authorized by section 3238a, Rev. St.

(Syllabus by the Court.)

Error to circuit court, Highland county.

Action by J. M. Hughey, as receiver of the Hillsboro Gas & Electric Light Company, a corporation, against Picard and another. A judgment was rendered holding certain bonds to be valid liens, and defendants bring error. Affirmed.

This action was begun by J. M. Hughey, as receiver of the Hillsboro Gas & Electric Light Company, a corporation organized under the laws of this state to manufacture and furnish electric lights, to sell certain real estate that belonged to the corporation, and for adjustment of liens thereon. The cause was tried in the court of common pleas, and appealed to the circuit court, where the facts were found separately from the conclusions of law, and a judgment rendered holding that certain bonds which had been issued by the Hillsboro Gas & Electric Light Company were valid liens on such real estate; whereupon the cause was brought to this court for reversal on such special finding of facts. The facts necessary to the understanding of the decision of the court will be found in the opinion.

Higgins & Horst, for plaintiffs in error. Collins & Collins, Van Deman & Chaffin and Steele & Hogsett, for defendants in error.

BRADBURY, J. Only one question will be considered in this opinion, and that question relates to the legality of the proceedings by

which the Hillsboro Gaslight Company enlarged its object and purposes so as to authorize it to manufacture and furnish electric lights. The special finding of fact discloses that in the year 1875 the Hillsboro Gaslight Company was incorporated under the laws of this state for the purpose of erecting gas works for the manufacture and sale of gas. Its capital stock was \$40,000, divided into 800 shares of \$50 each, 50 per cent. of which had been paid in, when, in 1888, the company attempted to enlarge its powers so as to permit it to manufacture and furnish electric lights in addition to gas lights. It appears that all the formal steps prescribed by statute to accomplish this purpose were correctly taken; that the charter was, in fact, amended so as to authorize the corporation to manufacture and furnish electric lights; that afterwards the name of the corporation changed from the Hillsboro Gaslight Company to the Hillsboro Gas & Electric Light Company, and the capital stock reduced from \$40,000 to \$20,000. Thereupon the directors of the new corporation, in order to secure funds for the purpose of purchasing the necessary plant, machinery, and apparatus with which to produce and furnish electric light, passed the following resolution: "Resolved, that the president of the Hillsboro Gas & Electric Light Company be, and he is hereby, authorized to issue the bonds of said company to the extent of \$14,000, in denominations of \$500 each, and all payable on the 1st day of July, 1899. Said bonds to be dated July 1, 1889, and draw interest from date at the rate of six per cent. per annum, payable semiannually, and shall be signed by the president and countersigned by the secretary of said company." And to secure the payment of these bonds the president of the company was authorized to execute, on behalf of the company, a mortgage, or deed of trust, upon the real estate, fixtures, material, privileges, and franchises of the company; and thereupon the bonds were executed, and a mortgage also executed for the purpose of securing their payment.

If, under the statutes of this state, the old company, so called, had power to amend its charter so as to authorize it to manufacture and sell electric light instead of, or in addition to, gas, the new corporation, so called, should not be regarded as a distinct entity from its predecessor, but rather as the same body, but clothed with enlarged powers and a new name. It is, however, probably immaterial to the question under consideration which view of this question of identity is adopted, for in either case, whether the new company should be regarded as distinct from the old one or a continuation of it under a new name, the validity of the bonds and mortgage in question depends upon the authority of the corporation to construct and pay for machinery and apparatus adapted to generate electricity, and to generate and sell the same for lighting purposes. If the

new concern had no power to engage in the production and sale of electric light, the bonds in question, having been issued to provide the machinery, etc., necessary to the production of electric lights, and the mortgage given to secure them, would be void, at least in the hands of those who had notice of the purpose for which the bonds were issued, unless the corporation and its stockholders should be estopped to set up this want of power. They would have been void for the reason that they were issued for a purpose which the corporation had no power to accomplish. The circuit court was of the opinion that the facts established by the evidence did raise such an estoppel, and also that the bonds, or most of them, were held for value by bona fide owners who were not chargeable with notice of want of power in the corporation to issue them. Without differing from the circuit court upon those questions, we rest the decision of this court upon the power of the corporation to make and issue the bonds in question, and to execute a mortgage on the corporate property to secure them. This, of course, depends upon the validity of the amendment made to its charter. By its original charter, authority is given to erect "gas works for the manufacture and sale of gas for the streets, and public and private buildings of the incorporated village of Hillsboro, Ohio." It is quite clear that under the powers thus given the corporation could not proceed to erect an electric light plant, and manufacture and furnish electric light to the village of Hillsboro and its inhabitants. The obvious purpose of its creation was to manufacture and sell light to that village and its inhabitants, but it chose, in the first instance, to ask the state for authority to furnish a particular kind of light, and that authority, and no other, was given. Whether at that time any other means of lighting the streets of our towns and cities were known, is not material; for, whether there was or was not, the charter of this corporation then limited its right to the production and sale of gas, and, of course, it had no power to do anything else. In the year 1888 the corporation sought to enlarge its powers by amending its charter, and to that end applied to the state for and obtained authority to produce and sell to the same village and the same inhabitants, and for the same purpose.—i. e. to light the streets, etc., of the village of Hillsboro,—a different agency, known under the name of electricity. The authority to apply for this amendment is found in section 3238a, Rev. St., which reads: "Any corporation incorporated under the general corporation laws of the state, may * * * amend its articles of incorporation so as to change its corporate name, * * * or so as to modify, enlarge or diminish the objects or purposes for which it is formed; or so as to add thereto anything omitted from, or which might lawfully have been provided

for in such articles originally; provided, however, that nothing in this supplementary section contained shall authorize a corporation, by amendment, * * * to change substantially the original purposes of its organization."

The power of amendment granted by the foregoing section is broad. The corporation may change its name or its place of business. It may enlarge or diminish the objects or purposes for which it was formed, and it may add to its articles of incorporation anything which might have been included in said articles originally. These extensive powers of amendment have only a single limitation, which is that the amendment does not change substantially the original purposes of the corporation. The right to amend its charter by adding whatever might originally have been included in the articles of incorporation is expressly given. The power of amendment in that respect, and to that extent, received direct legislative sanction. The legislative mind was immediately directed to that particular matter, and the power to accomplish that end expressly and unequivocally granted. It would seem to follow from this explicit and unambiguous grant of the right to amend the charter, so as to add what might have been originally included—that the making of such an amendment by a corporation would not in any case, in the contemplation of the legislature, substantially change the original purposes of its organization. This certainly is a reasonable construction, for surely no good reason can be assigned that would forbid the granting, by amendment, of any power that might have been originally granted. If the public welfare or convenience did not demand the exclusion of the power originally, why, or upon what principle, should they deny its being given by amendment of the charter? No sound reason has been advanced against the policy of granting to the same corporation the power to make and sell gas for the purpose of lighting public streets and places and public and private buildings, and also conferring the power to generate electricity, and apply it to the same purposes, and we can see none. Each power is but a different means to the same end. The ultimate object or purpose for which each agency is employed is to provide light. Originally the Hillsboro Gaslight Company sought to accomplish this object by means of manufactured gas. Afterwards it was discovered that this object could be in some respects more satisfactorily accomplished by electricity. We think an amendment of its charter so as to authorize it to employ for this purpose electricity is expressly authorized by that provision of section 3238a which permits any amendments that add powers which "might lawfully have been provided for in said articles originally." This court, in the case of *State v. Taylor*, 55 Ohio St. 61, 44 N. E. 513, had occasion to consider the extent to which corporate charters may

be amended under section 3238a, Rev. St. It may be observed, in passing, that the original charter of the relator in that case conferred upon it the power to employ both gas and electricity much more extensively than the amended charter of the Hillsboro Gas & Electric Light Company permitted, and yet no suggestion was made that the exercise of such powers was not authorized by our laws. In that case the corporation already had, as we have seen, power to employ both gas and electricity for producing light, etc., but sought to enlarge its powers so as to obtain the authority to operate a street railway. This court was of the opinion that the power thus sought would, if obtained, change substantially the original purpose of the corporation, and denied the right to that amendment. That conclusion, however, in no wise conflicts with the conclusions reached in this case. Judgment affirmed.

(58 Ohio St. 612)

STATE ex rel. ATTORNEY GENERAL v.
ADAMS.

(Supreme Court of Ohio. June 21, 1898.)

NOTARY PUBLIC—CONSTITUTIONAL LAW—ELIGIBILITY OF WOMAN.

The act of April 26, 1898, to amend section 110 and other sections of the Revised Statutes (93 Laws, 405), is ineffectual to render a woman eligible to the office of notary public, in view of the provisions of section 4 of article 15, and section 1 of article 5, of the constitution; the former section requiring that an officer shall be an elector, and the latter that an elector shall be a male citizen.

(Syllabus by the Court.)

Quo warranto proceedings by the state, on relation of the attorney general, against Grace A. Adams. Judgment of ouster.

The petition of the attorney general alleges that on the 4th day of March, 1898, the defendant, Miss Adams, was by the governor commissioned as a notary public for Lake county; that she then gave bond and took an official oath as prescribed by statute; that she has ever since claimed, and now claims, to be holding such office and exercising its functions; that she is usurping said office because of the invalidity of the act assuming to authorize her appointment. For the purpose of final judgment, the facts alleged in the petition are admitted to be true.

F. S. Monnett, Atty. Gen., and J. L. Lott, Asst. Atty. Gen., for plaintiff. A. G. Reynolds, John Kenney, James R. Garfield, and W. E. Fink, Jr., for respondent.

PER CURIAM. The commission was issued to Miss Adams under authority supposed to be conferred upon the governor by the act of April 26, 1898, to amend sections 110 and other sections of the Revised Statutes (93 Ohio Laws, 405). Before the amendment, the pertinent provision of this section was: "The governor may appoint and commission as notaries public as many persons

having the qualifications of electors," etc. In the amended section the phrase "having the qualifications of electors" is omitted. The amendment is ineffectual for the purpose contemplated, because section 4 of article 15 of the constitution ordains that "no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector." The qualifications of an elector are prescribed in section 1 of article 5 of the constitution, and it is required that an elector shall be a male citizen of the United States. That a notary public is an officer seems clear from the nature of his functions, as well as from the authorities upon the subject. That a notary is an officer, and that a woman is ineligible under these constitutional provisions, are propositions distinctly held in *Re Notaries Public*, 9 Colo. 628, 21 Pac. 473. That a notary is an officer is held in *Hill v. Bacon*, 43 Ill. 477, and *Opinion of Justices*, 150 Mass. 586, 23 N. E. 850. The same conclusion is implied in *Warwick v. State*, 25 Ohio St. 21, where it is held that a woman may be deputy clerk of the probate court, because the acts of such deputy are not independent, but are the acts of the principal. The contrary view is not supported by *State v. City of Cincinnati*, 19 Ohio, 178, and *State v. Board of Elections of City of Columbus*, 9 Ohio Cir. Ct. R. 134. It was held in those cases that the qualifications of an elector are not essential to the holding of positions of an official character under the school laws, because of the effect of the constitutional provisions relating especially to the subject of schools. Those cases have not sufficient breadth or strength of foundation to admit of additional superstructure. The conclusion here reached is in accord with that announced in *State v. McKinley*, 57 Ohio St. 627, 50 N. E. 1134. Judgment of ouster.

(58 Ohio St. 599)

STATE v. GARDNER.

(Supreme Court of Ohio. June 21, 1898.)

CONSTITUTIONAL LAW — REGULATION OF PUBLIC HEALTH—PLUMBERS—LICENSES—UNIFORMITY.

1. The right to labor and enjoy the rewards thereof is a natural right, which may not be unreasonably interfered with by legislation. Where, however, the pursuit concerns, in a direct manner, the public health and welfare, and is of such a character as to require a special course of study or training, or experience, to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the general assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance.

2. The business of plumbing is one which is so nearly related to the public health that it may, with propriety, be regulated by law, and reasonable regulations, tending to protect the public against the dangers of careless and inefficient work, and appropriate to that end, do not infringe any constitutional right of the citizen pursuing such calling.

3. But it is essential to the validity of an act

undertaking to regulate the business that it shall, in its requirements, operate equally.

4. That part of the act of April 21, 1896, entitled "An act to promote the public health and regulate the sanitary construction of house drainage and plumbing," which requires any plumber, whether master or employing plumber or journeyman, before engaging in the business, to undergo an examination as to fitness, and obtain a license, but permits all members of a firm to pursue the business where one only has procured such license, and all members of a corporation to pursue it where the manager only has procured such license, does not operate equally upon all of a class pursuing the calling under like circumstances, and is invalid.

(Syllabus by the Court.)

Exceptions from court of common pleas, Summit county.

John M. Gardner was convicted of engaging in the business of plumbing without having secured a license. The judgment was reversed, and the state excepts. Overruled.

May 27, 1897, John M. Gardner was convicted, before the mayor of Akron, Summit county, of a violation of the act of April 21, 1896, entitled "An act to promote the public health and regulate the sanitary construction of house drainage and plumbing" (92 Ohio Laws, p. 263), and sentenced to pay fine and costs. It was shown by the agreed statement of facts that for two years Gardner had been a master plumber, and that for ten years prior thereto had been a journeyman; that he was skilled and competent; that all that time he worked at the trade and was still working; that on May 7, 1897, he was engaged in that business at Akron, as an individual; that he was not a member of any firm or co-partnership or corporation; that on that day he put in a certain sink, sewer, and water connection in Akron; and that at the time he had not procured a license therefor from the board of health of said city. Exceptions having been taken by Gardner to the sentence and judgment of the mayor, the same were presented to the court of common pleas of Summit county, the Honorable Jacob A. Kohler presiding, at the October term, 1897, and, on consideration, that court reversed the judgment of the mayor, holding the act on which the charge was founded to be unconstitutional, and discharged the defendant. To this ruling the prosecuting attorney duly excepted, and, on leave, filed his bill of exceptions in this court for its decision upon the points presented, and to establish the law in any similar case.

R. M. Wanamaker, for plaintiff. Musser & Kohler, for defendant.

SPEAR, C. J. (after stating the facts). The first section of the act in question requires that every person, firm, or corporation, engaged in the business of plumbing, either as master or employing plumber or journeyman, shall first secure a license. The second section requires that any person desiring to engage in or work at the business of plumber shall apply to the president of the

board of health or other officer having jurisdiction in the locality where he intends to engage in, or work at, such business, and be examined as to his qualifications. But "in case of a firm, or corporation, the examination and licensing of any one member of such firm, or the manager of such corporation, shall satisfy the requirements of this act." Section 3 provides that in every city, and in each town having a system of water supply or sewerage, there shall be a board of examiners consisting of the president of the board of health, the inspector of buildings, if any there be, and three practical plumbers. In localities where the required number of plumbers cannot be secured, such vacancy can be filled by the appointment of reputable physicians. The members shall be appointed by the board of health, and, if there be no such board, then by the health officer. If there be no inspector of buildings, then a practical plumber shall be added. Section 4 directs as to time, etc., of examinations, and that "the board shall examine said applicants as to their practical knowledge of plumbing, house-draining and plumbing ventilation, and if satisfied of the competency of the applicant, shall verify to the board of health." The board is then to issue a license. The fee for a master or employing plumber is to be five dollars and a journeyman one dollar, to be renewed annually. Section 5 provides for the appointment by the board of health of one or more inspectors of plumbing, who shall be practical plumbers, their term of office, their compensation, and their duties. The sixth section requires the board of health to prescribe rules and regulations for the construction, alteration, and inspection of plumbing and sewerage placed in or in connection with any buildings, subject to approval by ordinance of the council, and the board shall further provide that no plumbing work shall be done, except in case of repairs or leaks, without a permit. Section 7 prescribes punishment, of a fine from five to fifty dollars, for any violation, and that the license may be revoked for incompetency, etc., after hearing before the board, subject to appeal to the state board of health. All money derived from examinations shall go to the board of health.

Applying to the case the general presumption that the acts of the general assembly are to be held valid unless the contrary clearly appears, the natural order of inquiry leads to a consideration of the objections urged against this act. Two are deemed worthy of special notice: First, that the statute deprives of liberty and property without due process of law, and that it unreasonably interferes with the natural right of the individual to labor and enjoy the fruits thereof; second, that the statute discriminates against the individual in favor of firms and corporations, and thus imposes unequal burdens upon persons of the same class.

1. Does the act unreasonably interfere with

the right to labor? That the right to labor and enjoy its fruits is a natural right, which may not be unreasonably interfered with, is, we presume, not denied by any one. But it is equally well settled that it is one of the rights which may, under some circumstances, be subject to reasonable regulation. This principle finds examples in our laws termed "Sunday Laws," in those acts which regulate apprenticeships, the employment of children in factories and in theatrical and other exhibitions, and in a number of other instances which will readily occur. The acts referred to fall within the exercise of the police power of the state; that power, conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure or tend to the comfort, health, or protection of the community. Further examples of its exercise are found in the laws which require study and examination before one is permitted to practice law, or medicine, or engage in the occupation of a dentist or a pharmacist. If, then, the regulation of the business of plumbing, and the performance of the work of a plumber, may naturally be expected to promote the health of a community, or relieve of dangers to health which otherwise might follow its careless exercise, and the legislation be appropriate to accomplish the object sought, it cannot be said that such regulation interferes with a natural right or unreasonably prevents its exercise.

We are aware that an opinion prevails in some quarters, and has found expression in judicial utterances, that the pursuit of plumbing is a mere trade, which may be easily mastered by any one possessed of ordinary intelligence; that the plumber is not, nor is he expected to be, an expert in the science of sanitation; and hence his work cannot have such relation to the public health as to justify its regulation.

True it is that the business of the plumber is not ranked with the learned professions, and that much of his work is mechanical merely, calling for the exercise of deftness of the hands rather than the possession of scientific knowledge. Yet a certain degree of training and experience is absolutely necessary to render one intelligent as to the groundwork of his calling as well as competent and skillful in its exercise. He is required to put into our dwellings and public buildings tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage, which require, among other essentials, the keeping out and protection against gases which are destructive of health, and not infrequently of life itself. That it is of the highest importance that the drainage and sewerage of our public buildings and private tenements should be as skillfully planned and executed as the modern standard of science admits would seem not to be open to question. And surely it is reasonable to sup-

pose that one who has been educated to understand the scientific principle necessarily involved in work of this character, and to comprehend the reasons and teachings of experience upon which it is based, and the evil results which may follow neglect to observe it, will be more likely to provide the needful safeguards than one who is ignorant upon the subject. It is conceded by those who doubt the power as well as the propriety of regulation of the work itself that the legislature has power to provide for a careful sanitary inspection of plumbing work, and in this way secure a result, as to its system and sufficiency, which will tend towards the protection of the health of the general public. But it is difficult to perceive a reason for the exercise of the power last referred to which does not as well apply to the other, for, if it be wise to devise means by which a good result may be obtained by careful inspection, it would seem clear that methods which are calculated to reduce the hazards of careless inspection would tend in the same direction. And defects revealed by inspection would, it would seem, be more likely to be remedied if the hands which should be called upon to do the work of correction were guided by minds trained in the science of the business as well as skilled in the mere manipulation of the tools. The question really is, does the requirement of examination as to the fitness reasonably tend to accomplish the object,—is it appropriate to that end? Not, necessarily, does it fully accomplish it? nor, does it make further care in the same direction unnecessary? We think it does so tend and is appropriate to the purpose, and that, therefore, the act does not unreasonably interfere with the right to labor. It is not here contended that the same high qualifications as to scientific acquirement should be required of the journeyman, one whose principal work is manual, as is required of the master plumber, the one who makes the plans and specifications for the work, and passes judgment upon the strength, durability, and quality of the material and the devices for perfect work; nor does that seem to be the import of the act, especially when it is noted that the fee for license charged is in the one case one dollar and in the other five. If the examination be sufficiently searching to show that the journeyman understands the principles governing his trade, and is sufficiently skillful to be able to produce good results, that would seem to satisfy the scope of this act.

This conclusion finds support in the case of *People v. Warden City Prison*, 144 N. Y. 529, 39 N. E. 686, and is distinctly sustained in *Singer v. State*, 72 Md. 464, 19 Atl. 1044, where it is held that an act which provides that no person shall engage in the business of plumbing, unless such person shall have received from the state board of commissioners of practical plumbing a certificate as to his competency and qualification, and

providing a penalty for violation, does not violate, in any sense, the constitutional rights of the workman, but is but the ordinary exercise of the police power of the state. See, also, *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; and *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231.

2. But a graver objection inheres in the claim that the act imposes unequal burdens upon those of the same class. It will be recalled that the first section requires that all who engage in the business of plumbing, whether master or employing plumber or journeyman, shall first secure a license, and that section 2 provides that, in case of a firm or corporation, the examination and licensing of any one member of such firm, or the manager of the corporation, shall satisfy the requirements of the act; that is, a journeyman, for whomever he works, must have a license, and an employing plumber, if not a member of a firm or a corporation, may not pursue the calling without a license. But a master or employing plumber, if he be a member of a firm another member of which has procured a license, is exempt, although he may be one who has, as a journeyman, applied for a license and failed for incompetency. So, too, in case of a corporation, if the manager is licensed, other members of the corporation may work without a license, without reference to their competency.

Our bill of rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and section 26 of article 2 of the constitution requires that all laws of a general nature shall have a uniform operation throughout the state. A statute, therefore, which imposes special restrictions or burdens on, or grants special privileges, to persons engaged in the same business, under the same circumstances, cannot be sustained, because it is in contravention of the equal right which all are entitled to in the enforcement of laws and in the enjoyment of liberty, and in the enjoyment of an equal right in the acquisition and possession of property, and so is not of uniform operation.

The constitutional objection to this statute is that it operates unequally, in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class, pursuing the same business, in the same way. It is contended that the act permits firms and corporations to employ such journeymen as they may choose, whether they be licensed or not, but we are not impressed that it will bear this construction. It is further suggested that the act does not prohibit the do-

ing of plumbing work wholly by apprentices. If it is open to this construction, an additional reason is thus offered for holding it invalid, but the spirit of the act would not, we think, permit this.

Objection is made to the composition of the examining board, on the ground that one who has been appointed a member of the board, although possibly inexperienced and incompetent, may, without any test whatever, continue his occupation. We deem it enough to say, as to this, that the act does not so provide. It would be possible, of course, that one appointed on the board might meet with greater favor from his fellows in his examination than another, but this possibility would not render the act itself invalid. It also might seem, at first blush, that the appointment of a board to examine others as to fitness and qualifications, the members of which may not have themselves been examined as to their qualifications, is a trifle incongruous. It is possible that the law in this respect might be improved. Yet there must be a start somewhere along the line, and the objection goes to the efficiency of the service rather than to the power of the legislature to authorize the method. Believing that the act does discriminate unjustly between persons in the same calling, we agree with the conclusion of the learned judge of the court of common pleas, and, for the reasons stated, the exceptions are overruled.

(151 Ind. 94)

STATE ex rel. MOORE v. BURGETT, County Auditor, et al.¹

(Supreme Court of Indiana. July 1, 1898.)

APPEAL—EFFECT—RECORD—REVIEW—RAILROADS—COUNTY AID—MANDAMUS.

1. An appeal to the circuit court from a judgment of county commissioners canceling aid voted to a railroad company, as provided by Burns' Rev. St. 1894, § 5369 (Horner's Rev. St. 1897, § 4069), vacates such decision.

2. In a mandamus case, wherein the application is based on a judgment of a circuit court, the supreme court will not consider any more of the record of the judgment than appears in the application and alternative writ, even though the judgment has been reviewed by the supreme court in a former appeal.

3. In an application for mandamus to compel the auditor and treasurer of a county to perform certain duties in the collection of a railroad aid tax which has been suspended, based on a final judgment of a circuit court determining the liability of the county to the tax, a demurrer would lie where it was alleged that the court rendered judgment only that the board of county commissioners should enter on its records an order requiring that said tax be immediately collected, and it was not alleged that the board ever entered such order.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by the state, on the relation of William R. Moore, against Emanuel Burgett,

county auditor, and another, to compel defendants to perform certain alleged duties. Demurrers being sustained to the alternative writs issued, relator appeals. Affirmed.

A. W. Hatch, F. Winter, and W. R. Moore, for appellant. Martin A. Morrison, Gavin, Coffin & Davis, and J. C. Suit, for appellees.

MONKS, J. On January 9, 1897, the relator commenced this action to compel appellees, the auditor and treasurer of Clinton county, to perform certain alleged duties in the collection of a railroad tax voted by Center township, in said county, in aid of the Frankfort & State Line Railroad Company. Alternative writs were issued, to which appellees filed separate demurrers, which were sustained by the court, and judgment rendered thereon in favor of appellees. The only errors assigned call in question the action of the court in sustaining said demurrers. It is alleged in substance, in the application and alternative writs, that on March 5, 1878, a petition signed by a proper number of resident freeholders and taxpayers of Center township, Clinton county, Ind., was filed before the board of commissioners of said county, asking that \$20,000 be voted in aid of the Frankfort & State Line Railroad Company. Subsequently such proceedings were had that an election was held, and such aid was duly voted; and said board of commissioners, at their ensuing regular June session, entered an order making a levy of a special tax for said purpose, and directing the collection of the same. Thereupon the auditor, in pursuance of such order, placed the tax so levied upon the duplicate for the year 1878, and delivered the same to the treasurer for collection. After said tax had been so placed upon the duplicate, the collection of the same was suspended by the auditor and treasurer until the road had been permanently located in said township, and work done thereon in said township, and paid for by the company equal in amount to said donation. Afterwards, on April 29, 1886, a petition signed by David P. Barner et al., twenty-five taxpayers of said township, was filed with the board of commissioners of said county, under the provisions of section 5369, Burns' Rev. St. 1894 (section 4069, Horner's Rev. St. 1897), asking that the aid voted be canceled for the reason that said railroad company had not within five years expended in the construction of said road, in said township, an amount of money equal to the aid so voted. Due notice of said petition was given in all respects as required by section 5369 (4069), supra. Afterwards, on June 16, 1886, Samuel O. Bayless, a resident taxpayer of said township, appeared and filed an answer and cross complaint, alleging that the railroad company, within the time required, had done an amount of work in the construction of said railroad in said township equal to the amount of said appropriation, and had

¹ Republished because of corrections made in opinion (49 N. E. 884) as originally handed down.

fully completed its entire line in said township and county, and asked that said board order that said tax be collected the same as if the collection thereof had never been suspended. Said railroad company also filed an answer to said petition of Barner et al. Barner and others filed an answer to the application of Bayless. On the issues so formed a trial was had, and the board of commissioners found for the petitioners, Barner et al., and against Bayless, on his application, and entered a final judgment canceling the tax mentioned in the petition of Barner et al. From this judgment, Bayless and the railroad company appealed to the Clinton circuit court. After the appeal, the Western Construction Company was, on application, made a party, and allowed to file an intervening petition. On account of changes of venue, the cause was finally tried in the White circuit court; and said court, at the request of the parties, made a special finding of the facts, and stated its conclusions of law thereon. The finding was against the petitioners, Barner et al., and in favor of Bayless, on his application or complaint. The court found that the railroad company, within the time required by law, had expended in the construction of the railroad in said township more than the amount of the aid voted. The White circuit court rendered judgment on said finding and conclusions of law: "That the petitioners, Barner et al., are entitled to no relief; that the Frankfort & State Line Railroad Company, by expending in the construction of its line of railroad through Center township a sum in excess of \$20,000, has, according to law, earned said sum of \$20,000, local aid voted by the taxpayers of said township in aid of said railroad company; that the Western Construction Company, intervening petitioner, acquired, by assignment, all rights and interest of said railroad company in and to said aid and money voted by said township; and that the board of commissioners of said county of Clinton, in the state of Indiana, shall enter upon its records an order requiring that said tax be immediately collected by the treasurer of said county, as though the same had never been suspended." This judgment was rendered October 3, 1890. Afterwards said cause was appealed by said Barner et al. to this court, where the same was in all things affirmed, June 15, 1893. 34 N. E. 502. A certified copy of said final judgment of the White circuit court was duly filed with the board of commissioners of Clinton county, and in the auditor's office of said county. After the same was so filed, William R. Moore, the relator in this action, and the Western Construction Company, demanded of Emanuel Burgett, auditor of said county, that he deliver the tax duplicate containing said railroad tax to the treasurer of Clinton county for collection, and he refused to do so; and they each also demanded of the treasurer of said county that he proceed to collect the same, which he re-

fused to do. Said tax remains wholly uncollected.

The board of commissioners of Clinton county had jurisdiction of the question presented by the petition of Barner et al. to cancel the aid voted, as well as the application of Bayless for an order to collect said tax. These applications were both authorized by statute, and any final order or judgment rendered thereon by said board was final and conclusive, unless appealed from as provided by law. Burns' Rev. St. 1894, §§ 5369, 5394 (Horner's Rev. St. 1897, §§ 4069, 4094). If the board had found in favor of Bayless on his petition, and ordered that said tax be collected at once as though the same had never been suspended, each of appellees could have been compelled, by mandamus, to take the steps necessary to the collection of said tax. The board of commissioners, however, found for Barner et al. on their petition, and against Bayless, and rendered judgment annulling and canceling the aid voted. The appeal from said judgment gave the court to which the appeal was taken the same power over the subject-matter and parties that was possessed by the board of commissioners of Clinton county. An appeal from a decision of a board of commissioners vacates such decision, and renders it of no effect; but, if such appeal is dismissed for any cause, the decision of the board again becomes effective, the same as if no appeal had been taken. The appeal from the decision of the board of commissioners in the case of Barner et al. against Bayless et al., therefore, vacated said decision of the board, and rendered the same of no force or effect.

Under the provisions of section 7835, Burns' Rev. St. 1894 (section 5778, Horner's Rev. St. 1897), the White circuit court was authorized to make a final determination of the proceedings appealed from, and cause the same to be executed; or it had the power to send the same down to the board with orders how to proceed, and require such board to comply with the final determination made by the court in the premises. The White circuit court found that the railroad company had, within the proper time, expended, in the construction of its road in said township, more than the amount of the aid voted, and had fully complied with all the requirements of the statute; and said court was fully authorized to render final judgment ordering "that said tax be collected at once, the same as though the same had never been suspended." It is not alleged, however, in the application or alternative writs, that the White circuit court rendered such judgment; but, on the contrary, it is alleged that said court rendered judgment that "the board of commissioners of said county of Clinton, in the state of Indiana, shall enter upon its record an order requiring that said tax be immediately collected by the treasurer of said county as though the same had never been suspended." It, in effect, as it was fully empower-

ed to do, sent the same down to the board of commissioners of said county, with orders that such board enter such final order and judgment. This order was binding on the board of commissioners of Clinton county, as a judicial body; and they were required to make and enter such order and judgment as directed, the same as a circuit court is required to perform and execute the orders and mandates of this court made in a case appealed from such court. It is not necessary, in order to bind an inferior court in a case appealed from it, that the member or members thereof should be made parties to the case on appeal. Until said order of the White circuit court is entered by the board of commissioners of Clinton county on its records, appellant cannot claim or assert any rights thereunder against appellees. It is not averred that the board of commissioners of Clinton county ever entered said order on its records. Such allegation was necessary to render the application and alternative writs sufficient to withstand the demurrer.

Counsel for appellant cite certain pages of the transcript in the case of *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907, and 34 N. E. 502, where the judgment rendered by the White circuit court is set out; but we cannot refer to the transcript of that case for any such purpose. If the White circuit court in that case ordered that said railroad tax be immediately collected, as though the collection of the same had never been suspended, such fact should have been alleged in the application and alternative writs. We can only know what was adjudged by the White circuit court in the case of *Barner et al. against Bayless et al.* from the allegations of the application and alternative writs in this case.

It is claimed by appellees that this court, in the opinion affirming the judgment of the White circuit court in *Barner et al. against Bayless et al.*, supra, held that part of said judgment upon which appellant bases its cause of action void, and that, therefore, only that part of said judgment not held void was affirmed by this court, and that, as the part of said judgment upon which appellant relies is void, no right can be asserted thereunder. The allegation in the complaint and alternative writs in regard to the action of this court in said case of *Barner v. Bayless*, supra, is that the "proceedings and judgment of the White circuit court were in all things affirmed." We are not at liberty to disregard the allegations of the complaint and alternative writs, which were admitted by the demurrer to be true, and look to the opinion of this court in said cause in determining the question of the sufficiency of the complaint and alternative writs. As we have already said, we can only know what was adjudged by the White circuit court in said cause, and by this court on appeal, from the allegations in the complaint and alternative writs; and if the judgment alleged to have been rendered, or any part thereof, was

in any way changed, modified, or set aside, or held null and void, by this court on appeal, we could not take judicial notice thereof, as against the allegation that the "proceedings and judgment were in all things affirmed." The effect of what was said by this court, if any, on the judgment of the White circuit court, is not before us, and we decide nothing upon that question. It is proper to say that what is said in this opinion has reference alone to the facts set forth in the application and alternative writs, and admitted by the demurrers. The court below did not err, therefore, in sustaining appellee's demurrers to the application and alternative writs. Judgment affirmed.

(20 Ind. App. 569)

INDIANA, D. & W. R. CO. v. ZILLY.

(Appellate Court of Indiana. July 1, 1898.)

CARRIERS—LIABILITY FOR LOSS OF BAGGAGE—
NEGLIGENCE.

1. Where a passenger, knowing when her baggage would arrive, did not call for it until seven days after its arrival, the railroad company was liable for it as warehouseman, and not as carrier, though the passenger was not notified of its arrival.

2. A passenger knowingly left her trunk at the carrier's depot, and on the sixth night after its arrival the depot was entered and the contents of the trunk stolen. The depot was locked during the night, and the windows fastened and wooden bars nailed across them. Baggage was never delivered at the station at night, and there was hence no night watchman. *Held*, that the carrier, having used ordinary care, was not liable for the loss.

Appeal from circuit court, Hendricks county; J. V. Hadley, Judge.

Action by Eliza Zilly against the Indiana, Decatur & Western Railroad Company. There was judgment for plaintiff, a motion for new trial was denied, and defendant appeals. Reversed.

Augustus L. Mason and Will H. Latta, for appellant. Miles & Miles, for appellee.

HENLEY, C. J. The complaint in this cause was in two paragraphs. The first paragraph charged appellant with liability for the loss of the contents of a trunk delivered to appellant and held by it as a common carrier. The second paragraph of complaint proceeds upon the theory that the appellant was liable to appellee for the loss of the contents of the trunk, charging appellant as a warehouseman. The cause was tried upon the issues formed by the denial of the material allegations of the complaint. The lower court found in favor of appellee, and overruled appellant's motion for a new trial. This action of the lower court is here assigned as error by appellant. Among the reasons assigned in the motion for a new trial and urged by counsel for appellant in this cause are these: That the judgment of the court in this cause is not sustained by the evidence; and that the judgment of the court is contrary to law.

The evidence is before us, embodied in a proper bill of exceptions, and presents the following undisputed facts: That the appellant is a corporation, and owns and operates a line of railroad 152 miles in length, between the cities of Decatur, Ill., and Indianapolis, Ind., and that its said road passes through the town of North Salem, Ind., where it has a station consisting of a one-story frame building and a platform; that this building contains three rooms,—the agent's room, in the center, the waiting room, to the right of the agent's room, and the baggage room, to the left of the agent's room; that the outside doors leading into the baggage room are large doors, of double thickness of wood, and fastened with heavy chains on the inside; that the outside doors of the waiting room are heavy pine doors, locking with a key; that the doors, two in number, leading from the agent's room into the baggage room, and one leading from the agent's room to the waiting room, are ordinary doors, with ordinary fastenings, and are inside doors, and were not locked on the night of Sunday, the 20th day of October, 1895; that there are no outside windows to the baggage room, and that the windows to the waiting room are about three and one half feet across, three feet above the ground, and consist of one upper and one lower sash, made from pine wood, and painted and sanded; that these windows were all fastened by iron fastenings at the place where the lower and upper sash met; that these fastenings were each attached to the window sash by two screws, about one inch long; that across each of the outside windows, in addition to the fastenings above referred to, and upon the outside, were six wooden slats, about two inches wide, one inch thick, and four feet long; that these were also painted and sanded, and were fastened by two nails and one screw, in each end of each slat, and were placed about eight inches apart; that appellant's agent is present at this station between the hours of 7 and 11:30 a. m., and between the hours of 1:30 and 5:30 p. m., and 6:30 and 8:30 p. m.; that the town of North Salem, where said above-described station was situate, has a population of about 800 souls; that there is no other railroad leading to said town except the road owned and operated by appellant, and that said station is situate in the southwest part of said town of North Salem, there being no residences nearer thereto than about 20 rods; that on the 11th day of October, 1895, the appellee, who is a resident of the state of Kansas, left her home at Eureka, in said state, to go to the town of North Salem, Ind., and at the same time she checked her trunk, containing articles that were afterwards lost to her; that she first purchased a ticket for Kansas City, Mo., and had her trunk checked to said last-named station; that her trunk was locked and corded when delivered to the agent at Eureka, Kan.; that she arrived in Kansas City on

the morning of October 12th, and rechecked her trunk at that point to North Salem, Ind., and that at that time her trunk was corded and locked; that she purchased a ticket, by way of the Wabash Railway, to Decatur, Ill., and thence, by way of appellant's road, to North Salem; that appellee arrived at North Salem about 3 o'clock a. m., Monday, October 14, 1895; that, while upon appellant's train, appellee inquired of one of the brakemen thereon, and also of the conductor of the train upon which she was riding, as to whether or not her trunk was upon the train, and would be delivered to her upon her arrival at North Salem; that she was informed, both by the conductor and brakeman to whom she addressed her inquiries, that the train upon which she was riding did not carry her baggage because of its arrival at her destination in the nighttime, but that her trunk would follow on the day train, which arrived in the afternoon of the same day of her arrival, and, in accordance with the information thus given her, her trunk arrived on the same day, having been carried by the day train, and was delivered to the agent at North Salem on the afternoon of Monday, October 14th, and placed in appellant's baggage room, where the same remained until the 21st day of October, 1895, being Monday of the week following its arrival; that upon appellee's arrival at North Salem she was conveyed by her brother to the home of her father and mother, about six miles in the country; that at that time her mother was very sick, and the brother of appellee made daily trips to the house where appellee was visiting from the town of North Salem; that the agent of appellant was present at said station daily during the regular hours before mentioned, and was ready at all times to deliver said baggage, upon proper demand and presentation of the check for the same, but that during all of said time no demand was made for said trunk, and the same remained in said baggage room, as aforesaid, up to and until the time before mentioned; that on the night of Sunday, October 20th, some unknown person, by means of a chisel 16 inches long and 2 inches wide, removed one of the slats from one of the outside windows in said station, and, by placing said chisel under the lower sash of the window, broke the fastenings, and effected an entrance into said station, and, on the morning of October 21st, a brother of appellee called for said trunk, and presented a check therefor to the agent of appellant, and the same was delivered to him, but said trunk had upon the night of Sunday, October 21st, by some unknown person, been broken open, the cords cut, and hinges broken, and articles of value taken from said trunk; that no notice was given to the appellee of the arrival of her said trunk; that the trunk did not have upon it appellant's name and residence, but had the name borne by her prior to her marriage, and that ap-

pellant's agent did not know appellee either by her present name or by the name written upon her trunk; that he inquired of persons living in the town of North Salem as to the whereabouts or residence of the party whose name appeared upon the trunk, but received no information thereabout. It is also shown by the evidence that the doors leading from the room occupied by appellant's agent were not locked. These were inside doors. There was a sawmill and several large piles of lumber near the station. The station was located about one-half mile from the business portion of the town, and the dwellings extended down to near the station. It was also shown by the evidence that this station and baggage room in which appellee's trunk was stored was such a station and baggage room as is ordinarily used by railroad companies in towns of 800 to 1,000 people, for the transaction of their business, and the reception and retention of baggage until called for.

It will thus be seen that appellee's baggage remained in the baggage room, undisturbed and uncalled for, during a period of seven days, before the station was broken into and the articles taken from the trunk. Under the authorities, appellant's liability as a carrier had ceased long before the loss herein complained of. Where a passenger has notice of the rules and regulations of the company, and the rules and regulations are reasonable, regarding the manner of transporting and delivering baggage, the passenger is bound thereby, although not directly assenting thereto. *Gleason v. Transportation Co.*, 32 Wis. 85. It was held in the case of *Railway Co. v. Addisoat*, 17 Ill. App. 632, that a railroad company is the insurer of the baggage of a passenger as long as the relation of a common carrier exists, and that such relation exists as to such baggage until its arrival and discharge at the place of destination, and until the owner has reasonable time and opportunity to claim it and remove it. If such baggage is not called for within a reasonable time, the company should store it in its warehouse, and from that time its liability as a carrier ceases, and the liability of a warehouseman is assumed. It was also held in the same case, and we think correctly held, that a passenger cannot prolong the strict and rigid liability of a railroad company as a common carrier longer than is reasonably necessary under the circumstances of the particular case, or for any purpose of his own convenience; and that if a passenger is informed that his baggage has not arrived on the train he came on, and no directions are given concerning it, and no information to identify himself, so that notice of its arrival can be given him, it is his duty to make inquiry for his baggage within a reasonable time after the arrival of the next train. In the case at bar the appellee was informed of the particular time when her trunk would ar-

rive, and no notice of its arrival was necessary to relieve appellant of its liability as common carrier. *Bansemmer v. Railway Co.*, 25 Ind. 434. It is the undisputed law that, where baggage is not called for within a reasonable time, it is the duty of the carrier to properly store it, and, when this is done, its liability as a carrier ceases, and that of warehouseman attaches. *Mote v. Railway Co.*, 27 Iowa, 22; *Bartholomew v. Railway Co.*, 53 Ill. 227; *Wald v. Railway Co.*, 92 Ky. 645, 18 S. W. 850; *Burnell v. Railway Co.*, 45 N. Y. 184; *Railway Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Railway Co. v. McCool*, 26 Ind. 140; *Bansemmer v. Railway Co.*, supra. It was the duty of appellant, under the facts in this case, when appellee's trunk arrived, to place it in the baggage room, appellee not being present to receive it, and the liability of appellant then ceased to be that of common carrier, and became that of warehouseman. It was not necessary that such baggage room be fire-proof or burglar proof, but it was only necessary that it be such a place as persons of ordinary prudence, under like circumstances, would use for the storage of such goods. *Railway Co. v. Fairclough*, 52 Ill. 106. Ordinary care is all that the law requires. *Railway Co. v. McCool*, supra.

It would not be required of appellant that it keep a night watch about its baggage room, or to have some one sleep therein, when, as it is shown in this case, no baggage was delivered at this station from the night trains. In such cases there could be no need of any such precautions. See *Pike v. Railway Co.*, 40 Wis. 583. The evidence in this case conclusively shows that appellee failed to call for her baggage within a reasonable time after the time when she was informed that it would arrive; that appellant, at the time of the taking of appellee's goods, by some person unknown to either party to this action, occupied towards appellee the relation of a warehouseman, and not of a common carrier; and that appellant used ordinary care in providing a reasonably safe place to store said trunk, under the facts as presented by this case. Appellee's goods were not lost by any negligent act of appellant, nor by the omission to perform any duty which it owed to appellee. There is no conflict in the evidence. The finding and judgment of the court is contrary to law. Cause reversed, with instructions to sustain the motion for a new trial.

(20 Ind. App. 515)

RUSH et al. v. FOOS MFG. CO.

(Appellate Court of Indiana. June 29, 1898.)

APPEAL—OBJECTIONS NOT MADE BELOW—SUFFICIENCY OF COMPLAINT—PLEA IN ABATEMENT—NONRESIDENT CORPORATION—SERVICE OF PROCESS.

1. An appellate court will not consider a question not presented to the trial court, except that on a proper assignment of error it may pass on

the sufficiency of a complaint, where the issues have been made, a trial had, and judgment rendered, without its sufficiency having been tested by demurrer.

2. The sufficiency of a complaint cannot be considered for the first time on appeal on an assignment of error to a ruling on a demurrer to a plea in abatement, since such a demurrer does not reach the record, nor relate back to the complaint.

3. A plea in abatement is a dilatory plea, and must be strictly construed, and must state facts necessary to the answer, and anticipate and exclude all supposable matter, which would, if alleged, defeat it.

4. Under Horner's Rev. St. 1897, § 313 (Burns' Rev. St. 1894, § 315), actions may be brought against a foreign corporation in any court having jurisdiction of the amount demanded, in any county in the state where any property, moneys, credits, or effects belonging to the corporation may be found; and section 316, Horner's Rev. St. 1897 (Burns' Rev. St. 1894, § 318), provides that process may be served on a corporation by service on certain of its officers, and, if none of said officers can be found, then on any person authorized to transact business in the name of the corporation; and, if defendant is a foreign corporation having no such person in the state on whom service may be made, it may be served in the same manner as on other nonresidents. *Held*, that a foreign corporation having no agent or officer in the state on whom service might be made, a summons was properly served on a mechanical superintendent within the state on the company's business.

5. A plea in abatement to set aside such service, not denying that the cause of action arose in this state, that the corporation has property or is doing business here, nor that the officer on whom the service was had was at the time within the state transacting its business, was insufficient on demurrer.

6. Where a foreign corporation allows an officer or agent to transact business for it in another state, it thereby submits itself to the jurisdiction of the courts of that state, and service may be had on such officer or agent.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Suit by Frederick P. Rush and others against Foos Manufacturing Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

W. A. Ketcham and Fred. E. Matson, for appellants. J. E. Scott and Albert Rabb, for appellee.

WILEY, J. Appellants sued appellee to recover damages for the alleged failure of a warranty, made by appellee to appellants, upon a cob-grinding machine purchased by the latter from the former. Summons was issued and served on J. F. Winchell, superintendent of appellee. Appellee appeared specially, and moved to quash the return to the summons, which motion was overruled. Appellee, still appearing specially, filed its plea in abatement. In this plea it was averred that appellee was a corporation organized and existing under the laws of Ohio; that its principal office was in Clarke county, Ohio; that it was not and is not incorporated in Indiana; that it did not, and does not now, maintain any office in Indiana, and that its officers were then, and now are, nonresidents of the state of Indiana, and did then, and do now, reside in Springfield, Ohio; that said

Winchell, upon whom said summons was served, was not at the date of said service, nor has he since been, a resident of Indiana, and that he did then, and does now, reside in Ohio; that he was then, and is now, an employé of appellee under the title of superintendent; that he is called superintendent because he has general supervision of the mechanical departments and processes,—the appellee being engaged in the manufacture of certain agricultural implements, etc.; that when said summons was served said Winchell was temporarily in Indianapolis, Ind., but was not then, or at any time during his temporary stay in Indiana, engaged in the transaction of business for appellee in any manner connected with the cause of action mentioned in the complaint. The appellants demurred to the plea in abatement on the ground that it did not state facts sufficient to abate the action, which demurrer was overruled. Appellants elected to stand on the demurrer, and suffered judgment against them for costs. The ruling on the demurrer is the only error assigned.

It is urged by appellee that the complaint does not state any cause of action against it, and hence, if it was error to overrule the demurrer to its plea in abatement, such error is harmless. Such a rule does prevail in this state, but it is not applicable here, for the reason that, as the record comes to us, we cannot determine the sufficiency of the complaint. The rule is firmly established in this state that the appellate tribunal will not consider any question on appeal that has not been presented to the lower court for its ruling. To this general rule there is an exception, and that is, where issues have been made, and the sufficiency of the complaint has not been tested by a demurrer, the cause tried on its merits, and judgment pronounced, then, on appeal, by proper assignment of error, this court may pass upon the sufficiency of the complaint. After pleading to the merits of a cause, the sufficiency of the complaint is, until its final disposition, before the court, but where there has been no pleading to the merits of a cause, but only a plea in abatement which challenges the jurisdiction of the court as to the person of the defendant, the sufficiency of the complaint is not thereby presented to the court below, either directly or indirectly. If the rule prevailed for which appellee contends, it would, indeed, be summary, and might, in many instances, work great hardships and harsh injustice. No difference how meritorious his right of action, if he had, by oversight or otherwise, failed to state a cause of action, he would thus be deprived of the liberal and wholesome rule to answer recognized in this state by the statute and the courts. Where a defendant has answered as to the merits of a cause, and his answer is attacked by a demurrer, such demurrer reaches the entire record, and may be carried back to the complaint, and the complaint declared insufficient, and the plain-

tiff, within such time as the court may prescribe, amend his complaint. But not so here. A demurrer to a plea in abatement does not reach the record, and cannot be carried back and sustained to an insufficient complaint, and, as there is no cross error assigned here, calling in question the sufficiency of the complaint, we cannot consider it. This exact question has been decided in this and in other states. A plea in abatement is not addressed to the complaint, and this is reason enough why a demurrer to it cannot be carried back to the complaint. In 6 Enc. Pl. & Prac. p. 332, it is said: "A demurrer to a plea in abatement, or to an answer in abatement, as it is sometimes called, does not search defects in a declaration." *Crawford v. Slade*, 9 Ala. 887; *Rogers v. Smiley*, 2 Port. (Ala.) 258; *Knott v. Clements*, 13 Ark. 335; *Wade v. Bridges*, 24 Ark. 569; *Vaden v. Ellis*, 18 Ark. 359; *State v. Hamlin*, 47 Conn. 118; *Ryan v. May*, 14 Ill. 49; *Price v. Railroad Co.*, 18 Ind. 137; *Railway Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Savings Ass'n v. Thompson*, 88 Ind. 405; *Clifford v. Cony*, 1 Mass. 500; *Dean v. Boyd*, 9 Dana, 171; *Shaw v. Dutcher*, 19 Wend. 216; *Ellis v. Ellis*, 4 R. I. 110; *Myers v. Erwin*, 20 Ohio, 382. In *Railway Co. v. Foster*, supra, there was a plea to the jurisdiction of the court, to which a demurrer was filed and overruled. On appeal, appellant insisted that the complaint was not good, and asked the court to carry the demurrer to the plea in abatement back to the complaint. The court, by *Zollars, J.*, said: "The sufficiency of the complaint was not questioned below by demurrer, nor by motion to arrest the judgment; nor is its sufficiency questioned in this court, except by the assignment that the court below erred in not carrying the demurrer to the plea back, and sustaining it to the complaint. It is a sufficient answer to this assignment of error to say that a demurrer to an answer in abatement does not reach back to the complaint, because such demurrer was not addressed to the complaint." See, also, *Price v. Railroad Co.*, supra, and *Savings Ass'n v. Thompson*, supra.

We come now to the only question properly presented by the record, and that is the sufficiency of the plea in abatement. The real question is, does the plea in abatement state facts sufficient to show that the Marion superior court did not acquire jurisdiction over appellee? If it does, then the court correctly sustained the demurrer. A plea in abatement is a dilatory plea, and it is not regarded favorably by the courts. It must be definite and certain, and nothing can be supplied by intendment or construction. The plea must not only state facts necessary to the answer, but must also anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea. In 1 Chit. Pl. (16th Am. Ed.) 773, it is said: "As pleas in abatement do not deny, and yet tend to delay, the trial of the merits

of the action, great accuracy and precision are required in framing them. They should be certain to every intent." In *Steph. Pl.* (9th Am. Ed.) 352, it is said: "Dilatory pleas are regarded unfavorably by the courts as having the effect of excluding the truth, and therefore they must be certain in every particular, which seems to amount to this: that they must meet and remove by anticipation every possible answer of the adversary." And at page 431 it is said: "The plea must at the same time correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new suit or declaration." Gould on Pleading, in speaking of the certainty required in pleas in abatement, says: "Certainty of this sort, or to a certain intent in every particular, requires the utmost fullness, and particularly of statement, as well as the highest obtainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated. The rule requiring this degree of certainty is a rule not of 'construction' only, but also of 'addition'; that is, it requires the pleader, not only to answer fully what is necessary to be answered, but also to anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea." These elementary rules as to pleas in abatement have been adopted and carried into our jurisprudence by the courts. *Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co.*, 50 Ind. 85, 117; *Kelley v. State*, 53 Ind. 311; *Needham v. Wright*, 140 Ind. 190, 39 N. E. 510. It will be observed that in the plea in abatement it is not denied that the cause of action did not arise in this state; neither does it deny that the appellee corporation has property within this state; nor is there any averment that it is not doing business in the state where jurisdiction was sought to be acquired; and, lastly, it is not denied that the officer of appellee, upon whom service was had, was at the time within the state as the agent and representative of appellee, and engaged in the transaction of business for it. It is averred that he was not here "engaged in the transaction of business for this defendant in any manner connected with the cause of action mentioned in the complaint." We must, under the well-established rule, construe this pleading most strongly against the pleader; and in determining whether or not there was error in the ruling on the demurrer to the plea in abatement we must assume all these enumerated facts, so far as they may benefit the appellant, to be true. There are several statutory provisions regarding service upon persons and corporations, and primarily we must look to them as a guide in determining whether the service in this case comes within their purview. Section 313, *Horner's Rev. St.* 1897 (section 315, *Burns' Rev. St.* 1894), is as follows: "Actions may be brought against corpora-

tions, created by or under the laws of any other state, government or county, in any court having jurisdiction of the amount demanded, by any person having a cause of action, in any county within the state where any property, credits or effects belonging to or due to the corporation may be found." Section 313a, Horner's Rev. St. 1897 (section 313, Burns' Rev. St. 1894), is as follows: "Any action against a corporation may be brought in any county, where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation unless otherwise provided in this act." Section 316, Horner's Rev. St. 1897 (section 318, Burns' Rev. St. 1894), provides for service of process upon domestic or foreign corporations, and, among other things, it is provided that "in case the defendant be a foreign corporation, having no such officer, person or agent, resident in the state, service may be made in the same manner as against other nonresidents." The section just cited is lengthy, and we need not set it out in full. It designates three classes of persons upon whom process may be served: First, chief officers of the corporation; second, secondary officers; and, third, any person authorized to do business for the corporation. *Railway Co. v. Owen*, 43 Ind. 405.

It seems to us that, in determining the question we are now considering, the several statutory provisions we have above quoted should be construed together. Section 313a (section 313) supra, was a part of the Civil Code of 1852, being section 796, Code 1852, but was omitted in the revision of 1881. In the subsequent revisions, however, it has been carried forward; but in *Insurance Co. v. Reid*, 49 N. E. 291, this court held that it was repealed by the act of 1881, overruling the case of *Railroad Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. 239, holding to the contrary. Thus we are left to consider sections 313, 316 (sections 315, 318) supra. Under section 313 (section 315) supra, actions against a foreign corporation may be brought "in any court having jurisdiction of the amount demanded * * * in any county within the state where any property, moneys, credits or effects belonging or due to the corporation may be found." There is no pretense but what the Marion superior court had jurisdiction of the amount demanded, and, as there is no showing to the contrary, by the plea in abatement, that the appellee corporation did not have any property, moneys, credits, or effects, etc., and, if necessary, might assume, under the strict rules of construction applicable to pleas of this character, that it did have such property, etc., and hence it was subject to be sued in such county. To properly bring appellee into court, summons had to be served upon some one who was connected with it in an official capacity. One of such persons was its superintendent, and summons was served

upon him, and the return shows that he was the highest officer of appellee corporation, within the bailiwick of the officers making the service. Turning now to section 316 (section 318) supra, we find that process can be served upon either a domestic or foreign corporation on certain of its officers, etc. If none of the officers enumerated in this section can be found, then service can be made upon any person authorized to transact business in the name of such corporation. Again, it is provided that, "in case the defendant be a foreign corporation having no such person, officer or agent, resident in the state, service may be made in the same manner as against other nonresidents." It cannot be denied, and specially it is not denied in appellee's plea in abatement, that a general superintendent of a corporation is an officer of such corporation, and authorized to transact business in its name. As we have before said, we must assume from the plea itself that Winchell was authorized to transact business for his corporation, and that he was in this jurisdiction for that purpose. So that we find that in the case before us the service upon Winchell comes within both the spirit and letter of the statute providing that service may be had upon certain officers of a corporation and any one authorized to transact business for it. Then, by the latter clause of the section, where a defendant is a foreign corporation, and there is no such officer, etc., resident of the state, "service may be made in the same manner as against other nonresidents." Alderson on Judicial Writs and Process (page 202) says: "Under the common law, jurisdiction could not be acquired over a foreign corporation by the service of process upon one of its officers. But under the statute a foreign corporation may be subjected to the jurisdiction of the courts of a state by personal service on the proper officer, and such service is equivalent to a personal service on a nonresident natural person. No attachment of property is necessary. This doctrine seems to rest on sound principle, and is sustained by the authorities." *Barnett v. Railroad Co.*, 4 Hun, 114, reported in 6 Thomp. & C. 358; *Weymouth v. Railroad Co.*, 1 MacArthur, 19. The case last cited is a very pointed one. There appellee corporation was created by an act of the Virginia legislature, and by an act of congress was allowed to run its road into the District of Columbia. It borrowed a sum of money in New York, through the agency of its treasurer, and default in payment having been made, suit was commenced in the supreme court of New York, by service of process upon its secretary, who was found there, and judgment rendered for the amount due. An action was commenced in the supreme court of the District of Columbia upon a transcript of the judgment procured in New York. It was held that, the corporation having contracted the debt in New York, the

court there obtained complete jurisdiction by such service, and that the judgment there obtained was entitled to the same conclusiveness in the District of Columbia as in the state where it was rendered. Again, at page 202, the same author says: "Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they may be sued, like natural persons, in transitory actions arising ex contractu, or ex delicto, in any state where legal service of process may be had." And so, in Mississippi, it has been held. *Railroad Co. v. Wallace*, 50 Miss. 244. In Illinois it has been held that, if the act authorizing service of process upon corporations applied to foreign corporations at all, it did not authorize the service of process issued in favor of a nonresident on an officer of a foreign corporation, if he came into the state as an individual only. This rule is eminently correct, for, as above said, a corporation cannot migrate to another state; and, if one of its officers goes into another state merely as an individual, while there he has no official connection with, or is no part of, such corporation. But in the same case it was held that the rule is different where such foreign corporation does business in another state, has property there, and an officer or an agent charged with such business. In such case the corporation may be sued in a state other than in the state where it is created and has its legal existence. *Railway Co. v. McDermid*, 91 Ill. 170. Where an officer or an agent of a corporation is in another jurisdiction, representing such corporation, and transacting business therein, it thereby submits itself to the jurisdiction of the courts, may be sued therein, and service had upon such officer or agent. *Railway Co. v. McDermid*, supra; *Porter v. Car Heating Co.* (Sup.) 7 N. Y. Supp. 166; *Silabee v. Hotel Co.*, 30 Ill. App. 204. Alderson on Judicial Writs, etc., at page 201, says: "A corporation doing business in a state other than where it was incorporated becomes subject to the jurisdiction of the courts of the former state, and process may be served on its officer or agent." *Insurance Co. v. Carrugi*, 41 Ga. 660; *Telegraph Co. v. Pleasants*, 46 Ala. 641. In *Insurance Co. v. Reid*, 49 N. E. 291, on a petition for a rehearing, this court, by Black, J., said: "A corporation organized under the laws of one state, and doing business in another state, becomes liable to be sued and served in the latter state, not merely where the action relates to business done therein, but also in transitory actions arising in another state. A corporation is not regarded as a citizen of a state, within the meaning of the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; and a state may impose conditions not in conflict with the laws and constitu-

tion of the United States, on the transaction of business within its territory by corporations chartered elsewhere, or may exclude them, or revoke permission or license already given. A corporation chartered in one state, by doing business in another state, where, as a condition, expressed or implied, to its right to do business there, it must submit to be sued in the courts of such other state, waives the right to be sued in the place of its residence; the right of trial within the state, district, or county of one's residence being a privilege which may be waived. It is not necessary that such a condition to the right of doing business be expressly stated in the statute, though this is sometimes done. If there be a statutory provision for service of summons upon a foreign corporation by serving its officers or agents through which it is doing its business in the state where the transitory action is brought, then there is an implied condition that the corporation, while operating in such state, shall submit to the jurisdiction of its courts upon such service; and while it so does business by such officers or agents it waives thereby objection to jurisdiction in personam acquired by service on them. In such case, though the corporation resides in the state of its creation, it is 'found' in the state where it is so sued and served. See *U. S. v. American Bell Tel. Co.*, 29 Fed. 17; *Works, Courts & Jur.* § 43; *Elliott, R. R.* § 621; *Thomp. Corp.* § 301 et seq." A corporation is an artificial person. As was said in *Davis v. Steuben School Tp.* (Ind. App.) 50 N. E. 1: "It exists only by virtue of statute. It is an impersonal something. It is without knowledge, action, or existence, save in law. It can only act by and through legal officer and representative." And as was said in *Insurance Co. v. Reid*, supra: "The legal situs of a corporation—its residence—for purposes of jurisdiction need not be confined, however, but may, by statutory provision, be in any place where its franchises are exercised, or business is done, or where it has an agent upon whom process may be served. A corporation is necessarily represented by its officers and agents. A law authorizing a suit to be brought in any county in which it transacts business through its agents has been said to be based upon sound reasons growing out of the difference between natural and artificial persons. *Home Protection v. Richards*, 74 Ala. 466; *Insurance Co. v. Pruett*, Id. 487.

The statute in this state provides for service of process, both upon domestic and foreign corporations, and also where actions against them may be commenced. It was certainly not the intention of the legislature to confer greater privileges upon foreign than upon domestic corporations. The former are permitted to do business in this state, and it is an equitable rule that they should submit themselves to the jurisdiction of our courts in return for the reciprocal

right to transact business within our borders. It is the general rule, recognized everywhere, that a natural person shall only be sued in the immediate county or local jurisdiction of his citizenship, and this rule is applicable alike to every citizen. Yet if a citizen of Ohio comes into our state he may be sued in any county where found, and upon personal service of summons upon him a judgment in personam may be rendered against him. Horner's Rev. St. 1897, § 312 (Burns' Rev. St. 1894, § 314); Reed v. Browning, 130 Ind. 575, 30 N. E. 704. Why is not this rule as applicable to foreign artificial persons as to foreign natural persons, and what good reason is there why the rule should not be strictly enforced? We are unable to see any, and especially is this true in the view of the broad and liberal statutory provisions we have quoted. When Winchell—appellee's superintendent—was within the jurisdiction of the lower court, engaged in the transaction of its business, appellee itself was there, for, as we have seen, a corporation can only act by and through its officers and authorized agents. A foreign corporation is protected in all of its rights by the laws of this state, when it complies with such laws. It may transact business here. It may seek the forum of our courts to enforce its rights and collect debts due it, and it is sound reason that it should be held responsible in the same tribunals which it uses for its own benefit for obligations and liabilities here incurred. In other words, if it comes within our jurisdiction to transact business for its own profit and benefit, it must in like manner respond in our courts to demands against it, accruing to our citizens arising out of its business here contracted. And we believe this to be the prevailing doctrine. In *Milk Co. v. Brandenburg*, 40 N. J. Law, 111, it was said: "Since the case of *Moulin v. Insurance Co.*, 24 N. J. Law, 222, it must be regarded as the settled law of this court that if a corporation makes a contract in a state other than that in which it was chartered it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state." Mr. Justice Drummond, of the United States circuit court, in *Packing Co. v. Hunter*, 11 Chi. Leg. News, 207, Fed. Cas. No. 17,852, and also reported in 8 Cent. Law J. 333, 7 Reporter, 455, said: "Now, in the case of *Railroad Co. v. Harris*, reported in 12 Wall. 65, the only ground upon which the court took jurisdiction of the case was under the act of congress. The Baltimore & Ohio Railroad was authorized to construct a railroad within the District of Columbia. The service of process was upon the president of the company. The person, the corporation, was there through its president, and it was the only way the court could by any possibility take jurisdiction. The person, the defendant, the corporation, must be

found within the district, in order that the court may have jurisdiction, and it was found there in consequence of the acts of congress, which authorized it to construct a branch road within the District, and because the president was within the District. At the time the writ was thus served there was no act of congress authorizing suits against corporations doing business in the District, and, of course, no act which authorized service of process upon foreign corporations, though the court took jurisdiction of the case, as I have said, on the ground that the corporation was there found." Continuing, the learned judge, speaking about foreign corporations doing business in states other than those where they are chartered, said: "When they attempt to do business within the state, they come within the limits of our state, they are protected by our laws, they transact business within our territory, and are they then not to be subject to writs against them? Ought they to be permitted to come here, to make contracts, to do, maybe, all their business here, by virtue of the law of another state, and then say they cannot be sued in our state, because their corporation is within another, a sister, state? I do not think it is reasonable or right. They come; they ask the protection of our laws; they transact business under the protection of these laws; and they ought to be liable to the burdens, as well as the benefits, of the laws. One of the burdens, I think, is liability to be sued." This is strong and pointed language, and is entitled to great weight and serious consideration. Remembering that in the case cited from 12 Wall. 65, and the case from which we have just quoted, the jurisdiction was sustained in the absence of statutory enactment providing for service of process upon foreign corporations, how much more forcible the rule where such provision is made by statute, as in this state. In 22 Am. & Eng. Enc. Law, p. 118, speaking of statutes relating to service of process on corporations, it is said: "It has been decided that, since the object of such statutes is merely to carry out the principle that no proceeding may be had against the defendant until due notice has been given him, a service which virtually accomplishes this object will not be held invalid if the statute is capable of a double construction." *Railway Co. v. Yocum*, 34 Ark. 493; *Ghradelli v. Greene*, 56 Cal. 629; *Cicero Tp. v. Shirk*, 122 Ind. 572, 24 N. E. 166; *Nye v. Railroad Co.*, 60 Vt. 585, 11 Atl. 689; *Pope v. Manufacturing Co.*, 87 N. Y. 137. It has also been held that such statutes, being of a remedial nature, are to receive a liberal construction. *Insurance Co. v. Warner*, 28 Ill. 429; *Pope v. Manufacturing Co.*, supra; *Railroad Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571.

So far as we have been able to investigate, we do not find any state having statutory provisions identical to ours in regard to service upon corporations. This being the case,

there is no case in other states construing like provisions. We do not find, however, any state with broader or more liberal provisions than our own. But touching the modern tendency towards extending jurisdiction, and the liberal manner in which courts construe statutes relating to jurisdiction, we cite *Railway Co. v. Hook*, 40 Ill. App. 547, in which it is said: "To be found within the state, a foreign corporation must have sent its agent on whom service is made to the state to conduct its business therein, either continuously or for a time, so as to complete a transaction or an enterprise, or at least charged with the duty of making a particular contract in the state, or negotiating therein for the company." *Klopp v. Waterworks Co.*, 34 Neb. 808, 52 N. W. 819, is a case directly in point. There appellee was a corporation organized and acting under the laws of Iowa. Action was commenced against it in Douglas county, Neb., and summons was served on one Soper, vice president, while temporarily in that county. The appellee appeared specially, and filed a plea to the jurisdiction of the court, in which plea it was averred: First, that it was a foreign corporation; second, that it had no office of any kind, nor any property, nor any managing or other agent, in the state of Nebraska at the time of the institution of the action, or since; third, that the said Soper, upon whom process was served, was at the time, and "ever since has been, and now is, a resident of the state of Illinois, and a nonresident of the state of Nebraska, and was but temporarily in and passing through the county of Douglas when such service was had upon him." After quoting the statute which authorizes service of process upon certain officers of a foreign corporation, the court said: "Now, suppose a foreign corporation comes into this state, and purchases goods to be paid for here, must the seller go into another state, or perhaps to a foreign country, to recover for the same? This is true if service cannot be had upon the corporation in the state; then the seller must bring his action where service can be had. But a person who has authority to contract a debt for the corporation within the state is so far the managing agent within the state that service may be had upon him for that debt that will bind the corporation. The agent is commissioned to contract the debt, and the corporation thereby secures the benefit of his services. It must take the burden of being liable to an action therefor. It will be observed that neither the motion nor the affidavit negative the fact that the debt was contracted here, or that Soper was the managing agent in this state." The plea was held bad. It will be observed that the plea in the case just cited is much stronger than in the case before us, in that it contained an express denial that the appellee had property or was doing business in the state. See, also, *Porter v. Railway Co.*, 1

Neb. 14; *Railroad Co. v. Manning*, 23 Neb. 455, 37 N. W. 462; *Shickle, H. & H. Iron Co. v. Wiley Const. Co.*, 61 Mich. 228, 28 N. W. 77; *Cunningham v. Express Co.*, 67 N. O. 425; *Hester v. Fertilizer Co.*, 33 S. C. 610, 12 S. E. 563; *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.*, 63 How. Prac. 459; *Porter v. Car-Heating Co.* (Sup.) 7 N. Y. Supp. 166; *Hiller v. Railroad Co.*, 70 N. Y. 223; *Pope v. Manufacturing Co.*, supra. Judge Baker, of the United States court for the district of Indiana, has recently passed upon the question we are now considering in the case of *Scofield v. Brewing Co.* The case is not reported, but the facts are substantially as follows: Scofield sued the brewing company in the Elkhart circuit court to recover for alleged personal injuries. Summons was served upon one Howe, as the agent of the company, and the return showed that there was no officer of the company superior in rank found upon whom service could be had. The case was removed to the federal court, where a motion was made to quash and set aside the summons and the sheriff's return. The brewing company was a foreign corporation; did not have any office or place of business for the transaction of business in Indiana; that it did not transact business in said state except as it received orders by mail or obtained orders in said state by and through its traveling salesmen, who went from Chicago, Ill., where said company was organized, and had its office; that said company did not and never had any agents residing in this state; that the only agents it ever had in this state were traveling salesmen temporarily going from place to place, whose sole authority was to solicit and procure orders for the products of the said company; that said Howe was such salesman, and that he had his residence in Chicago, and his sole authority was as just stated; that when said summons was served on him he was at Elkhart, Ind., temporarily, for the sole purpose of soliciting and procuring orders of said company. Upon these facts, which were found specially, the court stated its conclusion of law that the service of summons so made on said Howe was sufficient to give the Elkhart circuit court jurisdiction over said company. This is the strongest case we have found, and while, in our judgment, the rule announced is carried to the very border line and extreme limits, it is entitled to much weight, coming as it does from one so profoundly learned in the law, and one who has had such a long experience, both as a lawyer and a judge.

We do not feel like closing this opinion without remarking that there are some courts of high standing that have not carried the rule so far as expressed herein, and others which have held to the contrary, but, after a deliberate consideration and exhaustive review of all the authorities, the conclusion we have reached is in harmony with the great weight of the decided cases, and is correct

upon sound principle. The judgment is reversed, with instructions to the court below to sustain the demurrer to appellee's plea in abatement, and for further proceedings not inconsistent with this opinion.

(58 Ohio St. 620)

STATE ex rel. PLIMMER v. POSTON et al.
(Supreme Court of Ohio. June 24, 1898.)

ELECTION LAWS—CERTIFIED NOMINATIONS—CONSTITUTIONAL LAW.

The requirement of section 6 (89 Ohio Laws, p. 434) that certified nominations of candidates for public offices must be made by "convention, caucus, meeting of qualified electors, primary election held by such electors or central or executive committee, representing a political party, which at the next preceding election polled at least one per cent. of the entire vote cast in the state," is not repugnant to any provision of the constitution.

Spear, C. J., and Minshall, J., dissenting.

Petition for mandamus by the state, on the relation of Richard Plimmer, against Poston and others, constituting the board of elections of the city of Columbus. Petition dismissed.

The defendants constitute the board of elections in the city of Columbus, Ohio. The plaintiff alleges that he is an elector of Franklin county; that at a convention of electors of such county, held on the 29th day of March, 1898, he was nominated for the office of county commissioner on the ticket of the Prohibition party, and that other persons named, who were also electors of said county, were nominated for the other county offices to be filled at the November election, 1898; that on the 17th day of April, 1898, the said nominations were duly certified to the defendants, as required by law; that they rejected said certificate, and refused to file the same, and refused to print the names of said nominees on the ballots to be voted at said election, claiming that said Prohibition party did not poll 1 per cent. of the vote cast at the last preceding election, as required by section 6 of the ballot act, and that said party failed and neglected to file with said board nomination papers, as provided by section 7 of said act. The petition contains no allegation as to the number of votes cast by said party at the last election, nor does it allege that any nomination papers were filed with said defendants, or tendered to them, other than the certificate of the action of said convention. But the relator, claiming that the statutory provisions under which the defendants refused as aforesaid are in conflict with section 1 of article 5 and section 26 of article 2 of the constitution, prays that a writ of mandamus may issue, commanding the defendants to receive and file said certificate, and to print the names of said nominees upon the ballots to be voted at the next election.

G. T. Stewart, F. M. Mecartney, and Mahlon Rouch, for relator. Charles W. Voor-

hees, Florizel Smith, and William J. Ford, for defendants.

PER CURIAM. Since no nomination papers were tendered under section 7 of this act, the only question is whether the requirement of section 6 that a certified nomination shall be by a political party which at the last election "polled at least one per cent. of the entire vote cast in the state" is valid. Certainly, the right of a qualified elector to vote at all elections is secured by section 1 of article 5 of the constitution, but that the exercise of the right is subject to such regulations, looking to a fair election, as do not unreasonably or unnecessarily impair it, is a proposition too familiar to call for discussion or citation of authorities. Some restriction upon the right to have nominations printed upon the blanket ballot is necessary to render it practicable. In view of the small ratio of voters required to make a certified nomination, and in view of the right to have nominations made by papers or petition signed for that purpose, and of the right conferred by the act upon every voter to supply the names of all persons for whom he may desire to vote, we cannot say that the exercise of the right is unreasonably impeded. In *Dewalt v. Bartley*, 146 Pa. St. 529, 24 Atl. 185, it was held that an act requiring that, to entitle it to certify nominations, a party must have polled 3 per cent. of the largest vote cast at the next preceding election, is valid. In *Ransom v. Black*, 54 N. J. Law, 446, 24 Atl. 489, 1021, the same conclusion was reached with respect to an act which required 5 per cent. of the entire vote for that purpose. The provision under consideration was enforced by this court in *State v. Kinney*, 57 Ohio St. 221, 48 N. E. 942, though its validity does not then seem to have been doubted by any one. Petition dismissed.

SPEAR, C. J. (dissenta.)

MINSHALL, J. (dissenting). It seems clear to my mind that sections 6 and 7 of the ballot law, as amended April 18, 1892 (89 Ohio Laws, p. 434), and April 8, 1898 (93 Ohio Laws, p. 94), respectively, requiring a party to have polled a certain per cent. of the aggregate vote at the previous election before it can have its nominees placed in the official ballot, or a petition signed by an equal number of electors, pledging themselves to vote for the nominees, impair the right secured by the constitution to every elector to vote at all elections, and to do so by ballot. Const. art. 5, §§ 1, 2. It is claimed that this right is not interfered with, because the right is given the electors to erase any name on the ballot, and insert that of the person of his choice. This is ingenious, but not ingenious. It overlooks the object an elector has in casting his ballot. He does not cast it as a matter of amusement. His object is to secure the election of a person or persons who

will best represent him in his own views on questions of public policy and the administration of public affairs. Hence it is of vital importance to him, in the exercise of his right, that those for whom he votes should have an equal chance at the polls of being supported by all in harmony with the policy they represent, and any regulation which interferes with this right impairs his constitutional right as an elector. That this is done by the sections above referred to in the ballot law in all cases where a particular party failed at the previous election to secure a certain per cent. of the aggregate vote cast, or is a new party, should, it seems, be plain to any unbiassed mind; for it seems too plain to require argument that, where the nominees of a party must be written on the ballot by those who desire to vote for them, such nominees have not an equal chance of an election, whatever their character or political views may be, with those whose names are printed on the official ballot, and may be voted for by the simple act of making a mark. No one will, I apprehend, deny that a party has an advantage where its nominees may be voted for on what is known as a "straight ticket" over one where nominees cannot be so voted for. It was to deprive leading parties of this supposed unfair advantage that the original Australian ballot system was devised. It required all nominees for a particular office to be placed on the ballot under a proper designation of the office without reference to any party nomination, so that the elector would be required to select for himself the persons for whom he desired to vote. It is so done in Massachusetts and a number of the other states. But in this state we have simply adopted the name, with hardly a trace of the system. The well-understood advantage of a "straight ticket" is denied to all parties who cannot have their nominees placed on the official ballot, and electors who desire to vote for them must write the names on the ballot. This not only impairs the right, but places an unequal burden on the voter against whom this discrimination is made, and must necessarily diminish the number of votes that would otherwise be cast for such nominees. The advantage of printed ballots in securing results over such as must be written by the voter himself is too apparent and well borne out by experience to admit of denial. This evident unfairness is sought to be justified on the ground that it is necessary to the adoption of the Australian system, as without such regulation there would be no limit to the extent of the ballot; or, in other words, in order to secure the supposed benefits of the system, the constitutional right of an elector to vote at all elections must be pared down so as to secure an official ballot of moderate dimensions. This simply places the size of the ballot—a piece of paper—above the right of the elector secured to him by the constitution. I do not deny the

power of the legislature to regulate the ballot and the casting of it, but all such regulations must be reasonable and not impair the right to vote. The regulation by which the nominees of one party are excluded from the official ballot manifestly impairs this right. It measurably excludes all who support them from the polls by excluding them from the facilities in voting enjoyed by all others. They are at least handicapped in the race. That the court of Pennsylvania or of New Jersey may have sustained similar laws is no reason why this or any other court should lend itself to a flagrant violation of the right to vote. In *State v. Kinney*, 57 Ohio St. 221, 48 N. E. 942, the only question presented and considered was the right of a party to have a device at the head of its ticket, as provided for in section 12 of the law. This is not a constitutional right, as is the right to vote, and depends upon a compliance with the law. The invalidity of the sections here in question were not mooted in the case, and cannot control the judgment of the court in this case. Hence the last clause of the majority opinion, referring to that case, has no pertinency in the present inquiry.

(174 Ill. 64)

KEITH v. MILLER et al.

(Supreme Court of Illinois. June 18, 1898.)

HUSBAND AND WIFE—RESULTING TRUST—MARRIED WOMAN'S ACTS—DEEDS—ESTABLISHMENT OF TRUST—WRITING.

1. Evidence that a husband had sufficient money belonging to his wife in his hands at the time of a purchase of certain land does not show a purchase for the wife, so as to establish a resulting trust.

2. Land purchased with moneys of the wife, prior to the married woman's act of 1861, became the absolute property of the husband, and said statute did not divest his rights or title.

3. Payments or oral agreements, after the title is taken, will not create a resulting trust, since the trust must result, if at all, at the time of the execution of the conveyance.

4. Where different instruments are executed as evidence of one transaction, they are to be construed as constituting but a single instrument.

5. Defendant and his wife were well advanced in years and had no children. They had a large farm, paid for by their joint labor, and had discussed its disposal on their death. In pursuance of such a discussion, and as orally agreed, he drew up two wills, one for himself, and one for his wife, which was signed by her. The latter will devised part of said land which "belongs to my husband * * * and myself," subject to the use and control of the husband during life. *Held*, that there was a declaration of trust, "manifested and proved in writing," within the meaning of Rev. St. c. 59, § 9, and hence effectual to establish a trust in the wife's half of the land devised in her will.

Wilkin and Cartwright, JJ., dissenting.

Appeal from circuit court, McDonough county; Jefferson Orr, Judge.

Bill in equity by Charlotte Miller and others against Joseph A. Keith for a decree that plaintiffs own certain lands subject to a

life interest in defendant. From a decree for complainants, defendant appeals. Reversed.

This was a bill in equity, filed September 1, 1893, in the circuit court of McDonough county, by Charlotte Miller, Mary Jane Wolf, Robert N. Tyner, and Elijah T. Wolf against Joseph A. Keith, claiming the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 7, township 7, range 1, in McDonough county, Ill., devised to them under the following will by Martha A. Keith, the wife of Joseph A. Keith: "First. I give, bequeath, and dispose of my property as follows, viz.: My real estate, consisting of a certain tract of land described and designated as follows, viz. fifty-two acres of land on the old homestead (Tyner homestead), located near on Blue river, in Hancock county, Indiana, to be equally divided among my dear relatives, my sisters, namely, Mary Jane Wolf and Charlotte Miller, my brother, Robert N. Tyner, and nephew, Elijah T. Wolf; and, further or secondly, I give, bequeath, and devise unto my dear relatives the following described real estate, viz.: The west one-half of the northeast quarter of section 7, in township 7 north, and range 1 west of the fourth principal meridian, in McDonough county and state of Illinois, with the following proviso or conditions: That my husband, Joseph A. Keith, have, during his lifetime, the entire use and control of it, and, in case he should make sale of the same, then the proceeds of said sale shall go to my relatives above named, equally divided. In witness whereof I hereunto set my hand and seal this 28th day of November, 1885. Martha A. Keith." The will was executed in the presence of two witnesses, and admitted to probate in McDonough county, February 3, 1886. The bill alleges that Martha A. Keith died in McDonough county, February 1, 1886, leaving a husband, Joseph A. Keith, surviving her, but left no child or children; that she left a last will and testament, which was duly probated February 3, 1886; that Joseph A. Keith claimed the aforesaid land in fee (the land in Indiana mentioned in the will not being involved in this suit), and denied complainants' title; and prays that complainants be decreed to be the owners, subject to the life estate of Joseph A. Keith, and that the court decree that he holds the land in trust for complainants, subject to said life estate. The bill also alleges that Joseph A. Keith bought this land, together with other land, part of which is 78 acres on the S. side of the S. W. $\frac{1}{4}$, and on W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, of section 6, with the separate money of Martha A. Keith, derived from her father, Elijah Tyner, both before and after his death, in 1871; that Keith received \$1,150 from said Tyner before his death, and \$1,913 from his estate, all belonging to his wife, Martha A.; that said Keith and his wife agreed that each should own an inter-

est in said land in proportion to the amount invested therein by each; that said Keith agreed with said Tyner that the money he had or should receive from him or his estate should be invested for the use of Martha A., or her heirs at the death of said Keith; that said Keith bought the lands and took the deeds in his own name; that said Keith and his wife, in her lifetime, had made an oral partition of said lands, by which it was agreed that she should have the lands in controversy as her separate property; that said Keith wrote a joint will for himself and wife, by which he devised the same from said Martha A. to himself for life, remainder to her heirs, writing his own name therein, and that the same is a declaration of trust in which he held the land; that pursuant to such agreement said Martha A. claimed to be the sole owner, subject to such life estate; that said Keith has been in possession since her death, and now denies that she ever had any interest in the land, or that complainants now have, and denies she had any right to dispose of the same by devise; that said agreement is not of record, and that said Keith is liable to dispose of the land. The bill prays that said oral partition be confirmed and for general relief.

Joseph A. Keith put in an answer to the bill, in which he admits the making and probate of the will of his wife, Martha A., and the death of Elijah Tyner; denies knowledge of her will until after her death; denies that he purchased the land in controversy, or any land, with money belonging to Martha A. or with money received from her father; denies there was any agreement that she should have any interest therein or that he bought any land with such money; denies that he agreed with Elijah Tyner to invest any money for Martha A., or that the same or any land or property should go to her or her heirs at his death, and sets up the statute of frauds as a defense; denies that he wrote a joint will for himself and wife, and that any will of his wife contained a declaration of trust signed by him; denies that there was any oral partition, and that his wife was to have the land in controversy as her separate property, or that she ever claimed it except by her will, which was without his knowledge or consent; says that he became the owner of all the lands mentioned in the bill about 40 years ago, by deeds to himself, paying the consideration out of his own means, and not from his wife's, and did not have any of her money when the conveyances were made; that said conveyances were recorded and kept at his home; that his wife knew said lands were so conveyed to him, and, with her knowledge and consent, he had exclusive and open possession and control, and paid taxes, since the date of said deed, claiming to own the same; that complainants have had knowledge of his claim since Martha A. Keith's death from his possession and from the records,

and have acquiesced therein; sets up laches and possession for 20 years, and payment of taxes for 7 years, under color of title, as a defense; that he is the absolute owner of said land, and that said Martha A. had no interest therein which she could dispose of by will, and denies that complainants are entitled to any relief. A general replication was filed by complainants to the answer. The decree below found a resulting trust in all the land in favor of Martha A. Keith. Joseph A. Keith appealed.

Sherman & Tunncliffe and Neece & Son, for appellant. Bailly & Holly and David Myers, for appellees.

CRAIG, J. (after stating the facts). It is contended in the argument by appellees that the facts establish a resulting trust as to the land in controversy. It does not appear by a preponderance of the evidence that when the property in controversy was purchased by Keith and the conveyance made to him the consideration was paid with the money of his wife. Keith swears he bought all the land with his own money; that he had \$600 when he came to Illinois with his wife, in 1850, which he had earned farming and in the carpenter business; that he bought land with this money, which land he afterwards sold, and bought the land in controversy, in 1860; that he never got a dollar of any one to buy land with. The receipts introduced by complainants, signed by Martha A. Keith and Joseph A. Keith, to Elijah Tyner,—one for \$550, dated March, 1854, and one for \$350, dated December, 1871,—for advancements to her, do not show that the money went to purchase this land. Keith says his wife lost \$400 in the bank which broke in Bushnell, and she loaned \$400 to one Bobbell and never got anything from him. He says he borrowed \$500 from Elijah Tyner, his wife's father, to buy cattle with, and paid him \$50 a year interest for nine or ten years; that no part of it went into the land; that he paid this \$500 to his wife as soon as her father died. This testimony stands uncontradicted. To raise a resulting trust in favor of the wife, on the ground that her money went into the purchase of the land, that fact must be clearly proved. It would not be inferred from the fact that the husband had in his hands sufficient money of the wife to make the purchase. *Thomas v. City of Chicago*, 55 Ill. 403; *Corder v. Corder*, 124 Ill. 229, 16 N. E. 107.

It appears from the evidence that the land in controversy was bought in 1855. The common law was in force in this state at that time. Joseph A. Keith was married to Martha A. Keith in 1845, and all moneys received prior to the act of 1861, when reduced to possession, "by force of well-known and long-established principles of law governing marital relations, became the property of the husband, and the chattels purchased with it became his likewise. The statute of 1861

never was designed to take from the husband that which belonged to him as a consequence of the marriage, nor could it do so without violating those principles of right and justice no legislature has ever, knowingly and of purpose, disregarded and ignored." *Farrell v. Patterson*, 43 Ill. 52; *Dubois v. Jackson*, 49 Ill. 49; *Jassoy v. Delius*, 65 Ill. 469. Under the foregoing decisions all the money received by Martha A. Keith prior to 1861 became the property of her husband, and, even if it had been paid towards the purchase of the land in controversy, it could not be regarded as the money of the wife.

It is stated that \$2,162.91 was received by Martha A. Keith after the death of her father. This cannot affect the question, as the trust must result, if at all, at the instant the deed is taken and the title vests in the grantee. *Perry on Trusts* (section 133) says: "No oral agreements and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such, at the moment the title passes, that a trust will result from the transaction itself." The same doctrine was held by this court in *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095, where we said: "The resulting trust must arise, if at all, at the time of the execution of the conveyance." The evidence is not sufficient in this case to establish a resulting trust.

Was there a declaration of trust, manifested and proved by some writing, within the meaning of section 9 of chapter 59 of the Revised Statutes of Illinois? It appears by the evidence that on the 19th day of September, 1885, Joseph A. Keith prepared two wills,—one for his wife and one for himself. Both were in his own handwriting. Keith testified: "At the time the will I have produced in court was written, I wrote one for myself. Both were written at the same time. Myself and wife talked over our affairs, and about the land each should have, and how it should be disposed of, and after the conversation it was reduced to writing in these wills. * * * Whatever agreement we made was put in the wills just as we agreed." The first clause of the will drawn for his wife devised to the complainants 52 acres of land in Hancock county, Ind. The following is the second clause, and the part necessary to be considered in this case: "Second. I also give and bequeath to my dear relatives above named a certain tract or parcel of land which belongs to my husband, J. A. Keith, and myself, after we are done with it, lying and being in the county of McDonough and state of Illinois, known and described as follows, to wit: The west half of the northeast quarter of No. 7 (seven), in township No. 7 (seven) north, of range No. 1 (one) west of the fourth principal meridian, eighty acres, more or less. If the above-named real estate has not been disposed of at the death of myself and husband, J. A. Keith, I bequeath it to my four dear relatives, as stated before; and if it has been sold, and turned into money or real es-

tate, and has not been used for particular wants or necessities of us, what remains of it, as I stated above, either real or personal, I give to my four dear relatives, Mary Jane Wolf, Charlotte Miller, Robert N. Tyner, and Elijah T. Wolf, be equally divided between them." Keith also testified that he put the date to it; that the signature was the signature of his wife; that they consulted together with reference to getting up the will prior to his writing it, and that she consented to the same; that the will he wrote for himself and the one he wrote for his wife were alike, except her will related to the land south of the road, which at her death was to go to her heirs, and his will related to the land north of the road, which at his death was to go to his heirs; that there were no witnesses to either will; that he did not recollect that his name was to it, but he might have signed it; that he destroyed his will as soon as she died, and before he married his second wife.

In construing these two wills, prepared by and in the handwriting of Joseph A. Keith, for himself and wife, at the same time, they fall within the rule, frequently applied by this court, that, where different instruments are executed as the evidence of one transaction or agreement, they are to be read and construed as constituting but a single instrument. *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Gardt v. Brown*, 113 Ill. 475; *Duncan v. Charles*, 4 Scam. 561; *Freer v. Lake*, 115 Ill. 662, 4 N. E. 512. Appellant contends that, whatever might have been the efficacy of these two wills as a declaration of trust or a testamentary disposition of the alleged property of Martha A. Keith, they were revoked by the subsequent will prepared by one Edie and probated after her death. The case at bar comes within the case of *Kingsbury v. Burnside*, 58 Ill. 310, where it was said (page 330): "We have seen that the trust is not necessarily to be declared in writing, but only to be manifested and proved by writing, and, if there be written evidence of the existence of the trust, the danger of parol declarations, against which the statute was directed, is effectually removed,"—citing *Lewin, Trusts*, 63. In *Forster v. Hale*, 3 Ves. 696, decided by the master of the rolls in 1798, in construing the seventh section of the English statute respecting trusts, which is like section 9 of the statutes of this state, it was said: "All declarations of creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party." The master of the rolls adopted a letter as a clear declaration of trust, by which he said he meant clear evidence in writing that there was such a trust. And again the lord chancellor, in 1800 (5 Ves. 308), in regard to adopting a letter as evidence in writing of a declaration of trust, said: "It is not necessary that it should be a declaration, but a writing signed by the party may be evidence of a trust admitted in that writing." The question of revocation,

or whether those wills were valid and operative as wills, is immaterial, but the real question is, was there evidence in writing, manifested and proved by these wills, of the existence of a trust?

In construing written instruments courts will endeavor, in all cases, to place themselves in the position of the contracting parties, so that they may understand the language used in the sense intended by the parties using it. Keith and his wife were married in 1845, were well advanced in years, and were without children. They had a farm of 208 acres of valuable land, the accumulation of their joint labor, and they talked over the matter as to how it should be disposed of at their death. The husband says that he and his wife talked over their affairs, and about the land each should have, and after that conversation it was reduced to writing in these wills; that it was put in the wills just as they agreed; that he wrote the wills, and they were in his own handwriting. The language is as follows: "I also give and bequeath to my dear relatives above named a certain tract or parcel of land which belongs to my husband, John A. Keith, and myself, after we are done with it, and lying and being in the county of McDonough and state of Illinois, known and described as follows, to wit: The west half of the northeast quarter of No. 7, in township No. 7 north, of range No. 1 west of the fourth principal meridian, eighty acres, more or less." The language, "a certain tract of land belonging to my husband, John A. Keith, and myself," clearly establishes the existence of a trust in favor of Martha A. Keith to an undivided half of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 7, township 7 N., range 1 W. of the fourth principal meridian, subject to the use and control of Joseph A. Keith during his natural life. The trust being manifested and proved by the written wills, written by Keith himself, who was by law able to declare the trust, it must be carried out.

The decree of the circuit court will be reversed, and the cause remanded, with directions to that court to enter a decree declaring the trust, and require the proper conveyance to complainants of one-half of the land described in the will of Martha A. Keith, dated November 28, 1885, and duly probated, but subject to the use and control of Joseph A. Keith during his natural life. Reversed and remanded.

WILKIN and CARTWRIGHT, JJ., dissenting.

(58 Ohio St. 676)

HALE v. STATE.

(Supreme Court of Ohio. June 24, 1898.)

INDICTMENT—OFFENSE IN ALTERNATIVE—PRACTICE OF MEDICINE—FAILURE TO FILE CERTIFICATE—NEGATIVE EXCEPTIONS IN INDICTMENT.

1. When an offense against a criminal statute may, in the same transaction, be committed

in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant.

2. An indictment, drawn under the act "to regulate the practice of medicine in the state of Ohio" (92 Ohio Laws, p. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee, prescribed, directed, and recommended for the use of a person named a drug, medicine, and agency, put up in a paper box, on which he wrote directions, to which he signed his name, and appended thereto the letters "M. D.," is not bad for duplicity.

3. An averment in such indictment that the defendant, at a time more than 90 days, after the passage of the statute, practiced medicine in the county of his residence without having left with the probate judge of the county a certificate of the state board of medical registration and examination, is sufficient to show a failure to comply with the provisions of the statute. It is unnecessary to aver either that the defendant was not a graduate of a medical college, or that he was not a legal practitioner of medicine when the statute was enacted.

4. Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negated by averment in the indictment, in order to fully state the offense; but, when its effect is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary.

5. The proviso contained in section 4403f (Rev. St. 1890) of the act to regulate the practice of medicine in this state is not descriptive of the offense made punishable by the first clause of section 4403g; and an indictment for such offense, otherwise good, is not demurrable for want of an averment negating the facts to which the proviso relates.

(Syllabus by the Court.)

William F. Hale was convicted in the court of common pleas of unlawfully practicing medicine. The judgment was affirmed by the circuit court, and defendant moves for leave to file a petition in error. Motion overruled.

At the February term, 1898, of the court of common pleas of Jackson county, William F. Hale was indicted for practicing medicine in that county without having complied with the provisions of the act "to regulate the practice of medicine in the state of Ohio," passed February 27, 1896 (92 Ohio Laws, p. 44). The indictment charges that: "William F. Hale, late of said county, on the 14th day of February, in the year of our Lord 1898, at said county of Jackson and state of Ohio, did knowingly, willfully, and unlawfully practice medicine in the state of Ohio without having first complied with the provisions of the act of the general assembly of the state of Ohio entitled 'An act to regulate the practice of medicine in the state of Ohio,' passed February 27, 1896, in this: that at the time and place aforesaid he, the said William F. Hale, did, for a fee, to wit, the sum of thirty-five cents, prescribe, direct, and recommend for the use of one C. B. McClelland a certain drug, medicine, and agency, to wit, a certain drug, medicine, and agency put up in tablet form, and encased in a certain paper box, upon the outside of which said paper box then and there con-

taining said medicine, put up in tablet form as aforesaid, he, the said William F. Hale, then and there wrote and signed his name to a certain prescription and direction, and he, the said William F. Hale, then and there annexed and appended the letters 'M. D.' to his said name so written under and signed to said prescription and direction as aforesaid, which said prescription and direction is in the words and figures following, to wit, '1 to 2 with each meal. Hale, M. D.,' the name and composition of which said medicine, drug, and agency is unknown to this body, the grand jury aforesaid, for the treatment, cure, and relief of a certain bodily infirmity or disease, the name and nature whereof is unknown to said body, the grand jury aforesaid; he, the said William F. Hale, at the time aforesaid not having left for record with the probate judge of the county in Ohio wherein he then resided, to wit, the county of Jackson, a certificate from the state board of medical registration and examination of the state of Ohio entitling him to practice medicine or surgery within the state of Ohio, as required by the act aforesaid, and he, the said William F. Hale, at the time aforesaid not being entitled, under the act aforesaid, or the law of Ohio, to practice medicine or surgery within the state of Ohio." The defendant filed his motion to quash the indictment on the ground that it was bad for duplicity; and, that motion having been overruled, the defendant filed a demurrer to the indictment, which was also overruled. He was found guilty on the trial of the case, and adjudged to pay a fine and the costs of prosecution. That judgment was affirmed by the circuit court, and the present motion is made for leave to file a petition in error in this court to reverse the judgments below. The errors assigned are the overruling of the motion to quash the indictment, and of the demurrer thereto. These will be more particularly noticed in the opinion.

Powell & Eubanks, for the motion. A. E. Jacobs, Pros. Atty., for the State.

WILLIAMS, J. (after stating the facts). As the statute on which this prosecution is founded is of recent enactment, and the questions presented are likely to arise in other cases, it has been deemed proper to report the decision upon the motion.

1. The statute provides (Rev. St. 1890, § 4403f) that any person shall be regarded as practicing medicine or surgery, within the meaning of the act, "who shall append the letters M. D. or M. B. to his name, or for a fee prescribe, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease." And it is contended that, as the indictment, in the same count, charges that the accused prescribed a medicine for the use of a person named, and appended the

letters "M. D." to his name, subscribed to directions written on the package for the use of the medicine, two distinct offenses are charged, rendering the indictment obnoxious to a motion to quash on the ground of duplicity. It appears to be a well-settled rule of criminal pleading that when an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute, if they are not repugnant, and proof of any one of them will sustain the indictment. This rule is more fully stated in Bishop's New Criminal Procedure (volume 1, § 436), as follows: "A statute often makes punishable the doing of one thing, or another, or another; sometimes specifying a considerable number of things. Then, by proper and ordinary construction, a person who, in one transaction, does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or'; and it will not be double, and it will be established at the trial by proof of any one of them." The offense of practicing medicine without compliance with the statute may, as it is defined in section 4403f, be committed either by prescribing a medicine or remedial agency for a fee, or by appending to one's name the letters 'M. D.'; but it is apparent that the statute may be violated in both of these ways in the same transaction. It is not unusual, in prescribing a remedy, whether it is prepared ready for use, by the physician, or is to be filled by a druggist, to accompany the prescription with directions for the use of the remedy; and when such direction is written, and signed with the usual professional designation or abbreviation of a physician appended to the signature, by a person not authorized to practice medicine, there is committed, by the same transaction, an offense against each of the provisions of the statute, and both may be charged in a single count without rendering the indictment objectionable on the ground of duplicity. Under such indictment there may be a conviction upon proof of a violation of either of the provisions; and such conviction, or an acquittal, will necessarily be a bar to any further prosecution based on that transaction. Nor is this indictment open to the objection of duplicity because it charges that the defendant prescribed, directed, and recommended the remedy, and describes the latter as a drug, medicine, and agency for the treatment, cure, and relief of a wound, fracture, and bodily injury, although the statute is in the alternative, and makes it an offense to do either of the things mentioned; for they are not repugnant, and all of them

may occur in the same transaction, constituting but one offense. Upon this principle it has been held that, where a statute made it a crime to use instruments or administer drugs to produce an abortion, an indictment drawn on it was not double which charged that both of those means were employed by the defendant in the commission of the offense. *Com. v. Brown*, 14 Gray, 419. And under a statute which prohibited the unlicensed sale of rum, brandy, whisky, or gin, it was held proper to charge in a single count the sale of all these various kinds of liquors. *Rawson v. State*, 19 Conn. 202. Numerous cases are found in the books in which indictments so drawn on alternative statutes have been sustained. *Bish. St. Crimes*, §§ 244, 383; *Bish. New Cr. Proc.* § 586.

2. The indictment charges that at the time the defendant engaged in the practice of medicine, as therein described, he had not left for record with the probate judge of the county in which he resided and so practiced a certificate of the state board of medical registration and examination entitling him to practice medicine or surgery in this state, as required by the statute; but it contains no averment that he was not a graduate in medicine or surgery, or a legal practitioner under the laws in force when the statute was passed, and the want of such averment is one of the objections made to the indictment on the demurrer. The contention is that such an averment is necessary to the statement of an offense under the statute, because neither those who were legal practitioners at the time of its passage, nor graduates of medical colleges, are required to leave certificates obtained by them from the medical board with the probate judge; that requirement being applicable, it is said, to those only who receive certificates upon examination by the board. We are unable to adopt that construction of the statute. It is made necessary, by section 4403c, for every person, without exception, to first comply with the provisions of the statute, before engaging in the practice of medicine or surgery; and section 4403g makes it a misdemeanor for any person to practice medicine or surgery without having first complied with the provisions of sections 4403c and 4403d. Compliance with both of these sections is essential. By the first of them, all persons who desire to engage in the practice of medicine or surgery (those who were legal practitioners at the time of the enactment of the statute, and graduates of medical colleges, as well as others who were neither) are required to first obtain a certificate entitling them to do so, from the board; the only limitation upon that requirement being that persons engaged in the practice when the statute was enacted are authorized to continue therein for a period of 90 days after it took effect, in order to enable them to apply for and obtain the certificate required;

but, if they would thereafter engage in the practice, they must have the necessary certificate. There is a difference in the mode of obtaining these certificates. A graduate of a medical college is required to present his diploma to the board of examination, accompanied by his affidavit that he is the person to whom it was granted, and stating his age and the time spent in the study of medicine; but this does not necessarily entitle him to a certificate to practice. The board must pass upon the genuineness of the diploma, and determine whether the college issuing it was at the time a chartered medical institution in good standing; and though it be genuine, and issued by such a medical institution, the board may nevertheless refuse to grant a certificate to the applicant, if, in the opinion of the board, his habits or character render him unfit to practice. A person who was a legal practitioner when the act was passed is required to furnish the board satisfactory evidence to that effect, and all others must undergo an examination. But, while there is this difference in the methods by which certificates to practice may be obtained from the board, no person of either class is entitled to practice medicine in this state, after 90 days from the passage of the act, without having first obtained the necessary certificate from the medical board. The only difference in the certificates is in their duration. Those received on examination entitle the holder to practice for one year, while the others continue in force indefinitely, unless revoked by the board. Then, in explicit terms, section 4403d requires that every person receiving a certificate to practice medicine or surgery shall, before entering upon the practice, leave his certificate with the probate judge of the county in which he resides, for record. In this requirement there is no exception in favor of graduates or former legal practitioners, nor any distinction on account of the method of obtaining the certificate, or otherwise. The statute in this respect was designed to operate uniformly upon all members of the medical profession; and its purpose was to provide a public record, open at all times to public inspection, containing a complete list of all authorized resident practitioners in the county, from which it can be readily ascertained who are legally authorized to practice the profession. This is obvious enough from the subsequent provisions of that section, by which it is made the duty of the probate judge to make a record of all certificates, in a book to be kept for that purpose, note on the margin the time when received or revoked, and any change in the location of the owner, or his death, and furnish annually to the secretary of the board a list of all certificates recorded and in force, and those revoked, or the owners of which have removed from the county or died during the year. And, in case of a change of residence to another county, the owner of

the certificate is required to have it recorded anew by the probate judge of the county to which he removes. An averment in an indictment, therefore, which charges that the defendant engaged in the practice of medicine or surgery at a time more than 90 days after the passage of the statute, without having first left with the probate judge of the proper county a certificate granted him by the medical board of registration and examination, is a sufficient averment of his failure to comply with the provisions of the statute; and it is unnecessary to aver either that he was not a legal practitioner when the statute was passed, or not a graduate of a medical college.

3. It is further contended in support of the demurrer that the indictment is defective because it contains no averment which takes the defendant, or the act charged, out of the operation of the proviso contained in section 4403f. The language of section 4403g is that "any person practicing medicine or surgery as defined in section 4403f, in this state, without having complied with the provisions of sections 4403c and 4403d, except as therein provided, shall be deemed guilty of a misdemeanor," etc. The phrase "except as therein provided" evidently refers to the proviso contained in section 4403f, and the language of that section, after defining what shall be regarded as practicing medicine or surgery, is as follows: "Provided, however, that nothing in this act shall be construed to prohibit service in case of emergency, or the domestic administration of family remedies; and this act shall not apply to any commissioned medical officer of the United States army, navy or marine hospital service in the discharge of his professional duties, nor to any legally qualified dentist when engaged exclusively in the practice of dentistry, nor to any physician or surgeon from another state or territory who is a legal practitioner of medicine or surgery in the state or territory in which he resides, when in actual consultation with a legal practitioner of this state, nor to any physician or surgeon residing on the border of a neighboring state, and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends into the limits of this state." It is claimed that inasmuch as the section which makes it a misdemeanor to practice medicine without having complied with the statute refers to section 4403f for a definition of what shall constitute such practice, from which the persons and cases mentioned in the proviso are excepted, the exceptions enter into the description of the offense; so that the indictment should, by negative averment, show that the defendant and the act charged against him are not within the proviso. The statement of the proposition is not without plausibility, but in our opinion it cannot be maintained. "Where a statute contains provisos and exceptions in distinct

clauses, it is not necessary to state in the indictment that the defendant does not come within the exception, or to negative the proviso it contains. Nor is it even necessary to allege that he is not within the benefit of its provisos, though the purview should expressly notice them, as by saying that none should do the act prohibited except in cases thereafter excepted. For all these are matters of defense, which the prosecutor need not anticipate, but which more properly come from the prisoner." 1 Chit. Cr. Law, *284; 2 Hawk. P. C. c. 25, § 113. This rule is aptly illustrated and applied in *State v. Miller*, 24 Conn. 522, where the defendant was prosecuted under a statute which prohibited the manufacture or sale of any spirituous or intoxicating liquors, "except as hereinafter provided." The next section contained certain exceptions. It was held the exceptions need not be negated, and it was there said by the court that "the rule everywhere laid down is that, after words of general prohibition, whatever comes in by way of proviso or exception need not be negated by the pleader, but properly comes from the accused." So, in the case of *State v. Abbey*, 29 Vt. 60, the defendant was indicted under a statute which provided that, "if any person who has a former husband or wife living shall marry another person or shall continue to cohabit with such second husband or wife in this state, he or she shall, except in the cases mentioned in the following section, be deemed guilty," etc. The following section provided that "this act shall not extend to any person whose husband or wife has been continuously beyond the sea, or out of the state for seven years," etc. It was held not necessary for the indictment to negative the exception. The same rule was applied, under a similar statute, in *Com. v. Jennings*, 121 Mass. 47, where it is observed by Gray, C. J., that "it is established by a great preponderance of authority that, where an exception is not stated in the enacting clause otherwise than by merely referring to other provisions of the statute, it need not be negated, unless necessary to a complete definition of the offense." And see *Hart v. Cleis*, 8 Johns. 33; *Com. v. Hill*, 5 Grat. 682. The test appears to be that, when an exception or proviso in a criminal statute is a part of the description of the offense, it must be negated by averment in the indictment, in order to fully state the offense, but, where its effect is merely to take certain persons or acts out of the operation of the general prohibitory words of the statute, the negative averment is unnecessary. Read together, sections 4403f and 4403g amount to this: That there is a general prohibition against persons practicing medicine by prescribing, etc., or appending the abbreviated professional designation to his name, without having first complied with the statute; and then, by the proviso, specified persons and cases are excepted from the operation

of the statute. An indictment which charges a violation of the general prohibitory provision makes a prima facie case; and if the accused, or the act with which he is charged, comes within any clause of the proviso, that is a matter which lies more especially within his knowledge, and should be brought forward by him in defense. This indictment was therefore not demurrable because it contained no averment negating the existence of the facts to which the proviso relates. Motion overruled.

(58 Ohio St. 483)

MAAS v. MILLER et al.

(Supreme Court of Ohio. June 7, 1898.)

INSOLVENT DEBTOR—CONVEYANCE OF PROPERTY BY DEED ABSOLUTE—CONTEMPORANEOUS AGREEMENT—GENERAL ASSIGNMENT—COMMENCEMENT OF ACTION.

1. Where an insolvent debtor, to prevent his property being seized and sold under legal process, conveys substantially all of it by a deed absolute in form, and by a contemporaneously executed written agreement the grantee is authorized to sell and convey the same, and apply the proceeds thereof—First, to reimburse himself for any advancements he may subsequently make to or on behalf of the grantor; second, to pay the legal debts of the grantor, preferring one of his creditors,—the transaction constitutes a general assignment for the benefit of the grantor's creditors.

2. In such case the right of creditors of the grantor to require a sale of the property thus conveyed, and a distribution of its proceeds, accrues contemporaneously with the execution of such deed and agreement, and is not affected by a subsequent settlement of the matter made by the grantor and grantee, to which they do not consent.

3. Section 4982, Rev. St., limiting the time within which certain actions shall be commenced to four years after their accrual, does not apply to an action where the petition therein discloses a right to relief under section 6343 of the Revised Statutes.

(Syllabus by the Court.)

Error to circuit court, Putnam county.

Action by one Maas against Nicholas Miller and another. This action was commenced by the plaintiff in error in the court of common pleas of Putnam county to set aside a conveyance which he alleged to have been made in fraud of the creditors of the grantor. The court of common pleas deciding the case against him, he appealed the action to the circuit court, and upon the trial in that court the same judgment was rendered. He then brought the action to this court, to obtain a reversal of the judgment of the circuit court. The facts will be found in the opinion of the court. Reversed.

George Fritz, for plaintiff in error. Handy & Ogan, for defendant in error Nelson E. Matthews.

BRADBURY, J. The plaintiff filed in the court of common pleas a petition, in which he alleged that one of the defendants, Nicholas Miller, had conveyed to his co-defendant, Nelson E. Matthews, certain real estate

In the petition described, for the purpose of hindering and delaying the plaintiff and the other creditors of Miller in the collection of their debts. The action was brought under section 6344 of the Revised Statutes, which declares, "All transfers, conveyances or assignments made by a debtor, or procured by him to be made, with intent to hinder, delay or defraud creditors, shall be declared void at the suit of any creditor. * * *". The plaintiff averred the recovery of a judgment against the defendant Miller, and the return of an execution unsatisfied, for want of property whereon to levy, and expressly averred that the conveyance made by Miller to his co-defendant, Matthews, was for the fraudulent purpose of hindering and delaying the creditors of Miller. He appended to his petition certain interrogatories, which he called upon the defendant Matthews to answer, and to which reference will be made hereafter. To this petition the defendant Matthews filed the following answer: "Now comes the defendant N. E. Matthews, and for answer to the petition says: That prior to and on the 3d day of February, A. D. 1885, the defendant Nicholas Miller was indebted to various persons in about the sum of \$10,000, of which the sum of about \$8,100 consisted of judgment liens on the premises described in the petition. That among said judgment creditors was the Michigan Mutual Life Insurance Company, upon whose judgment in this court for about \$7,700 the said insurance company had at the November term of A. D. 1884 procured an execution, and order of sale to be issued, directed and delivered to the sheriff of this county, under which order of sale the said sheriff had duly appraised and advertised all of said premises for sale. That at said last-named date there was no market for said real estate, and it could not have been sold at sheriff's sale for more than two-thirds of its actual value, which actual value thereof was then about the sum of \$15,000, and it was then believed by these defendants, and by the principal creditors of said Miller, with whom said defendants consulted, that if the forced sale of said premises could be avoided, and the said property could be sold at private sale upon a reasonable credit, or for cash, as the purchaser might desire, said premises could be sold for a sum sufficient to pay in full all of the said debts of said Miller; and thereupon, and for the purpose of selling said property for its fair value, and applying the proceeds to the payments of said indebtedness of the said Miller, the said Miller on said 3d day of February, A. D. 1885, conveyed all said real estate to this answering defendant and his heirs, by a deed of trust in the nature of a mortgage, with power to sell any or all of said real estate at its fair value for cash, or on reasonable credit, and at the same time, and as a part of the same transaction, it was agreed by and between this answering defendant and the said Mil-

ler that this defendant should accept said conveyance, and should, in his own discretion, advance money, and apply the same either in procuring an extension of the time of paying said liens until this defendant should sell said premises at their value, or in paying the said liens off, as to this answering defendant might seem most likely to realize the highest prices for said real estate. And it was further agreed by and between this answering defendant and the said Miller that this answering defendant should sell certain notes of said Miller, then deposited as collateral security with A. V. Rice & Co. and with George B. Cass to secure debts then owing to said A. V. Rice & Co. and to said George B. Cass (said sale being subject to the said liens of said A. V. Rice & Co. and said George B. Cass), and apply the surplus of said notes remaining after paying the said liens of said A. V. Rice & Co. and said George B. Cass on the said debts of said Miller; and it was further agreed in said contract that this answering defendant should have a right, upon the sale of any or all of said property, to first pay himself out of the proceeds the amount of all such advancements of money which he had theretofore made in pursuance of said contract, with interest thereon from the time of making such advancements; and this defendant avers that he accepted such conveyance, and that since the date of said conveyance, and up to the 1st day of January, A. D. 1891, he had sold the following parcels of said real estate, at the following prices, to wit: N. $\frac{1}{4}$ N. E. $\frac{1}{4}$ section 27, Palmer township, Putnam county, Ohio, for \$2,600; that since the date of said conveyance, and up to the 1st day of January, A. D. 1891, this answering defendant has paid, of his own money, in taxes and assessments on said real estate, the sum of \$1,955.84, which, with interest thereon at 8 per cent. up to said last date, amounted to \$2,815.42; that this defendant had, up to said last date, paid, out of his own money, upon said liens and indebtedness, the sum of \$6,549.48, which, with interest at the rate of 8 per cent. up to said last date, amounted to \$9,370.88. This answering defendant further avers that from the date of said deed up to the 1st day of January, A. D. 1891, he made diligent effort to sell said real estate at a fair value, but only succeeded in selling the parts thereof last above described; that at said last date this answering defendant had paid, in taxes, assessments, and liens on said real estate, in excess of the amount of said notes, and of all rents, issues, and profits by him received from said real estate so sold as aforesaid, the sum of \$14,123.07, which said last-named sum was at said last-named date greater than the then value of all of said real estate, and at said last-named date this answering defendant and the said Nicholas Miller had a settlement in full of all the matters and things covered by said deed and

contract, and in consideration of the said advancements by this answering defendant so as aforesaid by him made, and of the payment by this answering defendant of said taxes, assessments, and liens, the said Miller then and there released his equity of redemption in said premises to this answering defendant, who is now the owner in fee simple. This answering defendant further avers that said deed from the said Miller to him recited the execution of the above-described contract as a part of the consideration for said deed, and that immediately after the execution of said deed, and on, to wit, the — day of February, A. D. 1885, this defendant procured the said deed to be duly recorded in volume No. 46, p. 541, in the deed records of said Putnam county, and since the said release of said equity of redemption this answering defendant has expended in the necessary repairing and improving of said premises, and in the payment of the legal assessments and taxes thereon, a large amount of money in excess of all the rents, issues, and profits of said premises. And this answering defendant denies, all and singular, the allegations of the petition not hereinbefore expressly admitted."

The defendant Matthews also answered the interrogatories that had been propounded to him, which, so far as material, are as follows: Fourth interrogatory: "What, if any, money or other thing of value did you pay or deliver to said Nicholas Miller at or about the time of the execution and delivery of said deed, and intended to operate as a consideration for the execution and delivery of said deed?" Answer to fourth interrogatory: "Nothing, except a certain contract herein-after attached to these interrogatories." Fifth interrogatory: "Did you pay any money, or engage to do so, to the said Nicholas Miller, as consideration for the execution and delivery of said deed; and was the same, or any part thereof, unpaid at the date of filing this petition?" Answer to fifth interrogatory: "I agreed to do nothing except that stated in said contract." Seventh interrogatory: "What amount did the said Nicholas Miller owe you at the time of the execution and delivery of said deed to you?" Answer to seventh interrogatory: "None." Sixteenth interrogatory: "What, if any, property, real or personal, was the said Nicholas Miller possessed of immediately after the execution and delivery of said deed to you?" Answer to sixteenth interrogatory: "None, to my knowledge." Seventeenth interrogatory: "Did you know that at said time?" Answer to seventeenth interrogatory: "Yes." Twenty-first interrogatory: "Was any contract made between you and said Nicholas Miller, providing for a part of the consideration for the execution and delivery of said deed from Nicholas Miller to you?" Answer to twenty-first interrogatory: "We entered into a contract. The consideration is expressed in the contract." Twenty-second

interrogatory: "Was it in writing?" Answer to twenty-second interrogatory: "Yes."

A copy of which writing is in the words and figures following, to wit: "This agreement, made and entered into this 3d day of February, A. D. 1885, by and between N. E. Matthews and Nicholas Miller, witnesseth, that whereas the said Nicholas Miller is largely indebted to divers and sundry parties, who are now threatening and are about to sell certain real estate of the said Nicholas Miller to secure the payment of their claims against him; and whereas, in order to gain time, and to avoid sales of the property of said Miller under process of law, the said N. E. Matthews, for and in consideration of a conveyance to him of certain real estate by the said Nicholas Miller, by these presents obligates himself to procure and obtain a suspension of a certain writ of execution and order of sale of a certain judgment of foreclosure against the said Nicholas Miller, in favor of the Michigan Mutual Life Insurance Company, for the sum of about seventy-seven hundred (\$7,700), rendered and obtained at the November term, A. D. 1884, of the court of common pleas of Putnam county, Ohio, and docketed and known to said court as cause numbered 3,984 until the first day of August, A. D. 1885, and the said N. E. Matthews, for and in consideration of the foregoing, agrees to pay all taxes due on all of the lands owned by, and taxed in the name of, said Miller, due December, A. D. 1884, and to pay all legal costs incurred by both plaintiff and defendants in said cause numbered 3,989, to this date, as well as an attorney fee of seventy-five dollars to Messrs. McKinzie & Robb, attorneys at law, of Lima, Ohio; said deed of conveyance by the said Nicholas Miller to the said N. E. Matthews, as before mentioned, being for the conveyance of the following real estate, to wit: [Here follows a description of the property.] Said deed being made and executed solely and only for the purpose of enabling said N. E. Matthews to procure the necessary funds to pay the said several amounts hereinbefore mentioned, and such other funds as the said N. E. Matthews may from time to time advance to assist the said Nicholas Miller, and to pay upon the legal indebtedness of said Miller. It is understood and agreed that the said N. E. Matthews shall have full power and authority, by virtue of the conveyance aforesaid, at any time to sell all or any part of the real estate in said deed of conveyance described, at its fair market value, for cash or otherwise, as he may deem proper; and he is hereby authorized and required to apply the proceeds of such sale or sales so to be made to the payment and extinguishment of the legal liabilities of the said Nicholas Miller. And the said N. E. Matthews hereby agrees to reconvey to the said Nicholas Miller any or all of the real estate hereinbefore men-

tioned and described, not sold or otherwise disposed of in accordance with the provisions of this agreement, upon the demand of the said Miller, at any time after all the legal obligations of the said N. Miller shall be fully paid and satisfied, which the said N. E. Matthews may have assumed, or may assume, pay, or in any way be personally liable for. Said N. Miller is to remain in the possession of all of said premises until the same may be sold or otherwise disposed of, and said Miller is to co-operate with the said Matthews in effecting sales of said real estate; and the said Matthews agrees that, whenever the said Miller shall effect a reasonable sale of any of the said premises, said Matthews shall make a deed therefor to the purchaser upon the request of said Miller; the proceeds of said sale to be applied by said Matthews upon the indebtedness of said Miller as aforesaid. Said Miller hereby undertakes and agrees to turn over to said Matthews all the rents, issues of, and profits arising from said real estate, saving and excepting sufficient to provide a reasonable support for said Miller and his family, to keep up necessary repairs upon the farm and other premises, and to properly provide and care for the live stock kept upon said premises. It is, however, agreed that, should the said N. E. Matthews desire to, he may and shall have full authority to rent one hundred acres of said premises for a cash rental. It is agreed that said N. E. Matthews shall have full power to settle all legal existing liabilities of the said Miller in such manner and upon such terms as he may deem fit and just. It is agreed that all notes and credits belonging to the said N. Miller, and by him deposited with A. V. Rice & Co. and George B. Cass as collateral security for advancements by said parties made before this time to said Miller, are hereby transferred and sold to the said Matthews for the purpose of realizing the value thereof by sale or collection,—subject, however, to any lien upon them that may exist in favor of said Rice & Co. or said Cass by reason of any previous agreement between them, or either of them, and the said Miller. And any and all sums so realized by the said Matthews from said notes shall be applied by said Matthews upon the indebtedness of said Miller, in the discretion of said Matthews. It is further agreed that said N. E. Matthews shall, out of the proceeds of any sales of real estate he may make or moneys that he may receive by virtue of said deed of conveyance to him, or by the provisions of this contract, he shall be authorized to reimburse himself for any and all advancements of money he may make for or in behalf of said Miller, and all such advancements shall bear interest at the rate of eight per cent. per annum. The said N. E. Matthews shall in no way become liable for any of the present indebtedness of said Miller, except as he shall see fit to voluntarily as-

sume the same. It is also understood that the said N. E. Matthews may at any time reconvey said real estate, or such portion thereof as may remain undisposed of, to the said Nicholas Miller; and the said Nicholas Miller shall then release said Matthews from any further effort in said Miller's behalf, or from liability on any contract for the payment of the indebtedness of said Miller. It is further agreed that said deed of conveyance hereinbefore recited carries with it the right to mortgage or otherwise pledge any part or all of said premises by the said Matthews for purpose of obtaining money to pay any existing indebtedness of said Miller, or any indebtedness incurred by the said Matthews in behalf of said Miller. It is also agreed that, in case of the death of said N. E. Matthews, said property, or so much thereof as may remain undisposed of, shall be at once reconveyed to the said Miller, and the estate of N. E. Matthews wholly released and saved from any and all obligations by reason of this contract, or said first-mentioned conveyances, and, in case of the death of said Miller pending the adjustment of the matters and affairs covered by this contract, that the contract shall remain in force and effect notwithstanding said demise, and the said N. E. Matthews shall consummate this agreement with the personal representation of the said Nicholas Miller. In witness whereof the parties hereto affix their signatures this day and date first mentioned. N. E. Matthews. Nicholas Miller. W. H. Meete. M. P. Goetschues."

The record thus discloses that the plaintiff was a creditor of the grantor, Miller, when the deed complained of was executed; that the claim has since been reduced to judgment, that execution has been issued on the judgment, and returned unsatisfied, and that Miller has no property subject to levy or sale on execution; that the property was conveyed to the grantee for the purpose of preventing such seizure and sale and with a view to its ultimate sale by the grantee if that should become necessary to pay the grantor's debts, and the application of the proceeds to such debts. Any surplus remaining after these debts were paid was to be returned to the grantor. The grantee, Matthews, thus became clothed with a trust. It became his duty to administer, in the manner agreed upon, the property thus conveyed to him. This agreement provided especially for the payment of the judgment or decree held by the Michigan Mutual Life Insurance Company, the costs made by both parties in the action in which that judgment had been recovered, and a claim held by McKinzie & Robb, attorneys, for \$75. No other debts were named in the agreement, and its terms, in so far as they related to the payment of Miller's other debts, are ambiguous; but the agreement is fairly open to the construction that the parties to it did not contemplate a pro rata application of the proceeds of the property to the general indebtedness of Miller. On the

contrary, the agreement is consistent with the right of Miller and Matthews, and perhaps of Miller alone, to select the claims of certain other favored creditors of Miller, and pay them in full, to the exclusion of others. We think this brought the grantee, Matthews, within the terms of section 6343, Rev. St., which reads as follows: "Sec. 6343. All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter." As the word "assignment," in this section, embraces every form of conveyance that will operate to transfer title to property, the deed and accompanying contract involved here constitute such an assignment as the section contemplates. *Gashe v. Young*, 51 Ohio St. 876, 38 N. E. 20; *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716; *Brown v. Webb*, 20 Ohio, 389; *Harkrader v. Leiby*, 4 Ohio St. 602. The inability of the grantor to pay his debts, and the danger of his property being sacrificed by means of judicial sales, were the expressed motives that induced the transaction, and show that it was done in contemplation of the insolvency of Miller. By the express terms of the agreement under which Mr. Matthews was to administer the trust, the claim of McKinzle & Robb, and the costs incurred in reducing the insurance company's claim to judgment, are to be paid in full. So that, leaving out of consideration the judgment of the Michigan Mutual Life Insurance Company, which had already become a lien upon the real estate in question, and also leaving out of consideration the right of the grantor and grantee to select other favored creditors of Miller, to whom payment in full might be made, and also ignoring the fact that the conveyance and contract embraced all, or substantially all, the property owned by Miller, yet, as the undeniable effect of the transaction was to prefer McKinzle & Robb and the costs above named, that is enough to satisfy the requirement of the statute that the assignment "shall have been made with intent to prefer one or more creditors."

The grantee, Matthews, in his original answer filed in the court of common pleas, alleged that: "This answering defendant further avers that from the date of said deed up to the 1st day of January, A. D. 1891, he made diligent effort to sell said real estate at a fair value, but only succeeded in selling the parts thereof last above described; that at said last date this answering defendant had paid, in taxes, assessments, and liens on said real estate, in excess of the amount of said notes, and of all rents, issues, and profits by him received from said real estate so sold as aforesaid, the sum of \$14,123.07, which said last-named sum was at said last-named date greater than the then value of all of said real estate; and at said last-named date this answering de-

fendant and the said Nicholas Miller had a settlement in full of all the matters and things covered by said deed and contract, and in consideration of the said advancements by this answering defendant, so as aforesaid by him made, and of the payment by this answering defendant of said taxes, assessments, and liens, the said Miller then and there released his equity of redemption in said premises to this answering defendant, who is now the owner in fee simple." This statement constituted no defense to a decree declaring the transaction to constitute an assignment for the benefit of the creditors of the grantor, Miller. The rights of those creditors to have a decree to that effect accrued to them contemporaneously with the execution of the deed, and any subsequent arrangement, contract, or agreement entered into by and between Miller, the grantor, and Matthews, the grantee, should not affect these rights, unless consented to by those creditors.

Upon the admitted facts disclosed by the record, therefore, the plaintiff was entitled to a decree declaring the conveyance made to Matthews to constitute an assignment for the benefit of the creditors of Miller. The plaintiff, however, did not seem to desire this relief. He was determined to attack and destroy the deed on the ground that it was founded on fraud and collusion. And, pursuant to this determination, after he had been defeated in the court of common pleas upon this issue of fraud and collusion, and had appealed the cause to the circuit court, he obtained leave to file, and afterwards did file, an amended petition, in which he reiterated the charges of fraud, averring "that the said Nelson E. Matthews then and there accepted the said transfer, conveyance, and deed of conveyance of all said real estate without any consideration therefor, and in consummation of a combination and conspiracy between the said Nicholas Miller and Nelson E. Matthews, with the intent to hinder, delay, and defraud the creditors of said Nicholas Miller, including said plaintiff, and that said transfer and conveyance of all said real estate is void as to the creditors of said Nicholas Miller, including said plaintiff; that the title to all said real estate was transferred and conveyed to and accepted by said Nelson E. Matthews in secret trust, and to be sold and accounted for, and the proceeds of such sale to be secretly accounted for and secretly paid over to said Nicholas Miller, for the purpose of and with the intent to hinder, delay, and defraud the creditors of said Nicholas Miller, including said plaintiff." Perhaps the motive for the persistent efforts of the plaintiff to establish fraud and collusion, and to obtain a decree under section 6344, Rev. St., declaring the deed void on that account, is to be found in the circumstance that the plaintiff had given notice, under that section of the statute, of the pendency and object of the action. If he obtained relief thereunder, he and those who

might come in, secure costs, file cross petitions, etc., would obtain priority, in the distribution of the proceeds of the property, over other creditors who had no specific liens. In his judgment, it may have been quite clear that he, and those who, pursuant to the notice, came in, would be entitled to such priority if he brought the case within section 6344, Rev. St., while he may have been in doubt respecting it if relief should be granted under section 6343, Id. But, whatever his motive might have been, this course thus pursued by him is adverted to only as affecting his right to costs and the allowance of an attorney fee. To the charge of fraud and collusion thus reiterated in the circuit court the defendant Matthews interposed a denial, and, as a distinct defense, averred that the cause of action accrued more than four years prior to its commencement; and the cause was tried in the circuit court on these issues, and a general finding made for the defendant. This finding exonerates Matthews from the charge of fraud and collusion, and the evidence fully sustained that finding. The record discloses nothing to indicate that he did not act in perfect good faith in all that he did in the matter. However, notwithstanding that no bad faith or fraud in fact was shown in the transaction, nevertheless its effect was to remove from the operation of legal process the property of the grantor, Miller; and for that reason the deed was constructively fraudulent, as against the plaintiff and other creditors of Miller, under the rule laid down in *Loudenback v. Foster*, 39 Ohio St. 203; and upon that ground plaintiff was entitled to relief under section 4982, Rev. St., if his action had been commenced before the statute of limitations of four years had attached. Doubtless the court of common pleas, as well as the circuit court, recognized this constructively fraudulent character of the transaction, but under the rule laid down in *Combs v. Watson*, 32 Ohio St. 228, denied relief because the action had not been commenced within four years from the time it accrued. Whatever the motive of the plaintiff was in pursuing this issue of fraud and collusion, and in contesting the plea of the statute of limitations which grew out of that issue, it is manifest that the interests of the general creditors of Miller were not advanced by this course of proceeding; for, notwithstanding the issues thus joined in the circuit court, the answer of the grantee, Matthews, filed in the court of common pleas, and which disclosed the circumstances under which the property had been conveyed to him, had not been withdrawn, but remained a part of the record, as did the interrogatories and the answers thereto, including the contract prescribing the manner in which this property was to be administered by the grantee. This contract and the deed constituted one entire transaction, and should be construed together; and, when thus con-

strued, that transaction, as has already been stated, was in law an assignment of the property involved for the benefit of the creditors of the grantor, Miller. The issue taken upon the charge of fraud and collusion, as well as that taken upon the averment of the cause of action that accrued more than four years before its commencement, were therefore both immaterial, in as far as the rights of general creditors were concerned. The issue respecting fraud and collusion was immaterial in this respect, because the relief to which the plaintiff, as the representative of the creditors of Miller, was entitled, under section 6343, Rev. St., upon the undisputed facts, did not depend upon the establishment of fraud, either actual or constructive, but might properly rest on the fact that the deed and agreement created a trust. And as a cause of action arising under that section does not depend upon fraud, or fall within any other class of actions that section 4982, Rev. St., requires to be commenced within four years, the issue growing out of the averment that the cause of action in this case had accrued more than four years before the action was commenced was also immaterial.

The petition contained a prayer for general equitable relief, and, notwithstanding the circuit court found those immaterial issues for the defendant, it should have rendered such judgment as the undisputed facts disclosed by the record required, and, if necessary for that purpose, should have directed the pleadings to be reformed to conform to those facts. The facts thus appearing, this court will proceed to render the judgment the circuit court should have rendered. The plaintiff was entitled to this relief from the moment the defendant Matthews filed his answer in the court of common pleas, and answered the interrogatories propounded to him; and doubtless it would have been granted if the plaintiff had demanded it, instead of pursuing the question of fraud and collusion. Much delay, and most of the cost, should be attributed to this course thus pursued by the plaintiff. On this account, we think he should not be allowed to recover costs made by him in the common pleas and circuit court. Nor should he be allowed an attorney fee out of the funds that may accrue from a sale of the property involved in this action. Judgment reversed, and judgment for plaintiff in error.

(174 Ill. 295)

HARVEY et al. v. AURORA & G. RY. CO.
(Supreme Court of Illinois. July 22, 1898.)

APPEAL—INSUFFICIENT ABSTRACT—BILL OF EXCEPTIONS—WAIVER OF OBJECTIONS—MOTION TO DISMISS—EMINENT DOMAIN—ELECTRIC STREET RAILWAY.

1. An appeal will not be dismissed for failure of the abstract to state that exceptions were preserved to the ruling of the court denying a motion to dismiss a petition to condemn prop-

erty for a railroad right of way, or that the affidavits set out were all the evidence heard and considered by the court, where appellant, on discovery of the omission, asked leave to correct it by amendment.

2. Where an order denying a motion to dismiss condemnation proceedings is appealed from, it is unnecessary to take a bill of exceptions on final judgment awarding damages, to complete the appeal record.

3. The right of a street-railway company to maintain condemnation proceedings may be properly determined on a motion to dismiss the same, and error therein is properly preserved by exception to the ruling.

4. Error in denying a motion to dismiss condemnation proceedings is not waived by filing cross petitions for the assessment of damages, or failure to make a motion for a new trial or in arrest of judgment, before judgment assessing damages is entered.

5. Statutes permitting the exercise of the right of eminent domain are in derogation of the common law, and must be strictly construed.

6. By Rev. St. 1874, c. 66, § 1, a horse and dummy railway, incorporated under the general incorporation law, was given the right to appropriate property necessary for the construction of its road; and section 2 provided that, when it was necessary for the construction of such road to take or damage private property, the same might be done in the manner provided for the exercise of the right of eminent domain. *Held*, that the power granted was limited to cases of necessity, and that an electric street railway, having obtained a right to lay its tracks along a public road, was not authorized to abandon it, and condemn private property for a right of way, where there was no showing of a necessity therefor.

Phillips, J., dissenting.

Error to circuit court, Kane county.

Condemnation proceedings by the Aurora & Geneva Railway Company against Jenny D. Harvey and others to acquire land for right of way. From an order denying a motion to dismiss the proceedings, defendants bring error. Reversed.

Edward O. Brown, for plaintiffs in error.
A. J. Hopkins, F. H. Thatcher, and F. A. Dolph, for defendant in error.

CRAIG, J. The Aurora & Geneva Railway Company, defendant in error, was organized under the general incorporation law of the state,—“An act concerning corporations,” approved April 18, 1872. In the application to become incorporated, the purposes for which the corporation was organized are stated as follows: “The object for which it is formed is to build, construct, maintain, and operate street railways, horse and dummy railroads, and tramways in the county of Kane, in the state of Illinois, to be operated by electricity or by any other motive power excepting steam, for the purpose of carrying passengers, express matter, mail and baggage; also, for the purpose of generating and supplying others with electricity in any form for power, heat, light, and for any other purpose.” The certificate of organization bears date July 29, 1896, and the purpose of the corporation was to construct a street railroad from Aurora to Geneva, the county seat of Kane county. Soon after the organization of

the company, it constructed an electric street railway over certain public streets in Aurora, and along the public highway from Aurora to Batavia, which was about two-thirds of the distance from Aurora to Geneva. On the 8th day of September, 1896, the defendant in error petitioned the board of supervisors of Kane county to grant to it, and to its successors and assigns, for the period of 20 years, the right to lay down, construct, maintain, and operate during said time its railway and tracks, with necessary sidings, appurtenances, poles, wires, and other equipments, for the purpose of operating its railway and carrying out the purposes of its incorporation in, upon, and along that part of the public highway in the townships of Batavia and Geneva, in said Kane county, Ill., which runs along the westerly bank of Fox river, extending from a point on said highway connecting with Batavia avenue at the northerly city limits of said city of Batavia to the southerly city limits of the city of Geneva. The board of supervisors, after due consideration, granted the prayer of the petition. From the northern limits of the city of Batavia the railway company proceeded to construct its street railway along the highway, the use of which was thus granted to it by the supervisors of Kane county, for the distance of about one-quarter of a mile, to a point less than 1,000 feet south of where the right of way of the Chicago & Northwestern Railway crosses the said highway. At this point the managers of the road determined to deflect from the highway, pass under the Northwestern Railway, and construct its road over private property from the point indicated to near the terminus of the road, a distance of over one mile. Under this arrangement the managers undertook to leave the highway altogether, and run over private property along the banks of the Fox river, which lies at a distance east of Batavia avenue varying from 800 to 1,500 feet. The railway company, not being able to procure land for right of way from the owners, filed a petition in the circuit court of Kane county to condemn a strip 50 feet in width, and about a mile and a half in length, over private property; claiming the right to do so under “An act in regard to horse and dummy railroads” (Rev. St. 1874, c. 66), and the eminent domain act (Id. c. 47). The plaintiffs in error, landowners, appeared and entered a motion, supported by affidavits, to dismiss the petition filed against them. The motion was predicated on the ground that unlimited power was not conferred on railway companies incorporated under the general incorporation act as horse or dummy railroads, but that the power of condemnation which is so given by the horse and dummy act is purely ancillary and incidental to the proper purposes of a street railway. Thus, it was contended that the power so given to condemn might properly be exercised by a street railway when it became necessary to take private property

in order to render the use of the highway practicable and efficient,—when, for example, power houses, switches, or turnouts demanded such use,—or when some practically insurmountable obstacle necessitated a slight deflection from, and return to, such highway, but that it could not be exercised for the purpose of enabling a street railway to cease to be a street railway: that it could not, in other words, be exercised, as in the case at bar was attempted to be done, to enable the road to leave the highway, over which it had the privilege of going between two points a mile and a quarter apart, and to make for that mile and a quarter an exclusive right of way for itself over the private estates of individuals. On the other hand, the petitioning railway company asserted that right, and claimed that power was given to it by the horse and dummy act to select its route over private property, and condemn the lands so selected. The court denied the motion to dismiss the petition. Plaintiffs in error excepted, and prepared a bill of exceptions, containing the motion and affidavits in its support, which was signed and sealed by the court. Cross petitions were then filed by the plaintiffs in error, and, on a hearing before the court and a jury, damages were awarded for the lands taken, and plaintiffs in error sued out this writ of error.

Before proceeding to a consideration of the main question in the case, several technical questions have been raised by defendant in error which may properly be considered here. First, it is said the abstract fails to show that exceptions were preserved to the ruling of the court in denying the motion to dismiss the petition; second, that the abstract fails to show that the bill of exceptions contains the statement that the affidavits set out in the bill of exceptions were all the evidence heard and considered by the court on motion. The defects mentioned are mere omissions in the abstract, which plaintiffs in error had the right to correct by an amendment to the abstract, which they asked leave to make upon a discovery of the omission. It is also contended that the record is incomplete, for the reason that no bill of exceptions was taken at the conclusion of the trial, upon the rendition of final judgment, showing the evidence heard on the trial relating to the issue involved on the motion to dismiss the petition. On the trial before the jury no question could be raised in regard to the right of petitioner to take private property for railroad purposes. That was a question which was not before the jury; and had any evidence been offered, bearing on that question, it would, no doubt, have been excluded. The only question before the jury was the amount of damages or compensation to be allowed each owner for lands taken or damaged. Plaintiffs in error do not call in question, or controvert in any manner, the finding of the jury, or the judgment of the court on the finding.

There was therefore no necessity for preserving the evidence heard on the trial in a bill of exceptions.

Whether the petitioner was authorized to exercise the right of eminent domain was a question to be determined by the court on the motion to dismiss. *Ward v. Railroad Co.*, 119 Ill. 287, 10 N. E. 365; *Railway Co. v. City of Chicago*, 143 Ill. 641, 32 N. E. 178; *Smith v. Railroad Co.*, 105 Ill. 511. That question was properly preserved by the course pursued by plaintiffs in error. It is also contended that plaintiffs in error waived the error committed in the denial by the court of the motion to dismiss the petition, by filing cross petitions in the matter of the assessment of damages, and by neglecting to make, before the statutory order upon the verdict was entered, a motion for a new trial or a motion in arrest of judgment. Where a defendant in an action at law interposes a demurrer to a declaration, which the court overrules, and the defendant then pleads over to the declaration, the right to insist on the defect in the declaration may be regarded as waived. But the rule which governs a case of that character has no application here. This was not a demurrer to a declaration or other pleading. It was a motion to dismiss on the ground that the petitioner had no right to exercise the power of eminent domain. After the motion was overruled, there was no pleading over by the plaintiffs in error, within the meaning of the law. The filing of cross petitions had no relation to or connection with the motion to dismiss; and, in our opinion, plaintiffs in error had the right to be heard on the question of compensation and damages in the contest before the jury, without waiving any rights they had acquired by the motion to dismiss the petition.

In the petition to condemn it is alleged: "Your petitioner, the Aurora & Geneva Railway Company, respectfully represents unto your honor that it is a corporation organized and existing under and by virtue of an act concerning corporations, approved April 18, 1872, in force July 1, 1872, of the general laws of the state of Illinois, and that said company was so incorporated for the purpose of constructing, maintaining, and operating a horse and dummy railroad and tramways in the county of Kane, in the state of Illinois; and being so incorporated as aforesaid, and for the purposes aforesaid, your petitioner is subject to, and has vested in it, the provisions of an act of the general assembly of the state of Illinois entitled 'An act in regard to horse and dummy railroads,' and of sections 1 and 2 thereof, by which petitioner may enter upon and appropriate any property necessary for the construction, maintenance, and operation of its road, and all necessary sidings, side tracks, and appurtenances; and when it is necessary for the construction, maintenance, and operation of the road of said petitioner, and for the nec-

essary sidings, side tracks and appurtenances thereto, to take private property, the same may be done by said petitioner; and said petitioner is entitled to have the compensation therefor ascertained and made in the manner now provided by law for the exercise of the right of eminent domain under and by virtue of the provisions of an act of the general assembly of the state of Illinois entitled 'An act to provide for the exercise of the right of eminent domain,' approved April 10, 1872, and in force July 1, 1872. Your petitioner further represents unto your honor that for the construction, maintenance, and operation of its said road, and all necessary sidings, side tracks, and appurtenances, it is necessary for your petitioner to enter upon and appropriate the property hereinafter described, which said property is located along and on either side of a line now surveyed, located, and staked out by your petitioner, which line is described as follows, to wit." Then follows a description of the lands sought to be taken for railroad purposes.

The appropriation of private property under the right of eminent domain is an exercise of sovereign power, and, where reliance is placed upon statutes conferring the right, these statutes being in derogation of common right, must be strictly construed; and the right cannot be exercised except in strict conformity to the power conferred. In *Railway Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, and 24 N. E. 674, in the discussion of this question it is said: "Lewis on Eminent Domain (section 600) says: 'The power to force a man to give up his property against his will, and for a consideration fixed by others, is one which is, in its nature, harsh, and against common right. According to all analogies of the law, such a power, to be effectual in its exercise, must be strictly pursued. This has been repeatedly held with respect to the power of eminent domain.' To put the court in motion, and give it jurisdiction in condemnation proceedings, a petition is, in general, necessary, and must be in conformity with the statute granting the right of condemnation. It should set forth, by appropriate averments, all such facts as are necessary to authorize the tribunal to act. *Smith v. Railroad Co.*, 105 Ill. 511; *Balley v. McCain*, 92 Ill. 277. It is thus stated by Mr. Lewis (section 353): 'The petition should show the use or purposes for which the property is desired, and that it was within the statutory powers conferred. It should show a clear right to condemn the property described. Accordingly, it must not only show that the property is wanted for a public use, but also that it is for a use that is within the particular statute under which the proceedings are had.'" In a later case (*Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934), summing up this fundamental principle, it is said: "Statutes conferring power to exercise the right of eminent do-

main are to be construed strictly. Unless both the letter and spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised." The rule here indicated has been sanctioned and adopted in other states. *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 531, 6 Atl. 564; *Currier v. Railroad Co.*, 11 Ohio St. 231. It must be observed that the petitioner, the Aurora & Geneva Railway Company, was organized under the general incorporation act of the state (Rev. St. c. 32). Section 1 of that act provides that corporations might be formed in the manner provided by that act for any lawful purpose, except banking, insurance, real-estate, brokerage, the operation of railroads, and the business of loaning money, provided that horse and dummy railroads may be authorized and conducted under the provisions of this act. At the same session of the legislature a general law was passed for the organization of railroad companies. Id. c. 114. Railroad companies organized under this act were authorized to select the most advantageous route for the location of the road; to purchase, hold, and sell such real estate as may be necessary for the construction and use of the railroad: to lay out the road, and construct the same, 100 feet in width; to purchase or condemn private property for right of way, or other lawful purposes connected with the building, operating, or running of the road. But no such power was conferred on horse and dummy railroads organized under the general incorporation act. No right was conferred upon such organizations to acquire private property by condemnation or otherwise; and it is not claimed in the argument that under the general incorporation act, under which defendant in error was organized, it was clothed with any power to take or condemn private property for right of way or other purposes. But in 1874, two years after the enactment of the general corporation act and the railroad act, the legislature passed an act in regard to horse and dummy railroads, and under this act the petitioner claims it is authorized to condemn private property for its line of road. That act, so far as it pertains to the question involved, is as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that any company which has been, or shall be incorporated under the general laws of this state, for the purpose of construction, maintaining or operating any horse or dummy railroad or tramway, may enter upon and appropriate any property necessary for the construction, maintenance and operation of its road, and all necessary siding, side tracks and appurtenances, and may, subject to the provisions contained in this act, locate and construct its road upon or over any street, alley, road or highway, or across or over any waters in this state, in such manner as not to unnecessarily obstruct

the public use of such street, alley, road or highway, or interrupt the navigation of such waters.

"Sec. 2. When it is necessary for the construction, maintenance or operation of such road, or the necessary sidings, side tracks or appurtenances, to take or damage private property, the same may be done, and the compensation therefor may be ascertained and made in the manner which may then be provided by law for the exercise of the right of eminent domain.

"Sec. 3. No such company shall have the right to locate or construct its road upon or along any street or alley, or over any public ground in any incorporated city, town, or village, without the consent of the corporate authorities of such city, town or village, nor upon or along any road or highway, or upon any public ground without any incorporated city, town or village, except upon the consent of the county board," etc.

There is a wide and well-understood difference between a railroad organized for general traffic, and a street, horse, or dummy railroad; and in placing a construction on the act in question, in order to arrive at the intent of the legislature, the functions, duties, and purposes of street or horse and dummy railroads must be kept in mind. A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of carrying passengers living upon, or having business on, such street or highway; its main object being to accommodate street travel. For this purpose the cars make frequent stops to take on and discharge passengers along the street or highway. Constructed as it is upon a public street or highway, it has no use for private property, unless it might need a small track for a side track, turnout, or station, as an incident to its main line. In *re South Beach Railway Co.*, 119 N. Y. 141, 23 N. E. 496, the court of appeals of New York, in the discussion of a similar question to the one involved here, said: "The chief element of a street railway is that it is built upon and passes along streets and avenues for the convenience of those living or moving thereon. Its fundamental purpose is to accommodate the street travel, and its motive power is dictated and regulated to that end. And while, consistently with its general object, it may need, for switches or storage, or stables or stations, the land of private owners, yet the necessity is only incidental to the main purpose of a line along the street, accommodating the street travel." The supreme court of Pennsylvania, in *Rahn Tp. v. Tamaqua & L. St. Ry. Co.*, 167 Pa. St. 90, 31 Atl. 472, says: "Street railways are railways on or along the streets of a city or town. They must conform to the grade of the streets they occupy. They may diverge for a short distance, where the conformation of surface or the position of streams make it necessary, in order to avoid discomfort or

danger to the traveling public. But that a street railway may, like a steam railway, locate its route, not for the accommodation of local travel along the highways, but to reduce time and distance for passengers travelling from city to city or town to town across the country, is a proposition not to be entertained, and involves a perversion of the character and object of street railways."

It is clear that section 2 of the act of 1874 confers power upon a street or horse and dummy railroad company to take private property, but the power is a limited one, as is apparent from the language of the section. It declares, "When it is necessary for the construction, maintenance or operation of such road, or the necessary sidings, side tracks or appurtenances to take or damage private property, the same may be done." Giving this language a strict construction, which, under the uniform decisions of this court, must be done, can it be said that defendant in error was at liberty, in the construction of its road, whenever it saw proper, to leave the highway upon which it was authorized by the board of supervisors of Kane county to construct its road, and take private property against the will of the owner? We think not. If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the meaning of the law, which would authorize the company to leave the highway, and go upon private property, until the difficulty encountered was overcome, when a return could be made to the highway. Or, if sufficient land could not be had in the street for side tracks, turnouts, or stations, and they were necessary for a successful operation of the road, under the statute the company would have the right to resort to private property. The power conferred by section 2 of the act is not general. It is limited to a case when it becomes necessary to resort to private property, and that necessity must be shown in the petition to condemn. What is said in 119 N. Y., 23 N. E., supra, applies here: "Section 13 of the act of 1850 allows any corporation organized thereunder to obtain by condemnation such land as is required for the purpose of its corporation. The power is not general or unlimited. The company cannot condemn what it pleases, but only such and so much land as the proper execution of its corporate purposes shall require and render necessary. Here no reason whatever was shown by the petitioner for leaving the highway, nor was any evidence introduced on the hearing of the motion to dismiss showing a necessity for leaving the highway and resorting to private property. On the other hand, the plaintiffs in error showed by affidavits that there was no substantial difficulty in constructing and operating the railroad in the highway, where the defendant in error was

authorized to construct it by the county authorities. It thus appears that the managers of the street-railroad company abandoned the highway, and undertook to construct their line of road over private property, when it was not necessary to do so in the construction, maintenance, or operation of the road. This they had no right to do. In the construction of the road, if a necessity existed for making a deflection from the highway, in order to avoid a heavy grade which would prevent a successful operation of the road, defendant in error would no doubt have the right to take and condemn private property to obviate the difficulty. But this record does not present a case of this character. Here, in the construction of the road, the highway was abandoned, and a new route selected, running over private property for more than a mile; no necessity whatever appearing for making the change. This was without authority of law, and the court, on the motion, should have dismissed the petition. For the error indicated the judgment will be reversed, and the cause remanded. Reversed and remanded.

PHILLIPS, J. I am of opinion that, under the horse and dummy act, the right to condemn a right of way is given; hence I dissent.

(58 Ohio St. 551.)

WONSETLER et al. v. ANDREWS et al.
(Supreme Court of Ohio. June 21, 1898.)

MINING CONTRACT—INTERPRETATION.

In an action to recover the sum agreed to be paid for the right to enter upon the plaintiff's land to explore for coal, and to mine and remove the same, at an agreed price per ton, money paid by the defendant as annual rent for coal prior to the commencement of mining operations, and intended by the parties as compensation for the postponement of such operations, will not be credited upon the agreed price of the coal, when removed, though the language of the instrument upon which the action is founded be appropriate to pass a present title to the coal.

(Syllabus by the Court.)

Error to circuit court, Mahoning county.

Action by Wonsetler and others against Andrews and others. Judgment for plaintiffs was reversed on error to the circuit court, and plaintiffs bring error. Reversed.

Wonsetler and others brought an action against Andrews and others in the court of common pleas to recover upon numerous causes of action founded on the following instrument; the plaintiffs being lessors, and the defendants the successors of the lessee: "That the said party of the first part hath this day leased and let, and do hereby convey, unto said second party, for the consideration hereinafter mentioned, all their right and title to any coal which may be found upon or within the following described lands, to wit: * * * Together with the right and privilege to enter thereon and drill and explore for coal, and, if

found, to dig, mine, and remove the same; and, in case it shall be absolutely necessary to use any portion of the surface of said land to mine said coal, said Andrews may do so by paying at the rate of one hundred (\$100) dollars per acre for the same, which shall in no case exceed two acres, except by consent of the party of the first part; and there shall in no case be miners' houses erected thereon. Said Andrews may use any entry or improvements which he may make, over or through which to transport coal mined from other lands; and in the prosecution of search for coal, as well as the mining of the same, as little damage shall be done to the soil or surface of said land as the nature of said business will permit. For and in consideration of the foregoing covenants and agreements by and on the part of the said first party, said second party hereby agrees and binds himself, his heirs and assigns, to pay or cause to be paid unto said first party, their heirs and assigns, the sum of fifteen (15) cents per ton (of twenty-two hundred and forty pounds) for each and every ton of coal mined from said land; said coal to be weighed upon correct scales at the bank, and a correct account of the same kept in books; and said scales and books shall at all reasonable hours be open to the inspection of said first party, their heirs or assigns. And said Andrews further agrees that he will proceed without delay to make search for said coal, and, if found in sufficient quantities to justify mining, that he will prepare to mine the same at the earliest time practicable, and continue to prosecute the mining thereof with all due diligence. Said Andrews also agrees that after he shall have reached said coal, by entry or otherwise, so as to be able to mine the same, that he will proceed to mine coal to such an extent that the rent due said first party at the aforesaid price per ton shall amount to at least one thousand dollars per annum, or pay for the same as though mined; otherwise this article to become null and void. And said Andrews further agrees that if, after one year from the date hereof, he shall not have been able to reach said coal (having used all due diligence and exertion), he will, if this article is retained, pay to the said first party, as rent for coal, at the rate of three hundred dollars per annum until said coal is reached so as to be mined, when, and from that time forward, he shall be bound as above stated."

The instrument was executed December 9, 1861; but actual mining of the coal under its provisions began in 1887, and was concluded in 1892. From the execution of the lease until mining operations were begun, the defendants paid the plaintiff the sum of \$300 per annum, but, after mining operations commenced, deducted from the coal mined, computed at 15 cents per ton, the sum of the annual payments of \$300 per annum so made previous to the mining operations; claiming that such previous payments were, according to the terms of the lease, payments in advance

upon the coal which might be mined, at the rate of 15 cents per ton. Whether this is the correct construction of the lease is the only subject of contention between the parties. These facts having been disclosed upon the trial, the defendants requested the court to instruct the jury that the sum of the annual payments made before mining operations were begun was to be regarded as payments in advance upon the coal mined during such operation, at 15 cents per ton. The court refused to give the instructions so requested, and, in lieu thereof, charged as follows: "The defendants claim and insist that this \$300 payment to be made annually was to be applied upon coal thereafter mined under the lease. The plaintiffs admit the receipt of the payments of \$300 from time to time as alleged by the defendants, but say that by the terms of this lease these payments were not to be so applied, and that there is due them from the defendants the amount claimed in their petition and the supplement thereto. Various pleadings have been filed by the parties in this proceeding, involving numerous other questions, to which it is not necessary to call your attention at this time; but the statement here made embraces substantially the controversy between the parties, and from this statement you will observe that the real controversy in this case arises in reference to the payment and application of the \$300 yearly as provided for in the lease. * * * It is incumbent upon the court to place a construction upon this lease, and upon that particular part of the same out of which this controversy arises; and upon this question I say to you, as matter of law, that the true import and meaning of the language used by the parties in the lease is, and that the intention of the parties therein expressed was, that the three hundred dollars to be paid yearly, provided for in the lease, and by the terms thereof, to which your attention has been called, when the same was paid, prior to mining of coal, would not be applied to the payment of the 15 cents per ton of 2,240 pounds of coal when the same was mined from the land." To the refusal to instruct as requested, and to the instruction given, counsel for the defendants excepted. There being a verdict and judgment for the plaintiffs, a petition in error was filed in the circuit court, where the judgment of the common pleas was reversed for error in the instructions.

R. B. Murray and L. W. King, for plaintiffs in error. Thomas W. Sanderson, for defendants in error.

SHAUCK, J. (after stating the facts). The different views taken of the meaning of this instrument by counsel and by the courts below find ample explanation in the vagueness of its stipulations. That its terms are effective to convey a present interest in the coal beneath the soil, as maintained by counsel for the defendants, may be admitted; but that

proposition does not seem to aid in the present inquiry, since the parties here are not contending concerning the ownership of the soil, or of the coal beneath it. When the controversy arose, the defendants had become the unquestionable owners of the coal. The controversy concerns the amount they were to pay for the rights and privileges conferred upon them by the instrument, whether the title to the coal remained in the plaintiffs until its actual separation from the soil, or passed upon the execution of the instrument. An analysis of the instrument shows that the parties first designated the rights of the defendants to be to enter upon the land described, to drill and explore for coal, and, if found, to mine and remove all that might be found upon or within it. The stipulation immediately following shows that the value of the coal in place was agreed to be 15 cents per ton, and this included compensation for the right to enter upon the land and explore for coal, and to occupy such portion of the surface, not exceeding two acres, as might be absolutely necessary for mining operations. In connection with this, and contemplating the diligence with which coal should be mined "after it should be reached," the defendants bound themselves to mine to such an extent that the plaintiffs should receive, at the designated "price per ton," at least \$1,000 per annum. The remaining stipulation of a material character does not concern the price of the coal. In making it, the parties seem to have contemplated only the delay which might intervene prior to the commencement of the actual mining of coal; and, with respect to that delay, the defendants became bound to pay the sum of \$300 per annum "as rent for coal." Certainly we are concerned only with the intention of the parties, and conclusive effect should not be given to the different terms, "price" and "rent," if they appeared to have been used as synonyms. That, however, does not appear. That they were used discriminatively to indicate the different purposes for which the contemplated payments should be made is to be inferred from the concluding portion of the stipulation lastly quoted, "When and from that time [that is, from the time the coal should be reached so as to be mined] he shall be bound as above stated." This stipulation, and the different terms used to designate the purposes contemplated in the different payments to be made, indicate that the price of \$300 per annum was to be paid so long as the defendants might retain the contract for the right to postpone mining operations, and it seems to be entirely independent of the price to be paid for the coal after mining operations should be actually undertaken. It is said by counsel for the defendants that nearly all the instruments executed for the purposes which these parties had in view contain the express stipulation that all sums paid in advance of mining operations shall be credited upon the agreed price of the coal when mined. The

omission of such stipulation in the instrument under consideration would indicate that a different result was intended by the parties in this case. A stipulation of so material a character should not be supplied by construction. The interpretation of the contract which the trial judge gave to the jury is in accord with this view. Judgment of the circuit court reversed; that of the common pleas affirmed.

(171 Mass. 563)

BISHOP v. DONNELL.

(Supreme Judicial Court of Massachusetts.
Suffolk. Aug. 31, 1898.)

JUDGMENTS—VACATION FOR DEFECTS IN PROCESS.

Under Pub. St. c. 187, § 3, providing that a judgment shall not be reversed or arrested for a defect or imperfection in matter of form which might have been amended, a default judgment against a resident will not be set aside because the summons, issued in 1896, bore date 29th October, 1890, and commanded defendant to appear on 14th November "next," where defendant was not misled by the mistake.

Exceptions from superior court, Suffolk county.

Petition for a writ of error by Isabella Bishop against Frank P. Donnell on judgment obtained by defendant. The judgment was sustained, and petitioner excepted. Exceptions overruled, and judgment affirmed.

At the hearing of this case before Knowlton, J., without a jury, it appeared that on November 7, 1896, the paper, a copy of which is hereto annexed marked "Exhibit A," was delivered to the plaintiff in error by an officer duly authorized to serve writs. The officer testified that he then told her when she was to appear at court, and that she told him what the suit was for. It was proved, and she admitted, that about 10 o'clock a. m. on November 14, 1896, the plaintiff in error, with her husband and his attorney, which attorney represents her in this proceeding, were together on the stairway of the building in which the police court of Chelsea is regularly held, which stairway leads to the hall adjacent to the police-court room, and that she was then told by the attorney that the writ in the action of Frank P. Donnell against her was returnable before the police court on that day and at about that hour, and that the date intended to be inserted in the summons served upon her was October 29, 1896, instead of October 29, 1890. It appeared that the attorney went into court and examined the writ, and came away without informing the court or the attorney of the plaintiff in the original action of the mistake in the date of the summons. The return of the officer was in the usual form, setting forth due service of a summons upon the defendant. The presiding justice found as a fact that the plaintiff in error knew of the mistake in the date of the summons before the time for appearance, and that she purposely refrained from appearing in answer to the suit on account of the mis-

take. The counsel for the plaintiff in error contended as follows: (1) That the plaintiff in error had not been served with original process, in contemplation of law. (2) That she had in no degree waived her right thereto by appearance or otherwise. (3) As matter of law, that neither the said so-called summons, which was lacking in not containing precise and correct notice of the time of the holding of the court at which she was called upon to appear, nor the information obtained as aforesaid in contradiction of that contained in the so-called summons, made her responsible to said police court of Chelsea; that there was absence of notice to her to attend, such as she was bound in law to respect; and he asked the court to rule that she was entitled to have the judgment reversed. Inasmuch as the record showed due service, and no error was apparent of record, the presiding justice was of opinion that the plaintiff in error had a remedy against the officer who served the writ in an action at law for making a false return, to recover the damages caused thereby, if any, and that she was not entitled to a remedy in this form of proceeding. He thereupon refused to rule as requested. To this refusal to rule the plaintiff excepts, and prays that her exceptions may be allowed.

"Exhibit A. Commonwealth of Massachusetts. Suffolk, ss: [Seal.] To Isabella Bishop, of Chelsea, in the county of Suffolk—Greeting: We command you to appear before our justice of the police court of Chelsea, to be holden at Chelsea, within said county of Suffolk, on Saturday, the 14th day of November next, at nine of the clock in the forenoon, to answer unto Frank P. Donnell, of Chelsea, in the county of Suffolk, plaintiff, in an action of contract; which action the said plaintiff has commenced to be heard and tried before our said court; and your goods or estate are attached to the value of two hundred dollars, for security to satisfy the judgment which the said plaintiff may recover upon the aforesaid trial. Fail not of appearance at your peril. Witness: Albert D. Bosson, Esquire, at said Chelsea, this 29th day of October, in the year of our Lord one thousand eight hundred and ninety- Joseph M. Curley, Clerk. Wm. J. Williams, Atty. for Plf., 18 Pemberton Square, Boston. Exceptions allowed. Marcus P. Knowlton, J.S.JC."

G. A. Emerson, for plaintiff. W. J. Williams, for defendant.

FIELD, C. J. The tendency of modern decisions is to the effect that a domestic judgment may be reviewed or reversed by a proper proceeding between the parties, when there has been in fact no legal service of process, and no appearance in the cause, even although the proof of such facts tends to contradict the record. The remedy by a suit against the officer for a false return often is inadequate, particularly when a large judgment has been rendered against a defendant

without any service upon him and without his knowledge. The return by an officer of service of process usually is held conclusive in collateral proceedings, but, as the facts stated in the return are not facts within the knowledge of the court, it is generally held that the record in this respect may be impeached by the party directly aggrieved by it, if it is false. In the case of a suit on a foreign judgment, the judgment may be impeached by pleading and proving in defense to the suit that the foreign court in fact acquired no jurisdiction over the defendant, although the record of the case recites due service on him or an appearance by his attorney; and this is true in a suit on a domestic judgment, where the defendant was not resident within the commonwealth when the suit was brought in which the judgment was rendered. The proper proceeding in this commonwealth for reviewing or reversing a domestic judgment, when the defendant was not resident within the commonwealth when the suit was brought in which the judgment was rendered, is a writ of error, although such a defendant may also have a writ of review, which is not a writ known to the common laws. If the defendant was resident within the commonwealth when the suit was brought, the proper proceeding is a writ of review, or a petition for a writ of review, and there are dicta to the effect that he may also bring a writ of error. *Kimball v. Sweet*, 168 Mass. 105, 46 N. E. 409; *Hall v. Staples*, 166 Mass. 399, 44 N. E. 351; *Iron Co. v. Crafts*, 156 Mass. 257, 30 N. E. 1024; *Young v. Watson*, 155 Mass. 77, 28 N. E. 1135; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6; *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; *City of Fall River v. Rilly*, 140 Mass. 488, 5 N. E. 481; *Hendrick v. Whittemore*, 105 Mass. 23; *James v. Townsend*, 104 Mass. 367; *Hutchinson v. Gurley*, 8 Allen, 23; *Bodurtha v. Goodrich*, 3 Gray, 508; *Brewer v. Holmes*, 1 Metc. (Mass.) 288; *Smith v. Rice*, 11 Mass. 507, 512. See *Harrison v. Hart*, 21 Ill. App. 348; *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833; *Bolles v. Bowen*, 45 N. H. 124; *Nelson v. Sweet*, 4 N. H. 256; *Ketchum v. White*, 72 Iowa, 193, 33 N. W. 627; 22 Am. & Eng. Enc. Law, p. 194 et seq.

If it be assumed, without deciding it, that in the present proceedings it was open to the plaintiff in error to show that no summons, or no sufficient summons, was served upon her, we are of opinion that the mistake in the date of the summons, on the facts found by the presiding justice, is not a sufficient reason for avoiding the judgment. If the officer had been permitted to amend his return in the original action so as to show the date of the summons, and the defendant therein had moved to dismiss the action, the court might have ordered the service of a new summons, as the defendant was within the jurisdiction of the court. If the suit had been in the superior court, the decision of that court,

upon such a motion, would have been final. *Parker v. Kenyon*, 112 Mass. 264. The defect in the service of process was one which the defendant in the original action might have waived.

Pub. St. c. 187, § 8, is as follows: "A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in matter of form which might by law have been amended; nor by reason of a mistake respecting the venue of the action; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict; nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error. But nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court."

In *Brown v. Webber*, 6 Cush. 564, the court say: "A court, in order to render a valid judgment, must have jurisdiction of the subject-matter and of the persons of the parties. In the language of the statute (Rev. St. c. 100, § 21), it must be a suit where the person and case may be rightly understood by the court. In order to acquire jurisdiction of the person, he must be served with process, as required by law, by arrest, attachment, and summons, or original summons, or otherwise. If the defendant would object to the irregularity or want of due service in this respect, he may do so by plea in abatement, where it is necessary to plead any matter of fact on which his objection is founded, or by motion to dismiss, where the objection is apparent on the face of the proceedings or the return of the officer, and, in either case, before pleading generally to the merits. And, to enable him to do this, he may appear specially for the purpose of stating such objection, without thereby waiving it. But if he will enter a general appearance, or plead to the merits, or lie by after he is aware of the matter of objection to the jurisdiction, he thereby submits himself to the jurisdiction of the court; and the court, then, having jurisdiction of the subject, and jurisdiction of the persons of the parties, may proceed, and the exception that the suit is brought in the wrong county cannot be made in arrest of judgment. *Gleason v. Dodd*, 4 Metc. (Mass.) 333, 339."

If this were a petition for a writ of review, we think that, on the facts appearing in evidence, it would not be granted. The defendant in the original action was not misled by the mistake in the date of the original summons, and she had full opportunity to appear and defend the action. No error appears in the record itself, and the defect was one which might have been amended if the attention of the court had been called to it. She lay by, and made no defense, although she was aware of the mistake in the date of the summons and of the pendency of the action, and she ought not now to be heard, in any form of proceeding, to contest the validity of

the service and judgment. See *Arnold v. Maltby*, 4 Denio, 498. The ruling of law of the presiding justice, if it be assumed to be erroneous, did her no harm. It did not affect his findings of fact, and we are of opinion that, on those findings, she is not entitled to have the judgment reversed. It is unnecessary to decide whether the errors of fact were well assigned or whether the plaintiff's sole remedy was by a petition for a writ of review. St. 1895, c. 234, § 9. Exceptions overruled. Judgment affirmed.

(171 Mass. 586)

HIGGINSON et al. v. TURNER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Aug. 30, 1898.)

WILLS—CONSTRUCTION—DESIGNATION OF BENEFICIARY—CHARITIES—INCORPORATION OF TOWN—TRUSTS.

1. Where a bequest was to the inhabitants of a town in trust for specified purposes, and was referred to in the codicil as a donation to the town, and as a donation to the inhabitants of the town, the title to the fund is in the town.

2. A town may, in its corporate capacity, accept a bequest in trust for charitable purposes, and act as trustee, and execute the trust.

3. A municipal corporation does not lose its identity by being incorporated as a city; and property held by the inhabitants of the town in trust will pass to the city on the same trust, and no action of any court is necessary to vest the title to such property in the city.

4. Where a bequest was made to a town in trust, with directions that the selectmen and certain others should manage the fund, these are not the trustees, but the town; and, where it afterwards was incorporated as a city, there was no vacancy in the trust, and the probate court had no authority to appoint trustees to manage the funds.

Case reserved from supreme judicial court, Suffolk county; Charles Allen, Judge.

Bill by Henry L. Higginson and others against Alfred T. Turner. Case reserved. Dismissed.

The following is the bill of complaint: "(1) Benjamin Franklin, late of Philadelphia, in the county of Philadelphia and state of Pennsylvania, died in said Philadelphia, on April 17, 1790. On the 17th day of July, 1788, he executed his last will and testament, and on June 23, 1789, a codicil thereto; and said will and codicil were duly proved and allowed in the orphans' court in and for the city and county of Philadelphia, on April 23, 1790. A duly-authenticated copy of the will and codicil was duly filed and recorded in the registry of probate of said county of Suffolk, in this commonwealth, on March 26, 1896. (2) By said will and codicil said testator gave certain personal property to be held in trust for the benefit of the inhabitants of the town of Boston, in Massachusetts, for the uses, interests, and purposes mentioned and declared in said will, and provided that said trust estate should be managed under the direction of the selectmen of the town, united with the ministers of the oldest Episcopal, Congregational, and Presby-

terian churches in that town. A copy of said will and codicil is hereto annexed. (3) The town accepted said bequest, and the executors of the will of Benjamin Franklin paid the amount thereof to the town of Boston; and thereupon, until Boston became a city, in the year 1822, the trust fund was managed by the selectmen, nine in number, united with the ministers of the Old Brick Church as the first Congregational one, and the minister of King's Chapel as the first Episcopal Church, there being no Presbyterian church in the town. Said trust estate is now in this commonwealth. There are no longer any selectmen in said Boston, and there have been no such officers since the town of Boston became a city, in 1822. No trustees under said will were appointed by any court in this commonwealth until March 18, 1897, and from 1822 until the 18th day of March, 1897, there was a failure of trustees of said fund. By a decree of the probate court of the county of Suffolk and commonwealth of Massachusetts, made on the 18th day of March, 1897, Henry L. Higginson, Francis C. Welch, Abraham Shuman, Charles T. Gallagher, Charles W. Duane, Stopford W. Brooke, and Alexander K. MacLennan, plaintiffs herein, were duly appointed trustees to manage said trust and trust fund. (4) Said trust estate now in this commonwealth, as aforesaid, amounts to a large sum, to wit, to the sum of six hundred thousand dollars, and the plaintiffs are entitled to possess and manage the same. (5) After the act incorporating Boston as a city went into effect, in 1822, and until the adoption of the revised charter of the city in 1854, the said fund was managed by the mayor and aldermen of the city, eight in number, together with the two ministers above referred to, except that, King's Chapel having ceased to be an Episcopal church, its minister was superseded as manager by the minister of Christ Church on Salem street, that being then the oldest Episcopalian church. After the adoption of the revised city charter, in 1854, the aldermen, then being twelve in number, together with the aforesaid ministers, to whom the minister of the first Presbyterian Church was at some time added, and without the mayor, acted as managers of the fund, until the year 1893; and since and including the year 1893 the aldermen, twelve in number, with the ministers of the three churches designated in Franklin's will, have acted as such managers. Different persons have acted as treasurers of the fund. Mr. William Minot was such treasurer from 1811 until 1866. In 1866, Frederick U. Tracey, then the treasurer of the city of Boston, was elected treasurer of the fund, and continued to be such treasurer until 1876, when he was succeeded in the office of treasurer by Samuel F. McCleary, who was then the city clerk. Mr. McCleary acted as treasurer of the fund, and also as city clerk, until 1885, when he ceased to be city clerk; and since

that time he has acted as treasurer of the fund in his personal capacity. (6) On December 28, 1893, at a meeting of the persons acting as managers of the Franklin fund held in city hall in the city of Boston, the following persons being present, Aldermen Lee, Dever, Folsom, Fottler, Maguire, Mitchell, and Sanford, and Reverend Charles W. Duane, rector of Christ Church, the following vote was unanimously passed: 'Ordered that the sum set apart from the general Franklin fund, as due to the city of Boston, on July first, 1893, viz. three hundred and twenty-two thousand, four hundred and ninety and $\frac{20}{100}$ dollars (\$322,490.20), with its accumulations, be paid by the treasurer of the fund in January next to the city treasurer, to constitute a special fund for the purchase of land, and for the erection thereon of the Franklin Trades School and the equipment of the same; said expenditures to be made under the direction of such department as may for the time being be charged by the statutes and ordinances with the duty of erecting and furnishing public buildings in the city of Boston. The location of and plans for said school to be approved by the managers of said fund.' (7) Thereupon said McCleary paid over to Alfred T. Turner, then and now city treasurer of Boston, a large portion of said fund, to wit, the sum of three hundred and twenty-two thousand four hundred and ninety and $\frac{20}{100}$ dollars (\$322,490.20), and also certain accumulations of interest, the entire amount paid over to said Turner, amounting in all to the sum of three hundred and twenty-nine thousand three hundred and $\frac{48}{100}$ dollars (\$329,300.48); and said Turner now holds in his possession said sum, with its accumulations accruing before and after the payment thereof to him. (8) And the plaintiffs say that the vote passed on December 28, 1893, by those assuming to act as managers of the fund set forth in the sixth paragraph of this bill of complaint, was invalid and inoperative, and had no legal effect, and did not lawfully affect or dispose of said fund; and the plaintiffs say that they are entitled to the possession, management, and control of said fund and its accumulations, and have requested said Turner to pay to them the portion thereof held by him; but said Turner refused so to do, and claims to hold the same upon special trusts, of the nature whereof the plaintiffs are ignorant. The plaintiffs therefore pray: (1) That said Turner be enjoined from paying over or disposing of the fund held by him in any manner except by payment to the plaintiffs. (2) That until such payment it be decreed that he hold such fund to the uses and for the benefit of the plaintiffs as trustees, upon trusts established by the will of said Franklin. (3) That he be directed to pay the moneys received and held by him as aforesaid to the plaintiffs, discharged of all trusts except those imposed by the will of the said Franklin. (4) For such other relief

to which they may be entitled and to the court shall seem fit. By Their Solicitor, Solomon Lincoln."

S. Lincoln and H. W. Ogden, for plaintiffs.
T. M. Babson, for defendant.

ALLEN, J. There can be no doubt that the title to the fund now in question was at the outset in the town of Boston. The gift was to the inhabitants of the town, in trust for the purposes specified, and was to be accepted by them. It is afterwards spoken of in the codicil as the donation to the town of Boston, and again as the donation to the inhabitants of Boston. It is now well settled that a town may in its corporate capacity accept a gift of real or personal estate left to it in trust for charitable purposes, and may act as trustee and execute the trust. *Drury v. Natick*, 10 Allen, 169, 182; *Webb v. Neal*, 5 Allen, 575; *Nourse v. Merriam*, 8 Cush. 11, 19; *Green v. Putnam*, Id. 21; *Worcester v. Eaton*, 13 Mass. 371; *Vidal v. Girard*, 2 How. 127, 190; 2 Dill. Mun. Corp. §§ 567-573. The city of Boston is the same municipal corporation as the inhabitants of the town of Boston were. By being incorporated as a city, the identity of the municipal corporation was not lost. Property held by the inhabitants of the town in trust would pass to the city on the same trust. No action of any court was necessary in order to vest the title to such property in the city; and the same duties would rest upon the city as rested upon the town. This was clearly established in *Girard v. Philadelphia*, 7 Wall. 1, where the granting of a new city charter, and the repeal of the old one, and the enlargement of the area of the city from 2 square miles to about 129, were held not to affect the city's title to property held in trust, or its capacity to execute the trusts. Again, in *Broughton v. Pensacola*, 93 U. S. 266, it was held that rights of creditors were not lost by a change of charter, the court saying: "It will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs." See, also, *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398; *Shapleigh v. San Angelo*, 187 U. S. 646, 17 Sup. Ct. 957; *City of Kahoka Case*, 35 Fed. 32; *Devereux v. Brownsville*, 29 Fed. 742; *State v. Natal*, 39 La. Ann. 439, 1 South. 923; *Amy v. Selma*, 77 Ala. 103; 1 Dill. Mun. Corp. §§ 171, 172.

It is, however, contended by the plaintiffs that even although the city may hold the title to the fund in trust, and be in that sense a trustee, yet the duties of the persons referred to in the will as managers are such as also to constitute them trustees, with a right of possession and control of the fund. Some of the provisions of the will tend to support this view, but an examination of the whole of the provisions relating to this bequest, and to the similar bequest to the city of Philadelphia, leads us to the conclusion that the managers

were not intended to be trustees. After making detailed provisions in respect to the gift to Boston, Dr. Franklin says: "All the directions herein given respecting the disposition and management of the donation to the inhabitants of Boston I would have observed respecting that to the inhabitants of Philadelphia; only, as Philadelphia is incorporated, I request the corporation of that city to undertake the management agreeable to the said directions." The distinction in his mind appears to have been that Philadelphia, being a city, could manage the fund through its existing officers or boards, while the inhabitants of the town of Boston, assembled in town meeting, could not well pass upon the details of the management, and hence he provides, in the first instance, that the fund "shall be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town." Afterwards he says that "it is presumed that there will always be found in Boston virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation by superintending and managing this institution gratis." A provision follows that "there may in time be more [money] than the occasions in Boston shall require, and then some may be spared to their neighboring or other towns in the said state of Massachusetts who may desire to have it, such towns engaging to pay punctually the interest and the portions of the principal annually to the inhabitants of the town of Boston." And still later he adds: "I hope, however, that, if the inhabitants of the two cities should not think fit to undertake the execution, they will at least accept the offer of these donations as a mark of my good will, a token of my gratitude, and a testimony of my earnest desire to be useful to them even after my departure. I wish, indeed, that they may both undertake to endeavor the execution of the project." There could be no pretense that the corporation of Philadelphia or any boards of officers of that city were intended to be trustees, as distinct from the city itself; and we think there was no intention to make the selectmen of Boston, or the three designated ministers, or the virtuous and benevolent citizens who might aid in superintending and managing the fund, or institution (as it is called in the codicil), trustees of the property, in a legal sense. They are nowhere called "trustees." No provision is made for any formal appointment or succession to the title when new persons of the classes described should act as managers. Formerly, on the appointment of a new trustee, a conveyance of the property to him was necessary; but now the vesting of title without such conveyance is often provided for by statute. It may be that the founder of a trust could provide for the succession to the title without a formal conveyance; but the absence of all provision for such succession, or for any formal appointment or ascertainment

of the ministers who were expected to serve, and the provision respecting the other persons who might take part in the superintendence and management, tend to negative the idea that any of the persons so designated or referred to were intended to be trustees. The case in this particular is quite different from *Drury v. Natick*, 10 Allen, 160, where it was expressly provided that the town should choose five trustees at the first annual meeting after the decease of the testatrix, and every fifth year thereafter, who should hold office for the term of five years.

In the present case, the duties of the managers, though in some respects like those usually exercised by trustees, are not such as necessarily to imply technical trusteeship. These duties bear some relation to those of visitors of a charity. The managers were probably intended to assist rather than to supplant the inhabitants of the town in the administration of the fund. It is not necessary at this time to define the extent and limits of their authority. It is enough to say that the city of Boston is the trustee, as successor to the inhabitants of the town of Boston, and that there is and has been no vacancy in the office of trustee. The probate court assumed to appoint the plaintiffs as trustees on the theory that there was a vacancy. It did not assume to appoint them as managers, and the statutes confer upon that court no jurisdiction to appoint such managers, and the power of a court of equity to appoint such managers under its general jurisdiction over charities need not now be considered. The plaintiffs assert no title except under their appointment as trustees, and this title fails. The selectmen and the ministers were never, as individuals, entitled to the possession and control of the fund as against the town; nor are the plaintiffs entitled to such possession and control as against the city. For these reasons, in the opinion of a majority of the court, the entry must be, petition dismissed.

(171 Mass. 560)

WHIPPEN v. WHIPPEN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Aug. 31, 1898.)

MARRIAGE—VALIDITY—EVASION OF STATE LAWS—INTENT.

1. Pub. St. c. 145, § 4, providing that marriages contracted while either of the parties has a former husband or wife living shall be void, applies only to marriages contracted in Massachusetts.

2. Under Pub. St. c. 146, § 22, prohibiting the marriage of a party against whom a divorce has been granted within two years from the final decree, and chapter 145, § 10, providing that where "persons" who cannot legally intermarry, go to another state with the intention of evading the laws, and there intermarry, and then return, such marriage is void in Massachusetts, a marriage in another state between residents of Massachusetts, against one of whom a decree of divorce has been granted within two years, is not void, where one of the parties acted in good faith, without any intent to evade the laws.

Report from superior court, Suffolk county.

Libel by Martilla Whippen against Charles D. Whippen for nullity of marriage. Decree of nullity, and case reported for determination, at the request of libelee. Dismissed.

J. F. Wakefield, for C. D. Whippen. S. W. Forrest, for M. Whippen.

FIELD, C. J. This case must be governed by *Tyler v. Tyler*, 170 Mass. 150, 48 N. E. 1075, unless the fact that the libelant was innocent of any intention to evade the provisions of our statutes distinguishes this case from that. The libelee intended to evade the provisions of Pub. St. c. 145, § 4, and chapter 146, § 22. There is no doubt that the present libel is the proper proceeding for determining the validity in this commonwealth of the marriage of the parties in Rhode Island. Pub. St. c. 145, § 11. The divorce granted to the former wife of the libelee for his adultery became absolute on July 9, 1894. On the following day the parties to this libel went to Rhode Island and were married. The disability of the libelee, under Pub. St. c. 146, § 22, to marry again continued until July 10, 1896. Before that time, to wit, on February 29, 1896, the libelant "ceased to live with the libelee because she then believed that she was not legally married." This case is not within St. 1895, c. 427, as amended by St. 1896, c. 499, and the decision of it depends upon the construction to be given to Pub. St. c. 145, § 10. That section is derived from Gen. St. c. 106, § 6 (see *Id.*, c. 107, § 25), and it was first enacted in Rev. St. c. 75, §§ 4, 6, probably in consequence of the decision in *Putnam v. Putnam*, 8 Pick. 438. When first enacted, it read: "When any persons resident in this commonwealth," etc. Section 4, Pub. St. c. 145, is confined to marriages solemnized in this commonwealth. *Com. v. Lane*, 113 Mass. 458, 461. If in the present case the marriage had been solemnized in this commonwealth, it would, we think, have been void, even although the libelant at the time of the marriage was ignorant of the disability imposed upon the libelee by Pub. St. c. 146, § 22, and entered into the marriage in good faith. *Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747; *Googins v. Googins*, 152 Mass. 533, 25 N. E. 833; *Thompson v. Thompson*, 114 Mass. 566. The language of Pub. St. c. 145, § 4, is: "All marriages contracted while either of the parties has a former wife or husband living except as is provided in chapter one hundred and forty-six shall be void." We have no doubt that the legislature might have made the same or a similar provision concerning marriages solemnized without the commonwealth of persons resident within the commonwealth, if the parties afterwards returned to and continued to reside within the commonwealth. As was said in *Com. v. Lane*, *supra*: "What marriages between our own citizens shall be recognized as valid in

this commonwealth is a subject within the power of the legislature to regulate."

The question, then, is whether Pub. St. c. 145, § 10, means that both persons must intend to evade some of the provisions of the first five sections of the chapter, or is it enough that one of them so intends? It may seem unreasonable that the libelant should be denied the relief she seeks, because in contracting the marriage she was innocent of any intention to evade our statutes, when if she had been guilty of such an intention the relief would be granted. But the remedy of having a marriage declared invalid is not given primarily for the benefit of either party to the alleged marriage, but for the purpose of determining the status of the parties and of enforcing the policy of the commonwealth with regard to marriage and divorce. In the present case, if the parties desire to be lawfully married to each other, they could have been married in this commonwealth or elsewhere at any time after the expiration of two years from the divorce granted to the former wife of the present libelee, and they can now be married. It is said that the present libelee is the same person as the libelant in *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644; and the present libelant undoubtedly wishes to obtain by the present proceedings a decree of nullity of marriage which would have much the same effect as a decree of divorce. But in the great majority of instances it would probably be for the interest of the innocent party to have such a marriage as that shown in the present case declared valid. Our statutes, under certain circumstances, declare that a marriage shall not be deemed or adjudged void when consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage, when without such belief the marriage would be adjudged void. Pub. St. c. 145, § 27; St. 1895, c. 427; St. 1896, c. 499.

The most natural construction of Pub. St. c. 145, § 10, is that both persons must have the intent to evade the provisions of the chapter, although the language is far from clear. Considering that the general rule of law is that a marriage valid where it is celebrated is valid everywhere, and that this marriage undoubtedly is valid in Rhode Island, and that Pub. St. c. 145, § 10, attempts to establish an exception to this rule, and that the word "persons," and not "person," is used in it, we think it more reasonable to hold that the intention of the section is that both persons must be residents of the commonwealth, and that both must intend to evade the provisions of the chapter by going into another state or country and having their marriage solemnized there, and must intend to return to reside in the commonwealth, and must afterwards return and reside here. The libel must be dismissed. So ordered

(171 Mass. 596)

CALLAHAN v. WOODBRIDGE.(Supreme Judicial Court of Massachusetts.
Suffolk. Aug. 31, 1898.)**TAXATION—SUCCESSION TAXES—PROPERTY SUBJECT
—ESTATES OF NONRESIDENT DECEDENTS—COM-
PUTATION OF VALUE—PROBATE COURT—JURIS-
DICTION.**

1. Pub. St. c. 156, § 2, gives probate courts jurisdiction where deceased nonresidents leave estates to be administered within the commonwealth. Chapter 127, §§ 15-17, allow foreign wills to be probated and such estates to be administered according to chapter 138, § 1, which provides that, when administration is taken as to the estate of a deceased nonresident, after the payment of his debts his estate shall be disposed of according to his will, and section 2, which provides that the personal estate may be distributed according to the will, or, in the discretion of the court, may be transmitted to the foreign executor, to be disposed of according to the laws of the state where decedent was domiciled. *Held*, that where a nonresident left a will devising and bequeathing his estate to one who came within St. 1891, c. 425, § 1, relating to a tax on collateral legacies or successions, section 14, providing that the probate court having jurisdiction of decedent's estate shall have jurisdiction to determine all questions in relation to said tax that may arise affecting any devise or legacy, applied thereto.

2. St. 1891, c. 425, § 1, providing a collateral legacy and succession tax on all property within the commonwealth, "whether belonging to inhabitants of the commonwealth or not, * * * which shall pass by will or by the laws of the commonwealth regulating intestate succession," applies to foreign wills, and to property that passes under Pub. St. c. 138, § 1, providing that the property of a nonresident, after death, shall "be disposed of according to the laws of the state or country of which he was an inhabitant."

3. St. 1891, c. 425, § 1, providing for a collateral legacy tax on property within the commonwealth, "whether tangible or intangible," applies to real estate within the state, and cash, bonds of railroad companies of other states, and bonds of the United States, when held or deposited within the state.

4. For the purpose of determining whether an estate is subject to St. 1891, c. 425, providing for a collateral legacy and succession tax on estates where the value of same, "after the payment of all debts," exceeds \$10,000, the expenses of administration are not to be deducted.

Case reserved from supreme judicial court, Suffolk county; O. W. Holmes, Judge.

Petition by James H. Callahan, executor of the will of James A. Winslow, deceased, for instructions. Mary E. Woodbridge and Edward P. Shaw, treasurer of the commonwealth, were cited to appear, and they answered. From a decree of the probate court, Mary E. Woodbridge appealed to the supreme judicial court; and the questions of law were reserved for a final determination of the full court, the facts having been agreed upon. Affirmed.

F. G. Cook, for appellant. H. M. Knowlton, Atty. Gen., and F. T. Hammond, Asst. Atty. Gen., for appellee.

KNOWLTON, J. This is a petition to the probate court by the executor of a foreign

will proved in this commonwealth for instructions upon the question whether he is liable to pay a tax on a collateral legacy or succession, under St. 1891, c. 425. Section 1 of this chapter is in part as follows: "All property within the jurisdiction of the commonwealth, and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the commonwealth regulating intestate succession * * * to any person, in trust or otherwise, otherwise than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, wife or widow of a son, or the husband of a daughter of a decedent, * * * shall be subject to a tax of five per centum of its value for the use of the commonwealth, * * * provided, however, that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars."

The appellant raises the preliminary question whether the probate court has jurisdiction over a case of this kind. We are of opinion that it has. Section 14 of this chapter expressly provides that "the probate court having jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy, or an inheritance under this tax," etc. The decedent was a nonresident, and these proceedings relate only to the property found in this commonwealth. So far as this property is concerned, the probate court has jurisdiction of the settlement of the estate of the decedent. Pub. St. c. 156, § 2; Id. c. 127, §§ 15-17; Id. c. 138, §§ 1, 2. Under the express provisions of the section last cited, it may regulate the settlement of the estate, not only in regard to the collection of assets and the payment of debts, but it may afterwards make final distribution of the property, or pay it over according to the will, or may, in its discretion, cause it to be transmitted to the executor or administrator, if any, in any state or country where the deceased had his domicile. *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34. The question as to the liability to pay a tax is a question affecting a devise, legacy, or inheritance, under the act; for, if the tax is paid, the devise, legacy, or inheritance will be diminished by the payment. It seems clear that the case is within St. 1891, c. 425, § 14, and we have no occasion to inquire whether the probate court has jurisdiction under other statutes. *Essex v. Brooks*, 164 Mass. 79, 41 N. E. 119. See St. 1891, c. 415: *Swasey v. Jaques*, 144 Mass. 135, 10 N. E. 758.

The constitutional authority of the legislature to lay an excise tax upon the privilege of succession to property after the death of the former owner of it was established by this court in *Minot v. Winthrop*, 162 Mass.

118, 38 N. E. 512, and is generally recognized by courts elsewhere. *Attorney General v. Bouwens*, 4 Mees. & W. 171; *Stern v. Reg.* [1896] 1 Q. B. 211; *Thompson v. Advocate General*, 12 Clark & F. 1; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *In re Romaine*, 127 N. Y. 80, 27 N. E. 759; *In re Swift*, 137 N. Y. 77-84, 32 N. E. 1096; *Orcutt's Appeal*, 97 Pa. St. 179; *Small's Estate*, 151 Pa. St. 1, 25 Atl. 23; *Alvany v. Powell*, 55 N. C. 51. The legal right of the legislature to make such a provision in regard to the property of a nonresident owner rests upon the fact that the property is within the state, and subject to its jurisdiction. This power is as large in reference to the property of a nonresident decedent as to that of the inhabitants of the commonwealth. It covers the property within the jurisdiction. A ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected. In the statute before us the succession to property of nonresidents is expressly taxed as if the property belonged to inhabitants of the commonwealth. The language, "which shall pass by will or by the laws of the commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and to property that passes under the statute of this commonwealth which regulates the succession to the property of a nonresident owner after his death, and declares that it shall "be disposed of according to the laws of the state or country of which he was an inhabitant." Pub. St. c. 138, § 1.

Upon the facts before us, there is no doubt that all the property referred to was within the jurisdiction of this commonwealth, so as to come within the statute, unless it be the note with mortgage security upon land in Kansas City. There was real estate in Boston, there was a small amount of cash on hand, and the rest of the property was in bonds of railroad companies, of the city of Zanesville, Ohio, of the state of New Hampshire, and of the United States, all of which were completely transferable by delivery, and were commonly bought and sold in the market in this commonwealth. The statute applies to property "tangible or intangible." Without any provision in regard to intangible property, the property above described would be included, because it was all tangible, passing from hand to hand, and was as completely within the jurisdiction of our laws as ordinary chattels. Much discussion has been had in other courts, under statutes somewhat like ours, in regard to stocks, bonds, promissory notes, and other similar property. The court of appeals in New York, in a very recent case, held that stocks in local corporations, and negotiable bonds, found within the state, belonging to the estate of a nonresident decedent, are subject to a succession tax. *In re Whiting's Estate*,

150 N. Y. 35, 44 N. E. 715; *In re Houdayer's Estate*, 150 N. Y. 37, 44 N. E. 718. The same doctrine is held, in well-considered cases, in Maryland and North Carolina. *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Alvany v. Powell*, 55 N. C. 51. It has been held that the statute in Pennsylvania was intended to embrace only personal property, of a tangible nature, actually situated or used for business purposes within the commonwealth, and not mere certificates of indebtedness, such as government bonds, whose situs necessarily follows the owner's domicile. In England it has been decided that succession duties under the statute of 16 & 17 Vict. c. 51, are not payable on legacies of personal property in England given by the will of a testator domiciled abroad. *Wallace v. Attorney General*, 1 Ch. App. 1. In this decision the court followed and applied the rule stated in *Thompson v. Advocate General*, 12 Clark & F. 1, in regard to duties on legacies under St. 36 Geo. III. c. 52. But probate duties, under St. 55 Geo. III. c. 184, are payable upon property belonging to estates of nonresident decedents, like that in the case before us. *Fernandes' Ex'rs' Case*, 5 Ch. App. 314; *Attorney General v. Bouwens*, 4 Mees. & W. 171. The language of our statute is too clear to admit of a doubt that such property as that to which we have referred was intended to be covered by it. Whether the note and mortgage were property within the jurisdiction of the commonwealth is a different question, which, upon the facts stated, it is not necessary to decide. We understand that the maker of the note, as well as the land covered by the mortgage, was not within the commonwealth. Assuming that the note and mortgage were not property within this jurisdiction, the proceeds of them will be applicable to the payment of the debts and charges of administration, which, as we understand the facts, will be more than enough to absorb them.

It is agreed that the value of the estate, after the payment of all debts, will exceed the sum of \$10,000, thus taking the estate out of the proviso at the end of section 1, c. 425, St. 1891. It is also agreed that the executor would testify, if his testimony is admissible without more, that, in his judgment, after the payment of all debts against the estate, and expenses of administration both in Massachusetts and in New York, the value of the estate will be less than \$10,000. If this testimony is taken as true, and is well founded, it raises the question whether the expenses of administration, as well as the debts, are to be deducted, in order to determine whether the value of the estate exceeds \$10,000, so as to subject the succession to taxation. This question is by no means free from difficulty. There is much force in the argument that it is only when the estate passing to a successor exceeds \$10,000 that the statute applies. On the other hand, in most of our statutes where expenses of ad-

ministration are to be added to debts, to determine an amount, or for purposes of deduction, it is expressly so stated. It is expected that taxes under this statute will be paid without waiting a long time for the settlement of controversies and the conclusion of litigation. The expenses of administration cannot be determined until the administration is nearly or quite completed. It is provided by section 12 of the statute that, if it is determined that the whole or a part of the tax paid ought not to have been paid, it shall be refunded. We are of the opinion that it is the better construction of the statute to hold that, for the purpose of determining whether the estate is taxable, the language is to be strictly followed, and that only the debts are to be deducted. Of course, for the purpose of determining on what amount the tax is to be computed, expenses of administration must be deducted, as the tax is to be paid only on the amount which passes to the successor or successors. Except as to the note and mortgage, the order will be, decree affirmed.

(158 N. Y. 683)

**FRANKLIN BANK-NOTE CO. v.
MACKEY.**

(Court of Appeals of New York. July 30,
1898.)

APPEAL—RECALLING OF REMITTITUR—JURISDICTION OF COURT OF APPEALS—JUDGES—POWERS AT CHAMBERS—STAY OF PROCEEDINGS.

1. The court of appeals has jurisdiction, after the filing of the remittitur in the court below, and an entry of an order thereon, to recall the remittitur for the purposes of a motion for a reargument or an amendment of the remittitur.

2. Under Code Civ. Proc. § 775, providing that no order staying proceedings longer than 20 days shall be made by a judge out of court, except to stay proceedings under a "judgment appealed from," a judge of the court of appeals may at chambers stay proceedings on a judgment for more than 20 days pending a motion for a reargument or an amendment of the remittitur.

Action by the Franklin Bank-Note Company against Charles W. Mackey. There was a verdict for defendant, and from an order of the general term (31 N. Y. Supp. 1057) granting a new trial defendant appealed to the court of appeals, where the order was affirmed. 50 N. E. 1117. On motion to vacate an order to show cause and a stay of proceedings issued by one of the judges of the court of appeals. Denied.

William J. Gibson, for the motion. Henry L. Burnett and Max J. Kohler, opposed.

BARTLETT, J. This is a motion made before me at chambers, in the city of New York, to vacate an order to show cause and stay of proceedings herein granted by my Brother GRAY upon the grounds—First, that, the remittitur having been filed, and order entered thereon below, this court has no jurisdiction;

and that, second, the stay, being for a longer period than 20 days, is void. For the convenience of counsel residing in the city of New York, and at the request of Judge GRAY, the motion is made before me.

The order to show cause and stay were granted under the following state of facts: The case was decided by this court in favor of plaintiff April 19, 1898. The remittitur was filed with the clerk of the supreme court, city of New York, April 25th, and an order entered, making the judgment of this court the judgment of the supreme court, May 16th. On the 24th day of June, 1898,—being the last day of the June session of the court,—the counsel for defendant and appellant applied for an order requiring the plaintiff to show cause before the court on the first Monday of October, 1898, why the return of the remittitur herein should not be requested, and why a reargument of this cause should not be ordered, or if such reargument should not be deemed proper, why the remittitur should not be amended in certain respects. This order was granted by Judge GRAY with a stay of proceedings pending the hearing and determination of the application for reasons he deemed sufficient, and I am confined to the questions of jurisdiction and power. This is a motion that the court request the return of the remittitur by the court below for the purposes of the application. There is a very general misapprehension as to the practice of the court on motions for reargument or to amend the remittitur. It is often erroneously assumed that after the filing of the remittitur in the court below, and order entered thereon, this court is deprived of all jurisdiction in the cause. In *Sweet v. Mowry*, 138 N. Y. 650, 34 N. E. 388, a motion for reargument was granted, and a return of the remittitur requested. These acts of the court were held to be in resumption of jurisdiction. In *Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499, a motion to amend the remittitur was granted, and the order entered requested the return of the remittitur by the court below, and when so returned it was ordered to be amended. In *Moffett v. Elmen-dorf*, 153 N. Y. 674, 48 N. E. 1105, a motion to amend remittitur was granted, and order entered that the remittitur be recalled for that purpose. A like motion was granted in *Buchanan v. Little*, 155 N. Y. 635, 49 N. E. 1094. This later practice of the court is not necessarily inconsistent with the earlier cases which hold that this court has no jurisdiction to grant a reargument or an amendment of the remittitur after the remittitur is filed and acted upon in the court below. *Wilmerdings v. Fowler*, 15 Abb. Prac. (N. S.) 86; *Jones v. Anderson*, 71 N. Y. 599; *Cushman v. Hadfield*, 15 Abb. Prac. (N. S.) 109; *People v. Village of Nelliston*, 79 N. Y. 638. It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur, so that reargument can be had, or the remittitur amended,

as the case may be. It is technically true that this court must be repossessed of the remittitur before an order made in the cause is effectual, but there is no objection to the return of the remittitur following the determination of this court to resume jurisdiction. The supreme court is always reluctant to vacate its order and return the remittitur in the absence of an expression by this court that it desires such a course to be pursued. *Hillyer v. Vandewater* (Sup.) 11 N. Y. Supp. 167. I am of opinion that there was jurisdiction to grant the order to show cause herein.

The remaining question is whether the order staying proceedings pending the hearing and determination of the application is valid, being a stay for more than 20 days. The respondent insists that the stay is in violation of the Code of Civil Procedure (section 775), which provides: "An order to stay proceedings in an action, for a longer time than twenty days, shall not be made by a judge out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application to the adverse party, or in cases where special provision is otherwise made by law." It seems to me quite clear that this order is within one of the exceptions of the section quoted, as it is made to "stay proceedings" under a "judgment appealed from." A motion for a reargument, or to amend the remittitur, is an incident to the remedy of a party who seeks to rid himself of a judgment by appeal; and if a judge of this court could not, in the recess of the court, stay proceedings for more than 20 days, great inconvenience and injustice would follow. The section of the Code we are considering was drawn so as to exclude from the operation of the 20-days limitation on the power of a judge out of court all proceedings under judgments or orders from which appeals had been taken. The order staying proceedings herein must be held valid. Having reached this conclusion, it precludes me from treating this as a motion upon notice for a stay, and considering the suggestion of respondent's counsel that it should only be granted on condition that the judgment below be perfected and duly secured on appeal. Motion denied, but, under the circumstances, without costs.

(174 Ill. 155)

**LINK BELT MACHINERY CO. v.
HUGHES.**

(Supreme Court of Illinois. June 23, 1898.)

**LANDLORD AND TENANT—INSOLVENCY OF LESSEE
—RECEIVERS—RATIFICATION OF LEASE
—LIEN FOR RENT.**

1. A creditor asked for the appointment of a receiver for a company, and that the business be continued, on the ground that it could be done with profit, specifically mentioning the lease from intervener as one of its valuable properties. A receiver was appointed, who was ordered to continue the business on the leased premises, and pay the rent, which he did for some three months before becoming in default. *Held*, that the receiver thereby adopted the

lease, so as to become bound to pay the rent named therein.

2. Where a lease expressly provided that lessor should have a lien on all property of lessee for any rent due and unpaid, and a receiver was appointed for lessee, to continue in possession of the leased premises, the receiver took and held lessee's property subject to the provision for the lien; and where the property of the insolvent lessee is afterwards sold by the receiver under an order of court, preserving whatever rights existed in favor of lessor, his lien was transferred to the proceeds of the sale, and was prior to the claims of other creditors and the costs of the receivership.

Appeal from appellate court, First district.

Receivership proceedings by the Link Belt Machinery Company against the Standard Eggette Coal Company. G. R. H. Hughes filed a supplemental petition, after a receiver's sale, claiming a lien on the proceeds. From a decision of the appellate court affirming a decree for Hughes, plaintiff appeals. Affirmed.

Appellee was the owner, on the 13th day of March, 1893, of certain premises known as the "Hughes Dock," on the northwest corner of Thirty-Fifth street, in the city of Chicago, and on that day leased the premises to the Standard Eggette Coal Company until April 30, 1895, for a consideration of \$10,225. \$625 of this was payable at the execution of the lease, and the balance in monthly installments of \$400 each. The lease contained the two following provisions: "And it is expressly understood and agreed by the said party of the second part hereto, for itself and its successors and assigns, that the whole amount of rent reserved and agreed to be paid for said above-demised premises, and each and every installment thereof, shall be, and is hereby declared to be, a valid and first lien upon any and all buildings and improvements on said premises, or that may at any time be erected, placed, or put on said premises by said party of the second part, its successors or assigns, and upon its, his, or their interests in this lease, and the premises hereby demised." "It is expressly understood and agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment, whereon it ought to be paid, as aforesaid, * * * it shall or may be lawful for the party of the first part, * * * at his election, to declare said term ended, and into the said demised premises, or any part thereof, either * * * with or without process of law, to re-enter, and the party of the second part, or any other person or persons occupying, in, or upon the same, to expel, remove, and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as in his first and former estate, and to distrain for any rent that may be due thereon upon any property belonging to the party of the second part, whether the same be exempt from execution and distress by law or not; and the party of the second part in that case hereby waives all

legal rights which it now has, or may have, to hold or retain any such property under any such exemption laws now in force in this state, or in any other way,—meaning and intending hereby to give the party of the first part, his heirs, executors, administrators, agents, attorney, or assigns, a valid and first lien upon any and all the goods, chattels, or other property belonging to the party of the second part, as security for the payment of said rent, in manner aforesaid; anything hereinbefore contained to the contrary notwithstanding.” On the 2d day of January, 1894, the Link Belt Machinery Company filed a bill in equity, in the nature of a creditors’ bill, against the Eggette Company, for the purpose of enforcing the collection of a judgment for about \$615, which it held against the latter company. The bill also prayed for the appointment of a receiver. Upon hearing the court appointed Arthur D. Dana receiver of the property and assets of the Eggette Company, including the premises belonging to appellee, and in the decree or order of appointment it was provided by the court that the receiver “continue the business of manufacturing artificial coal as now carried on by the defendant Eggette Company; that he employ suitable persons to conduct such business; that he purchase necessary materials and supplies; that he pay for such material, supplies, and services from the funds coming into his hands as such receiver; that he pay rent and other such charges,— * * * to the end that the property and estate of the Eggette Company, as described in the bill, may be preserved and conserved pending the further order and the final decision of the court.” The receiver took possession of the leased premises on the day of his appointment, and continued therein until about the 24th day of January, 1895. At the time of his appointment, no rent was due from the Eggette Company, such rent having been paid up to and including the month of December, 1894. The receiver paid the January rent, 1894, amounting to \$400. Appellee, in February or March of that year, filed his application for the payment of rent, and on March 12th an order of the superior court was entered that the receiver pay out of the first moneys coming to him in the course of administration in his hands, subject to costs of administering said estate, \$800 to appellee for rent of February and March, and that said amount should be a lien upon the property of the Eggette Company and its effects then in the receiver’s hands as expense incurred in administering said estate. Subsequently an order was made by the superior court directing the receiver to sell most of the property of the Eggette Company, and in compliance with such order the property was sold, realizing \$2,218. Upon the incoming of the receiver’s report of sale, appellee filed a supplemental petition, in which he claimed the lien upon the proceeds of such sale for rent due him at that time, amounting, as stated in his petition, to \$4,800. The matter was

referred to the master in chancery, who took evidence, and reported that there was due appellee, under the lease, \$3,774.38, being the rental for 10 months from February 1 to November 30, 1894, less \$225.62, received by him for dockage fees. The master further found, by the terms of the lease, Hughes had, as against the Eggette Company, a lien upon the property sold by the receiver, and that the receiver could not in such case make any defense not available to the Eggette Company; and that, by the terms of the order confirming the sale, the lien of Hughes had been transferred from the property to the proceeds, and recognized that the prayer of appellee’s petition be granted. Exceptions were filed, and, upon a hearing thereof, together with the petition filed by appellant, setting forth that under an order of the superior court, before that time entered, authorizing the receiver to borrow money to conduct the business, appellant had advanced to him about the sum of \$1,400, for the purpose of carrying on the business, and that it was entitled to be paid out of the proceeds of the sale of said property before the payment of the claim of appellee for rent, the superior court confirmed the master’s report, and ordered the receiver to pay the proceeds of the sale of the property, less expense of sale and wages of watchmen, to appellee on account of rent. This sum, amounting to \$2,138, was ordered to be paid to appellee. From this decree of the superior court, an appeal was prayed to the appellate court of the First district, whereupon, upon a hearing, the decree was confirmed, and thereupon this appeal was prosecuted to this court.

Breckenridge & Rich, for appellant. H. S. & F. S. Osborne and R. F. Pettibone, for appellee.

PHILLIPS, J. (after stating the facts). One of the reasons urged by appellant in this cause why the judgment of the appellate court affirming the decree of the superior court of Cook county should be reversed is that a receiver, by taking possession of leased premises, does not elect to adopt the lease of the individual, firm, or corporation of which he is receiver, nor does he become bound by the terms of the lease. There can be no denial of the proposition that a receiver has, subject to the order of the court, the right to elect whether he will perform or comply with the provisions of the lease held by the party for whom he is acting, and that he is entitled to a reasonable time after taking possession in which to make the election whether he will continue such lease. *Railroad Co. v. Humphreys*, 145 U. S. 82, 105, 12 Sup. Ct. 787; *Park v. Railroad Co.*, 57 Fed. 799; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268; *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 259. See, also, *Express Co. v. Railroad Co.*, 99 U. S. 191; *Ellis v.*

Railroad Co., 107 Mass. 1; In re Metz, 6 Ben. 571, Fed. Cas. No. 9,509; In re Hamburger, 12 N. B. R. 277, Fed. Cas. No. 5,975; In re Lynch, 7 Ben. 26, Fed. Cas. No. 8,634; Spencer v. Exposition, 163 Ill. 117, 45 N. E. 250. But in a case where the lease or contract is, of itself, a thing of value, and the receiver, under the order of the court, takes possession of the premises, and conducts the business which the insolvent had been unable to continue, and, without any act of disaffirmance or notice to the owner of the premises indicating that he would not be bound by the contract or terms of the lease, continues to hold the premises, and conduct the business under the order of the court, receiving all the benefits of the possession of such premises, he has not the right to repudiate the contract, and pay rent for the premises only on the basis of quantum meruit. Where a receiver has continued the business of the insolvent for a reasonable time, paying to the owner of the premises the rent specified in the lease held by the insolvent, and has raised no question as to the terms or conditions of the lease, it will be considered as an adoption by him of the terms of the lease during the time which he was occupying such premises under the order of the court for the continuance of the business of the insolvent. As held by this court in Spencer v. Exposition, supra: "No reason is perceived why the receiver may not either expressly elect, or, by unequivocal acts, inconsistent with the right of entry by the landlord, indicating an election to appropriate the leasehold estate, be held to have done so impliedly, without any acts on the part of the landlord whatever putting the court or the receiver to an election." No express election or declaration made by the receiver to the landlord of his intention to abide by or carry out the terms of the lease or contract of his insolvent is necessary. It may be done by acts; by continuing in possession of the premises, and, for a time, paying the rent provided for in the lease; by making no request to the court which has appointed him, to order whether or not the rent shall be continued; or by a failure to make other and different arrangements with the landlord on the question of amount or terms of the lease. Where none of these circumstances exist which indicate an intention on the part of the receiver to hold the premises under other or different terms from those named in the lease, it would be unjust to permit a receiver to say he intended to hold such premises under a quantum meruit, and not under the terms of the lease.

In Blackall v. Morrison, 170 Ill. 152, 48 N. E. 705, where a question in some respects similar was presented to this court, we held: "It would be wholly unjust to allow the receiver to enjoy the premises under an order providing for the payment of a fixed sum per month as rent, and, after such occupancy had continued for nearly a year, while the parties were contending as to whom the monthly sum was to be paid, to insist that payment of rent

should not be made according to the provisions of the order, but that the party entitled to the rent should be required to show by proof the reasonable rental value thereof."

In this case appellant had filed its bill asking for the appointment of a receiver for the Standard Eggette Coal Company, and in such bill it was alleged that the Eggette Company had spent large sums of money in erecting its plant and machinery on the premises in question, and that it had reached a point where appellant was informed and believed its business could be successfully and profitably continued. Appellant especially asked and prayed that the receiver be ordered to continue such business, and represented to the court that the lease in question was one of the valuable properties of the insolvent company. At its instance the court ordered the receiver to continue the business in which it was engaged, employ suitable persons to conduct such business, purchase materials, and that he pay the rent and other charges, to the end that the property of the insolvent should be preserved and conserved pending the further order of the court. There can be no question, under such circumstances, the receiver was put to no election, but, by continuing in possession of the leased premises, which were represented to be one of the valuable properties of the insolvent, he became bound to pay the rent named in the lease.

It is urged by appellant that, where the receiver had in his hands only the sum of about \$2,138, and the rent, together with money borrowed by the receiver to continue the business, receiver's fees, and other expenses, were largely in excess of that amount, the same should have been ordered to be prorated among appellee and the other costs of administration. We are not called upon to determine that question in this case. The lease in question expressly gave to appellee a lien upon all the property of the lessee for rent which should remain due and unpaid. The parties had a right to enter into a contract of this nature, and it was binding between the lessor and the lessee. When the receiver took possession under the order of the court, the lease was not changed. The court having ordered the receiver to occupy the leased premises under the lease, the receiver took the property subject to the same terms and conditions as it was held by his insolvent. If appellee had a lien against the property for rent, he also had a lien against the property after it thus passed into the hands of the receiver. In the case of Hooven, Owens & Rentschler Co. v. Burdette, 153 Ill. 672, 39 N. E. 1107, which was a case where an assignee of an insolvent debtor had taken possession of property which had been sold to the insolvent under a contract not recorded, retaining a lien until the purchase money had been paid, we held the rule was well settled that an assignee of a failing debtor takes the property assigned subject to the equities, liens, or incumbrances which existed against the same in the hands of the insolvent,

and cited in support of this rule *Willis v. Henderson*, 4 Scam. 13; *Hardin v. Osborne*, 94 Ill. 571; *Jenkins v. Pierce*, 98 Ill. 646; *Jack v. Welennett*, 115 Ill. 105, 3 N. E. 445; *Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24. We held, also, in that case such lien was transferred to the purchase money arising from the sale of such property; and in this case, where the property was sold by the receiver under an order of the court preserving whatever rights existed in favor of appellee, Hughes, his lien continued, and was transferred to the proceeds arising from the sale of such property, and was prior to the claims of other creditors or other costs. In the absence of such lien reserved upon the property in the lease for the payment of unpaid rent, a different question might arise as to the pro rata of the purchase money between a landlord and costs of administration.

Appellee having the right to his lien upon the purchase money arising from the sale of the property upon which he had reserved a lien for unpaid rent, and also to receive from the receiver the same rent provided for in the lease, it is unnecessary to discuss the other questions raised by appellant. The judgment of the appellate court of the First district, affirming the decree of the superior court of Cook county, is affirmed. Affirmed.

(172 Mass. 1)

**WHITNEY ELECTRICAL INSTRUMENT
CO. v. ANDERSON.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 13, 1898.)

**APPEAL—RECORD—REVIEW—INSTRUCTIONS—
EVIDENCE.**

1. Where the whole charge is not reported, and the portion of the charge excepted to relates to only one phase of the case, the court will assume that instructions were given appropriate to the other phases.

2. The evidence will not be weighed on the hearing of exceptions.

3. A contention that the jury were insufficiently instructed is unavailing where it does not appear that any further instructions were requested, or, if they were, that they were not given.

Exceptions from superior court, Suffolk county; Charles S. Lilley, Judge.

Action of tort by the Whitney Electrical Instrument Company against George W. Anderson, assignee in insolvency of the estate of W. B. Southgate & Co., for conversion. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

The judge submitted the case to the jury upon the following issue: "Did the plaintiffs retain the title and ownership of the instruments shipped by them to the insolvents, W. B. Southgate & Co.?" By agreement judgment was to be entered for the plaintiff for a certain sum if the jury answered the question in the affirmative, and for the defendant if the jury answered the question in the negative.

Among other instructions, to which no ex-

ception was taken, the judge gave the following: "It must appear to your satisfaction that it was the understanding of both parties, the Whitney Company and Southgate and Kellogg, when the arrangements were entered into for the shipping of these goods, that the title should remain in the Whitney Company. In other words, it is all a matter of agreement; not necessarily an express agreement, not necessarily an agreement reduced to writing, but an agreement upon which the minds of both parties met. For instance, it would not be enough to say: 'We are satisfied that the Whitney Company intended from the first to retain the ownership and title of those goods. We are satisfied of that, and hence will find that they did retain the title and ownership.' That would not be enough. There must have been not only an intention upon the part of the Whitney Company to retain title in the goods, but there must have been also an intention upon the part of Southgate and Kellogg that they should retain title in the goods. It must appear that there was an agreement, either express or implied, between the Whitney Company and Southgate and Kellogg, by which the title in the goods that the Whitney Company shipped to Southgate and Kellogg, or to persons for whom Southgate and Kellogg obtained orders, should remain in the Whitney Company."

The jury answered the question submitted to them in the negative. The plaintiff duly excepted to the above-quoted instructions.

F. A. Wyman and A. A. Wyman, for plaintiff. C. A. Reed and G. W. Anderson, for defendant.

LATHROP, J. The plaintiff states in its brief the contention of each party, and says that there was evidence to support each contention. It was necessary, therefore, to submit the question at issue to the jury. It was done in a form not objected to. The only exception taken was to certain portions of the charge, which are set forth in the bill of exceptions. The whole charge is not reported, but it appears that other instructions, not excepted to, were given. We must assume, therefore, that appropriate instructions were given if the jury should find that Southgate & Co. were acting merely as the agents of the plaintiff. See *Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022. The plaintiff's brief is chiefly devoted to arguments on the weight to be given certain portions of the evidence which make in its favor, but the weight of the evidence is not for us to determine. Nor is the question before us whether there was any evidence for the jury, for this is conceded. The plaintiff also contends that on the evidence reported certain principles of law are involved, upon which the jury should have been instructed, and that these do not appear in the instructions given. But the plaintiff has picked out a single paragraph of the charge to insert in the bill of exceptions, and it does not appear that he asked for any in-

structions, or, if he did, that they were not given. Instructions should have been requested. See *Railway Co. v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, and cases cited. Exceptions overruled.

(171 Mass. 600)

BENNETT et al. v. SWEET et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Aug. 30, 1898.)

ACTIONS—NATURE—CREDITORS' SUIT—PROPERTY REACHABLE—VERDICT FOR PERSONAL INJURIES—TRIAL—FORM OF VERDICT.

1. Where a declaration sought damages for unlawful restraint of plaintiff's liberty, and for compelling him to pay a sum of money to obtain his release, the gist of the action was the injury to the person.

2. Treating the second count of the declaration as one to recover money paid under duress, yet the verdict in plaintiff's favor was one for personal injuries, where it was a general one on both counts, and was not confined to the amount of money paid.

3. A verdict for personal injuries before judgment has been entered thereon is not property which can be reached in equity by a creditor of plaintiff therein.

Report from superior court, Suffolk county; Edgar J. Sherman, Judge.

Bill by James H. Bennett and Charles A. Rand, partners as Bennett, Rand & Co., against Edward H. Sweet, William H. Preble, Freedom Hutchinson, and James F. Kimball, to subject a verdict in favor of defendant Sweet, and against defendant Kimball, in an action of tort for personal injuries, to payment of plaintiff's claim against Sweet. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

H. R. Bailey and W. R. Sears, for plaintiffs.
F. Hutchinson, for defendants.

FIELD, C. J. It appears that Sweet brought an action of tort against one Kimball, and obtained a verdict, but that no judgment has been entered on the verdict, although by a rescript from this court the superior court could enter judgment. The superior court has continued the case for judgment, and it remains so continued. See *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243. The cause of action there alleged was that Kimball had procured the arrest of Sweet without right, and forced him to pay a sum of money for his release. The present suit is a bill in equity, brought by the partnership of Bennett, Rand & Co. against Sweet and his attorneys in Massachusetts, and against Kimball, to obtain the payment of a debt due to the partnership from Sweet, and it seeks to reach and apply the verdict in the action of Sweet against Kimball in satisfaction of this debt. Sweet is an inhabitant of Rhode Island, and has not been served with process within this commonwealth, but he has appeared specially by attorney, and has filed a motion to dismiss the bill, and also a plea to the jurisdiction. The plaintiffs traversed the plea, and, after a hearing on evidence, the superior

court dismissed the bill, with costs. The question of law which the case presents is whether the verdict in the action of Sweet against Kimball can be reached and applied in equity in satisfaction of the debt due from Sweet to the plaintiffs. We think that the gist of the cause of action in *Sweet v. Kimball* was an injury to the person, although by means of that injury Sweet was deprived of property. If one count of the declaration in that action could be regarded as a count to recover money paid to the defendant in that action under duress, yet we understand that the verdict was general upon both counts, and was not confined to the amount of money paid. A verdict in such a case before judgment is not assignable (*Linton v. Hurley*, 104 Mass. 353; *Rice v. Stone*, 1 Allen, 566), and it cannot be reached by trustee process (*Thayer v. Southwick*, 8 Gray, 229), and we are of opinion, for the reasons given in these cases, that a verdict for personal injuries before judgment has been entered upon it is not property which can be reached in equity. A verdict in favor of a plaintiff for a definite sum of money, if it could be reached at all by a creditor of the plaintiff, is of such a nature that it could be reached by trustee process. Decree affirmed.

(172 Mass. 5)

MAYOR, ETC., OF CITY OF NEWTON v. BOSTON & A. R. CO. et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Aug. 31, 1898.)

APPEAL—REVIEW—RAILROADS—ABOLITION OF GRADE CROSSINGS—COSTS—ALLOWANCE TO COMPANY.

1. An objection that a party had not filed exceptions in the superior court to the report of an auditor comes too late when made for the first time in the supreme court on an agreement reserving the case for determination.

2. Under St. 1890, c. 428, providing for the abolition of grade crossings, the auditor appointed under the statute to state an account of the "total actual cost of the alterations" may not include the cost of a new station. The allowance should be for the expense of altering the old station, and lowering it to meet the tracks, and providing new approaches.

3. Nor may he allow for the cost of a 95-pound rail to replace a 72-pound rail used before the alteration. He should deduct the value of the old rail from the value of a new 72-pound rail.

4. Under St. 1890, c. 428, providing for the abolition of grade crossings, and declaring that the allowances shall be for "the total actual cost of the alterations," an auditor appointed under section 7 of the act to take an account of such expenses may not include in his report an allowance to the railroad company for "a reasonable advance on the actual cost" of doing the work, so as to give a proper return on a portion of its road used outside the limits of the improvement, in carrying material excavated, and as compensation for interference with its other traffic.

Report from superior court, Middlesex county.

Petition by the mayor and aldermen of the city of Newton against the Boston & Albany Railroad Company and others for the aboli-

tion of certain grade crossings. The case came on for hearing on motion of the railroad company to confirm the report of an auditor as to expenses of making alterations, and on objections and exceptions of the city and objections of the commonwealth. By agreement, the questions were reserved and reported for determination in the supreme judicial court. Confirmed in part.

W. S. Slocum, for city of Newton. S. Hoar and W. Hudson, for Boston & A. R. Co. H. M. Knowlton, Atty. Gen., and F. T. Hammond, Asst. Atty. Gen., for the Commonwealth.

MORTON, J. This was a petition by the mayor and aldermen of Newton, under St. 1890, c. 428, and acts in addition and amendment thereto, for the abolition of certain grade crossings in the city of Newton. Commissioners were duly appointed by the superior court as provided by section 1 of the act, and made a report specifying the alterations to be made, which was confirmed by the court; and the city and the railroad company proceeded to make the alterations as directed. Subsequently an auditor was appointed pursuant to section 7, to whom were submitted accounts of expenses alleged by the defendant to have been incurred by it in making the alterations. The auditor made a report, which the railroad company moved to confirm, and to which the city filed objections and exceptions, and the commonwealth filed objections. The case came on for hearing, and thereupon the questions arising were, at the request of all parties, reserved and reported for the determination of this court. The defendant objects that the commonwealth filed no exceptions in the superior court. But the point does not seem to have been taken there, and comes too late when taken in this court for the first time. We assume that the rules in regard to equity practice apply to this case. The questions presented relate to the cost of the new station, to what was paid for new rails, and to what was allowed to the defendants as an investment return, and for interference with their other traffic. The defendants contend that these items constitute a part "of the total actual cost of the alterations" within the meaning of the statute. One question therefore is, what do alterations include? And the answer depends on the construction to be given to the statute. In construing the statute, regard is to be had "to the nature of the subject-matter, and to the various interests, public and private, which are to be affected." *Boston & A. R. Co. v. Hampden Co. Com'rs*, 116 Mass. 76. The object of the statute is to promote the safety of travelers and property on highways, and of passengers and property on railroads, and to remove the obstructions to highways and railroads which are caused by grade crossings. It seeks to do this by abolishing grade cross-

ings. It is just and reasonable that a part of the expense of doing this should be borne by the commonwealth and by the cities and towns, and the statute so provides. But for obvious reasons it is the policy of the state that much the larger part of the expense should be borne by the railroads, and this policy is expressed in the statute. The statute applies to existing conditions, and contemplates the abolition of grade crossings by means of changes and alterations in existing conditions. Except so far as is necessary to accomplish the proposed abolition, the existing conditions are, for aught that appears, to continue substantially as before. If the proposed abolition cannot be accomplished except by discontinuing an existing way and building a new way, or by relocating the railroad, that may be done. But this does not alter the fact that the statute contemplates a continuance of existing conditions, subject to such changes in them as may be required to accomplish the abolition of crossings at grade. This does not prevent the railroad company or a city or town from making at its own expense any improvements which it may deem advisable in view of the changes which have been or may be ordered; but we think that it confines the expense which is to be apportioned to that which is incurred in making the alterations which are expressly directed, and to that which is rendered necessary to adapt existing structures and arrangements to such alterations. Such last-named expense must be considered as incident to, and as a part of, that contemplated by the alterations which are ordered. It is manifest, we think, that it could not have been intended that a city or town or a railroad company could make such improvements as it chose in connection with or as a part of the alterations required, and insist that the expense of carrying them out should be reckoned as a part of the actual cost of the alterations. In ascertaining the cost, allowance is not to be made for the greater value over the old of the new work and new material and new appliances which replace old work and old material and old appliances, and which, in addition to being new, may perhaps be better of their kind, or for the fact that the construction may be superior in other respects to what it was before. These are incidental matters which cannot be taken into account in arriving at the actual cost. *Norwood v. Railroad Co.*, 161 Mass. 259, 267, 37 N. E. 199. Neither do we think that the statute should be construed so strictly as to limit the actual cost to expenditures made in literal compliance with the directions of the commissioners, and to exclude all others. "The total actual cost of the alterations" well may be held to include, not only expenditures made directly upon the alterations themselves, but also those which are rendered necessary to restore existing buildings and structures relatively to their former

condition, and to replace in a proper and workmanlike manner the rails, ties, platforms, and other things which have been removed or damaged in the work of alterations. See *Chace v. Worcester*, 108 Mass. 60. Applying the principles thus laid down to the case before us, we think that the auditor erred in allowing the cost of the new station, and that the sum allowed should have been the expense of altering the old station, and lowering it to meet the tracks, and providing suitable approaches, which the auditor finds would have been \$11,000. We think that there was also error in allowing the cost of a 95-pound rail to replace the 72-pound one which was in use before the alterations. It seems to be conceded that the old rails are to be accounted for, and the most which we think that the railroad company can justly claim is the expense of a new 72-pound rail as laid, from which should be deducted the value of the old rails. The questions which we have been considering, and those which we are about to consider, did not arise in *Re Westborough*, 169 Mass. 495, 48 N. E. 763, and that case has therefore no bearing upon this.

The remaining item relates to the amount allowed to the defendant as a return upon its road, as an investment, for its use outside the commissioners' lines, and for interference with its other traffic. The alteration consisted, among other things, in depressing the tracks, and this required the removal of large quantities of material. There was no place inside the commissioners' lines where this could be dumped, and the railroad company procured the most available locations, as the auditor finds, and, for convenience and expedition in doing the work, established two dumping grounds,—one east and one west of the commissioners' lines. These were at the busiest points on the defendant's road, and caused interference with its other traffic. We understand from the auditor's report that the defendant "has been allowed in former auditings for the actual expense of doing the work, viz. for the use of locomotives and cars, fuel, repairs, etc., and the pay roll of all men employed," and that the sum allowed by the auditor represents "a reasonable advance upon the actual cost," so as to give the defendant a proper return upon the portion of its road thus used, and compensation for the interference with its other traffic. Some emphasis appears to be laid, in the auditor's report, and also in the brief of counsel for the railroad, on the fact that the material was transported to points outside the commissioners' lines. We do not see the materiality of that fact. The defendant was entitled to the actual expense of removing such material as the alteration rendered it necessary to remove, whether the points to which it was necessary to remove it were within or without the commissioners' lines. And, if the defendant is entitled to an investment return upon the portion of its road outside the com-

missioners' lines that was used in transporting the material, we do not see why it is not entitled to a like return upon that portion which was within the commissioners' lines, and also upon the capital invested in locomotives, cars, etc. But we think that by the words "actual cost" it was intended to exclude anything in the nature of a profit or return upon the investment. "Actual cost" means real cost, as distinguished, among other things, from estimated cost (*Inhabitants of Lanesborough v. Berkshire Co. Com'rs*, 6 Metc. [Mass.] 329), or from market price, which may include matters which do not enter into the real cost (*Alfonso v. U. S.*, 2 Story, C. C. 421, Fed. Cas. No. 188; *U. S. v. 26 Cases Rubber Boots*, 1 Cliff. 580, Fed. Cas. No. 16,571). The word "cost" is of limited significance,—much narrower than "damages," for instance, which, in the case of laying out one railroad over and across another, has been held not to include compensation for the interruption and inconvenience to the business of the latter occasioned thereby. *Massachusetts, etc., R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124. In *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 9 Gray, 228, the "actual cost" of running trains was held not to include interest on cars, and to mean money actually paid out. And in *Alfonso v. U. S.*, supra, under the revenue act of 1799 (chapter 128, § 66), it has been held that the words "actual cost" meant the actual price paid in a bona fide purchase, and not the market value, thus excluding any idea of profit or return. See, also, *U. S. v. 16 Packages*, 2 Mason, 48 Fed. Cas. No. 16,303; *U. S. v. Tappan*, 11 Wheat. 423. The object of the provision which we are considering was, it seems to us, in view of the relations of the parties to the work and to each other, to exclude in the accounting between them any profit, and everything except what fairly might be reckoned as a part of the real cost of the alterations. And it appears like a contradiction of terms to speak of an advance upon the actual cost as constituting a part of that cost. Not much light, if any, can be got from the cases in regard to the compensation to be paid by one railroad to another for drawing its passengers, merchandise, and cars over the railroad of the other, and for providing depot accommodations, and for the use of its tracks. See *Boston & W. R. Corp. v. Western R. Co.*, 14 Gray, 253; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen, 262; *Metropolitan R. Co. v. Highland St. Ry. Co.*, 118 Mass. 290; *Cambridge R. Co. v. Charles River St. Ry. Co.*, 139 Mass. 454, 1 N. E. 345. "Compensation" is a term of larger scope than "cost," and especially than "actual cost." In one instance the statute uses the phrase "reasonable compensation." St. 1845, c. 191, § 2; *Boston & W. R. Corp. v. Western R. Co.*, supra. It is doubtful if that adds anything, since, from the nature of the case, the compensation must be reasonable. In fixing the compensation in the cases referred to, a suitable return upon

the capital invested was included. But in the present case the accounting is expressly limited by statute to "the total actual cost," and, unless "compensation" is held to mean the same as "actual cost" (which we doubt), those cases throw no light on this. The contention of the defendant is, in effect, that a suitable return on the capital invested constitutes a part of the actual cost of the alterations. But though, in a sense, the return on capital which one would have received for work done constitutes a part of the cost, we do not think that in ordinary usage the term "real cost" or "actual cost" includes a proper return upon the capital invested. After allowing all the actual expenses of doing the work, that seems to us more in the nature of profit than of cost.

The result is that a majority of the court think that on the first item the sum of \$11,000 should be allowed, on the next item a sum equal to the cost of a new 72-pound rail, as laid, less the value of the old rails, and the third item disallowed altogether. So ordered.

(172 Mass. 37)

KINGSLEY v. DELANO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Sept. 23, 1898.)

APPEAL—RIGHT OF REVIEW—PERSONS AGGRIEVED.

St. 1893, c. 396, § 24, provides that a party "aggrieved" by the judgment of a district court may appeal to the superior court. Pub. St. c. 198, § 4, provides for costs on failure of a plaintiff on appeal to recover a greater sum than the first judgment. *Held*, that where the declaration contained only one count, and plaintiff recovered in the district court less than the amount claimed, he was "aggrieved," and might appeal.

Appeal from superior court, Hampshire county.

Action by William F. Kingsley against Charles G. Delano, executor of the will of Henry B. Graves, deceased, on account to recover \$148. At the trial in the superior court, the jury returned a verdict for the full amount, but on exceptions the supreme judicial court held that defendant should have been credited with \$20, the price of a mare delivered to plaintiff. Plaintiff remitted the \$20 from the verdict, when defendant moved in arrest of judgment. From an order overruling the motion in arrest of judgment, defendant appeals. Affirmed.

C. G. Delano, for appellant. J. B. O'Donnell, for appellee.

FIELD, C. J. This case once before has been considered by this court on exceptions, and is reported in 169 Mass. 285, 47 N. E. 1013. After the decision there reported, the plaintiff elected to remit \$20, the price of the mare; and the defendant then filed a motion in arrest of judgment, which was overruled, and he appealed to this court. The action was begun in the district court of Hampshire, and the declaration contained a single count, being on an account annexed. Judgment was

rendered in that court for the plaintiff for \$3 damages, and the costs of suit. The plaintiff's claim was for \$148.00 and interest. From this judgment the plaintiff appealed to the superior court, and the case was there tried, and the jury returned a verdict in favor of the plaintiff for \$151.45.

The defendant now contends that as the judgment of the district court was in favor of the plaintiff, although for a smaller sum than he claimed was due him, the plaintiff could not appeal to the superior court. St. 1893, c. 396, § 24, is as follows: "A party aggrieved by the judgment of a district or police court in a civil action, may within twenty-four hours after the entry of the judgment appeal therefrom to the superior court then next to be held in the county; in which case no execution shall issue on the judgment appealed from, and the case shall be entered, tried and determined in the court appealed to, in like manner as if it had been originally commenced there." See Pub. St. c. 154, § 39; Id. c. 155, § 23; Gen. St. c. 120, § 25; Id. c. 116, § 32; Rev. St. c. 85, § 13; Id. c. 87, § 36; St. 1783, c. 42, § 6. Pub. St. c. 198, § 4, distinctly implies that a plaintiff may appeal from a judgment of a police, district, or municipal court, or of a trial justice, in his favor, and makes provision concerning costs in such a case. That a plaintiff can appeal from a judgment of a district court in his favor was, in effect, decided or taken for granted in *Folsom v. Cornell*, 150 Mass. 115, 22 N. E. 705. Such always has been the practice. The cases cited by the defendant relate to appeals in cases where there is more than one count or more than one issue, and the appellant has prevailed on some of the counts or issues, and the adverse party has prevailed on others. *Vinal v. Spofford*, 139 Mass. 126, 29 N. E. 288; *Smith v. Dickinson*, 140 Mass. 171, 3 N. E. 40; *Shepard v. Lawrence*, 141 Mass. 479, 5 N. E. 854. A plaintiff is aggrieved by a judgment in his favor if it is not rendered for all he claimed in his declaration. The order overruling the motion in arrest of judgment must be affirmed.

(172 Mass. 23)

DAKIN v. SAVAGE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 14, 1898.)

DEEDS—CONSTRUCTION—TRUSTS—EXECUTION—STATUTE OF USES.

1. A deed, in consideration of a certain sum to be paid by one H., "as he is trustee of" one D., gave, granted, bargained, sold, and conveyed "unto the said H., his heirs and assigns, as trustee as aforesaid, and upon the trust herein-after set forth," certain premises, to have and to hold, etc., "to the sole use and behoof forever of said D., her heirs and assigns, and in trust for her heirs and assigns." The trust mentioned was the payment of a mortgage, and the effect of the discharge thereof was not prescribed in the deed. Thereafter H., as trustee of D., and at her request, transferred the property to G. on the same trust. *Held*, that the grantee in each deed took the legal estate in

fee and in trust, and not as feoffee to uses; hence on the discharge of the mortgage the statute of uses did not vest the legal estate in D., but it was the duty of the trustee to convey, on request, the legal estate to D. or her assigns.

2. In the construction of a deed depending on nice and not very well-defined distinctions, where the parties legally and equitably interested have acted on a particular construction, it is proper to follow that construction, unless it is forbidden by some positive rule of law.

Appeal from superior court, Suffolk county; John W. Hammond, Judge.

Petition by Juliette G. Dakin against Francis G. Savage for partition. The petition was denied, and petitioner brings exceptions. Overruled.

H. Austin and W. M. Stockbridge, for petitioner. J. H. Butler and M. B. Breckett, for respondent.

FIELD, C. J. This is a petition for partition by one grandchild of Lois Davis against another. The petitioner is the only child of Celestia W. Chase, a child of Lois Davis, and the respondent is one of the two children of Mary Ann Savage, the other child of Lois Davis. Lois Davis died intestate on May 31, 1852, leaving as her sole heirs Celestia W. Chase and Mary Ann Savage. Celestia W. Chase died intestate on July 9, 1888, leaving no husband, and leaving the petitioner as her only heir. Mary Ann Savage died intestate on June 27, 1892, leaving no husband, and leaving George H. Savage and Francis G. Savage as her only heirs. In 1893, by proceedings in partition between George H. Savage and the respondent, the respondent acquired all the interest of George in the premises. The contention of the petitioner is that by the first two deeds hereafter mentioned the legal fee in the premises vested in Lois Davis by the operation of the statute of uses when the mortgage referred to in the deed of Oliver Kimball to John Henry, trustee, was discharged, which was on December 2, 1844; that the deed made by Gould, trustee, to Mary Ann Savage and her children, dated April 16, 1851, conveyed no interest whatever in the premises, because he had none when the deed was executed; that, therefore, Lois Davis died seised in fee of the premises, and the title passed by descent, one-half to her daughter, Celestia W. Chase, and one-half to her daughter Mary Ann Savage; and that on the death of the daughters, respectively, each daughter's share passed to her child or children. The contention of the respondent is that the legal fee never vested in Lois Davis, but vested successively in the grantee in each of the two deeds mentioned, as trustee for her, until the conveyance made by Gould, trustee, at her request, when the title vested in her daughter Mary Ann Savage for life, remainder in fee in the two children of Mary Ann Savage, and the trust ceased; that, if this is not so, Mary Ann Savage and the respondent acquired by adverse possession a title in fee to the whole of the premises; and that if neither of these

contentions can be maintained, the petitioner is estopped by her conduct from maintaining her petition. It is not disputed that Lois Davis and her trustees acted on the belief that the legal title was in the trustees up to the time of the conveyance by Gould, trustee, to Mary Ann Savage for life, remainder in fee to her children; but it is argued that it is immaterial what they thought about it, as the statute of uses takes effect as a positive rule of law. The first deed—that of Oliver Kimball to John Henry, dated June 11, 1844—purports to be “in consideration of six hundred and twenty dollars and fifteen cents, to be paid by John Henry, of Boston, in the county of Suffolk, as he is trustee of Mrs. Lois Davis,” and to “give, grant, bargain, sell, and convey unto the said John Henry, his heirs and assigns, as trustee as aforesaid, and upon the trust hereinafter set forth,” the premises. The habendum is as follows: “To have and to hold the above-granted premises, with the privileges and appurtenances thereto belonging, to the said John Henry and his heirs and assigns, to the sole use and behoof forever of said Lois Davis, her heirs and assigns, and in trust for her heirs and assigns.” The trust set forth in the deeds is as follows: “The above lot of land is under mortgage to Arthur W. Austin, and is sold and conveyed subject to that mortgage, the mortgage being for five hundred dollars and interest on that sum from and after the 1st day of April now last past, and providing for insurance on such building as is agreed to be built thereon; and the said Henry is to perform the conditions of said mortgage, the amount thereof being deducted from the consideration and purchase price above mentioned.” If this be construed as a deed of bargain and sale, the use for Lois Davis and her heirs and assigns would be a use upon a use, which is not within the statute of uses. Under our decisions the deed can be construed as any form of conveyance necessary to effect the intent of the parties, but it ought not to be construed to be an instrument different from what it purports to be, in order to effect a purpose other than that intended by the parties. The intent of the parties certainly was not that John Henry, his heirs and assigns, should be a mere conduit through which the legal estate should pass to Lois Davis, her heirs and assigns, immediately on the delivery of the deed, for the deed was upon a trust, which, during the existence of the mortgage, at least, might require the performance of active duties on the part of the trustee. The deed of John Henry, “as trustee of Mrs. Lois Davis,” to Thomas Gould, dated November 9, 1844, purports to be on a consideration paid by Thomas Gould, “as he is trustee now for the same Lois Davis,” and to “sell, transfer, and convey unto said Thomas Gould, his heirs and assigns, as trustee for said Lois Davis, and upon the trust hereinafter mentioned and set forth.” The trust set forth is, in substance, the same as in the preceding deed. The habendum is as follows:

"To have and to hold the said land and all the buildings thereon, and all the privileges and appurtenances thereto belonging, to him, the said Thomas Gould, his heirs and assigns, in trust for the sole use and benefit of her, the said Lois Davis, her heirs and assigns forever. And I, the said John Henry, having had connection with the premises only as trustee for said Lois Davis, and now conveying the same at her request, and transferring the trust to said Thomas Gould, am in no wise to be liable to any claim or demand whatever relating to the premises." This, in form, is not a deed of bargain and sale. The trust, when this deed was made, was still active, as the mortgage referred to had not been discharged; and it is plain on the face of the deed that the grantor regarded himself as seised in fee and in trust, and as conveying the premises at the request of the cestui que trust to Gould, his heirs and assigns, to hold upon the same trust as he (the grantor) had held the premises. Without examining the many nice distinctions which have been taken under the statute of uses between trusts and uses, and having regard to the principle, well established, that deeds are, if possible, to take effect according to the manifest intention of the parties, we think it appears from the two deeds first mentioned that all parties intended that the grantee in each deed should take the legal estate in fee and in trust, and not as feoffee or grantee to uses; and that, when the active duties of the trust ceased with the discharge of the mortgage, the statute of uses did not, of its own force, immediately vest the legal estate in Lois Davis and her heirs. The deed of Thomas Gould, trustee, to Mary Ann Savage for life, remainder in fee to her children, and the written request of Lois Davis that this deed be executed, show what all the parties who had any legal or equitable interest in the premises then thought about the title. In a case of difficulty depending on nice and not very well-defined distinctions, where all the parties legally and equitably interested have acted upon a particular construction of a deed or deeds, it is wise to follow that construction, unless it is forbidden by some positive rule of law; and in the present case the phraseology of the first two deeds is such that we cannot say that the construction which the parties have acted on violates any rule of law. The grantee in each of these deeds undoubtedly took the legal title for the purposes of the trust until the mortgage referred to was discharged, but the effect of the discharge of the mortgage upon the estate of the grantee is not provided for in the deeds. When discharged, the trust ceased, and the natural construction of the deeds is that it then became the duty of the trustee to convey, on request, the legal estate to Lois Davis and her heirs, or to her assigns. See *Stearns v. Palmer*, 10 Metc. (Mass.) 32; *Simonds v. Simonds*, 112 Mass. 157, 164. We find it unnecessary to consider the other questions argued. Exceptions overruled.

(173 Mass. 17)

KEENE v. DEMELMAN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 14, 1898.)

REAL-ESTATE BROKERS—AGENCY—VENDOR AND PURCHASER—RESCISSION—MISTAKE.

1. A real-estate broker obtained an option on lots containing an agreement that they were to be transferred to the grantee or his assigns on payment of the consideration. *Held*, that on the face of the contract the relation of the parties was that of possible vendor and vendee, and not that of principal and agent.

2. Plaintiff gave a real-estate broker an option on two lots erroneously described as containing 11,916 feet of land. The mistake as to area was based on information obtained at the assessor's office by the broker, who misunderstood the figures. The broker assigned the option to a purchaser, who made a small payment, and plaintiff signed a receipt written by the purchaser in which the lots were "warranted" to contain 11,916 feet of land. The purchaser examined the property carefully before concluding his purchase. The lots were of irregular shape, and plaintiff told the parties that the quantity of land was not mentioned in his deed, and that until the broker told him he never knew the area of the lots. On a survey being made at the request of the purchaser it was shown that the lots contained 5,888 feet. *Held*, that equity would permit plaintiff to rescind the contract on the ground of mistake, if the purchaser would not accept performance omitting the stipulation as to area.

Appeal from superior court, Suffolk county.

Bill by Charles S. Keene against L. E. Demelman. From a decree for plaintiff, defendant appeals. Affirmed.

H. P. Harriman and W. N. Buffum, for appellant. W. H. Coolidge and G. S. Selfridge, for appellee.

FIELD, C. J. Keene, the plaintiff, owned a lot of land on which was an apartment house called the "Hotel Puritan," numbered 37 and 39 Burgess street, Boston. The building covered the larger part of the lot, and the boundaries of the lot, as we infer, were pretty well defined. One Haines, then a member of the firm of Charles W. Cummings & Co., real-estate brokers, in May, 1894, telephoned to the plaintiff, asking if he was the owner of Hotel Puritan, and the plaintiff answered, "Yes." Haines then asked if it was still for sale, and the plaintiff answered, "Yes." Haines then said that he thought he had a client who wanted such a piece of property, and asked the price, and the plaintiff gave the price as \$15,500. Haines sent one Taylor—one of the firm's clerks—to the city hall to examine the assessor's books, and he reported that the lot contained 11,916 square feet. This was a mistake, and it occurred in this way: On the assessor's books the plaintiff was assessed "for Nos. 37 and 39 Burgess street, Ward 20, Boston, 5,958 ft. of land, \$3,300; house, Puritan, \$10,000"; total, \$13,300. The clerk inferred that there were two lots, each containing 5,958 square feet, and he doubled this, making 11,916 square feet. Haines thereupon, on May 7, 1894, prepared a writing, which was signed by the plaintiff, and sealed, where-in the plaintiff agreed with Cummings & Co.

to hold the property until May 12, 1894, at noon, during which time he agreed to transfer it to Cummings & Co., or to such persons as they might designate, by insured title, for \$7,500, to be paid at the time of sale, subject to a mortgage for \$8,000 then on the property. The property was described as "embracing land numbering 35 and 37 Burgess street, Dorchester Dist., containing in all 11,918 ft. of land, and also double apartment house on same, known as 'Hotel Puritan,' renting for \$1,716 per year." Keene testified that before he signed the writing he noticed the clause stating the number of feet, and asked Haines where he got that information, and Haines said, "At city hall;" that he (the plaintiff) then said that this was the first time he knew of the number of feet. The property was managed for the plaintiff by an agent, and the plaintiff personally had little to do with it. Cummings & Co. called the defendant's attention to various pieces of property which they had for sale, and among them was this property of Keene's, and the defendant, after some negotiations, said that if they would get an option from the plaintiff at the price of \$14,500, he would look over the property. On May 28, 1894, the first option having expired, Cummings & Co. procured a second option from Keene, wherein he agreed to hold the property until June 2d, at noon, during which time he agreed to sell it to them, or to such person as they might designate, for \$6,500, to be paid at the time of sale, subject to a mortgage of \$8,000. The property was described as follows: "Lots numbering 37 and 39 Burgess street, containing 11,916 feet of land, and a double apartment house; land being assessed for \$3,300, and houses for \$10,000." In this description the numbers are right, the mistake of the first option in this respect having been corrected. This option contained statements of the amount of the rents and stipulations concerning an apportionment of the taxes for 1894-1895, and for paying the expenses of transfer, and it was shown to the defendant, who went out with Haines, and examined the property. Haines testified that the defendant "went all around the outside of the land first, and then examined the basement and the first floor of No. 37 and the basement of No. 39." The defendant agreed with Cummings & Co. to take the property, and on May 31, 1894, for the consideration of \$100, they indorsed on the option of May 28, 1894, a transfer of it to the defendant, or to any one he should name; "balance to be paid, excepting mortgage for \$8,000, is \$6,400, on or before June 4, 1894." On the 31st of May or on June 1st, the plaintiff was informed by Haines that he had sold the property, and Haines and the plaintiff went to the defendant's office, and the defendant showed the plaintiff a typewritten receipt, which the plaintiff read and signed. The plaintiff testified that he then told the defendant that the quantity of land was not mentioned in his deed, and that, until Haines told him, he never knew the contents of the

lot. The receipt is as follows: "Boston, May 31, 1894. Received of L. E. Demelman, of Boston, Mass., receipt whereof is hereby acknowledged, \$100, being part payment of houses 37 and 39 Burgess street, Dorchester, warranted to contain 11,916 feet of land. Terms as follows: \$8,000.00 to remain on mortgage, and balance, \$6,400.00, to be paid upon transfer of title, to be guaranteed by the Mas. Title Insurance Co. And I further agree to pay proportion of accruing taxes for 1894-5; also to pay all expenses of transfer except registering of deed. Witness my hand and seal this year and date above written. It is further agreed that papers pass on or before June 4th next. Charles S. Keene. [Seal.] Witnessed by A. J. Haines." The defendant paid the plaintiff \$100 by check, and requested that the deed be made to Rachel A. Schwarzenberg. The parties met on June 4th at the office of the Massachusetts Title Insurance Company, and the plaintiff tendered a deed, signed by himself and his wife, in which the property was properly described, but it did not contain any statement of the number of feet of land. The defendant objected to it on this ground. The insurance company said that it could not give a policy assuring the number of feet without a survey, and a survey was ultimately agreed upon, and it was found that the whole lot contained 5,888 square feet. The plaintiff offered to "call the trade off" on the ground of a mistake, and to pay back the \$100, or to deliver the deed which had been tendered. The defendant refused to call the trade off, or to accept the deed, but he was ready to pay the \$6,400 called for by the receipt if he could receive a deed with a warranty that the land contained 11,916 square feet. A few hours afterwards the defendant brought an action at law against the plaintiff for a breach of the agreement contained in the receipt, and attached his property. The present bill in equity avers, among other things, as follows: "At the trial of the said cause at common law in the superior court, Suffolk county, the justice thereof continued said cause in order that the defendant in said action, to wit, the said Keene, might bring this his bill of complaint to restrain the further prosecution of said action at common law, inasmuch as, in the opinion of the said justice, the said Keene could not, in an action at common law, obtain the equitable relief that he could obtain by bringing this bill in equity." This is not denied in the answer. The superior court entered a decree in the present suit, which enjoined the defendant from prosecuting the action at law, or any other action, for the same cause of action, and ordered the plaintiff to pay back to the defendant the \$100, and from this decree the defendant appealed. The evidence was taken before a commission appointed under chancery rule 35 of the superior court, and was brought before us, but there are no findings of fact by the superior court.

We think that the superior court properly

could have found on the evidence that Cummings & Co. were not the agents of the plaintiff, but that they acted either independently for themselves or as the agents of the defendant in procuring the second option. They transferred their rights under that option to the defendant. Such an option is not absolutely inconsistent with Cummings & Co.'s acting as the agent of the plaintiff, but on the face of the paper itself the parties appear to be acting the one as a possible vendor and the other as a possible vendee. See *Bassett v. Rogers*, 162 Mass. 47, 37 N. E. 772; *Id.*, 165 Mass. 377, 43 N. E. 180. The court also could have found that the clause in the option and the warranty in the receipt concerning the number of feet were inserted in consequence of information furnished by Haines, that otherwise the plaintiff knew nothing about the number of feet, and that the defendant knew that the plaintiff had no knowledge on the subject except from the statement made by Haines. If it be assumed that both the plaintiff and defendant were equally honest, and relied upon the assurances given by Haines, and that Haines was honest, and relied on the statement made by the clerk from an examination of the assessor's books, and that the clerk was honest, and the mistake he made was one which, as counsel have agreed, any one might have made from the form of the entry in the assessor's books, the result would be that the defendant, the plaintiff, and Haines, as representing Cummings & Co. in their dealings with one another, acted under a common mistake of fact, and the plaintiff's statement concerning the number of feet of land in the last option and the warranty in the receipt were induced by the representations of Haines, which were false, but not fraudulent. The rights of Cummings & Co. in the option were transferred to the defendant, and the defendant, as assignee thereof, took only the rights of Cummings & Co. The subsequent receipt was given by the plaintiff directly to the defendant, but the court could properly have found that this receipt was given in pursuance of the option, and in consequence of the assignment of it to the defendant. The most serious difficulty is that the receipt contains an express warranty of the number of feet. It is argued that it is common knowledge that a warrantor is bound by his warranty if it turns out to be false, although he believed the warranty to be true at the time he gave it, and that it is immaterial that this belief was induced by the representations of the other party to the warranty, provided there has been no fraud. It seems that the shape of the lot was such that the area could not be readily estimated from a view, and we think that the superior court could properly have found on the evidence that neither the plaintiff nor the defendant was wanting in due care in relying upon the representations of Haines regarding the number of feet in the lot. There was no mistake on the part of any of the parties concerning the identity of the house and land pur-

chased and sold, but the difference in the number of square feet which the land was represented or warranted to contain, and that which it did in fact contain, cannot, we think, be regarded as immaterial. If the receipt had followed the language of the second option, and had only described the land as "containing 11,916 square feet," this might have been held to be an implied warranty, or a representation equivalent to a warranty. It may well be that the defendant should not have been compelled to accept the deed tendered. *Roberts v. French*, 153 Mass. 60, 28 N. E. 416. It does not, however, necessarily follow that he can hold the plaintiff to his warranty of the contents of the land. This is a warranty in connection with an agreement for a sale, and is a part of the agreement. There seems to have been no previous discussion about a warranty, and no oral agreement to give one. The word was first introduced by the defendant in the receipt. The plaintiff noticed it, but there was no evidence that the effect of it was considered by the plaintiff. If the defendant had been permitted to prosecute his action at law, it is questionable what the measure of damages would have been. In some jurisdictions the damages would be held, on the evidence appearing in this case, to be only the consideration which the defendant had paid, with interest. *Society v. Smith*, 54 Md. 187; *Hammond v. Hannin*, 21 Mich. 374. See *Engell v. Fitch*, L. R. 4 Q. B. 659. The superior court proceeded on the ground that in this commonwealth the damages in the action at law might be something more than the consideration paid, and that in equity the plaintiff had the right to rescind the contract if the defendant would not accept a deed of the premises as they were, on the ground of an honest mistake induced by the representation of the defendant's agent or assignor. The warranty being in an executory contract of sale, it is but a stipulation as a part of the contract. *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 434, 23 N. E. 311. The defendant was not bound to accept the deed tendered, because it did not convey land containing the requisite number of square feet, and therefore was not a performance of the contract. But the whole contract, in the form in which it was executed, the superior court properly could have found was based on an honest mistake on the part of the plaintiff with regard to the number of feet of land, which mistake was induced by the false, although not fraudulent, representations of Haines, who was either the defendant's agent in the transaction, or a person who had entered into a contract with the plaintiff, and then had assigned his rights under the contract to the defendant. We are of opinion that a court of equity has the power to permit a party to rescind a contract entered into in the manner above set forth, on the ground of mistake, if the other party will not accept performance of the contract omitting the particular stipulation inserted through the mistake. *Spurr v.*

Benedict, 99 Mass. 465; Noble v. Googins, Id. 231; Schramm v. Refining Co., 146 Mass. 211, 15 N. E. 571; Rackemann v. Improvement Co., 167 Mass. 1, 44 N. E. 990; 1 Story, Eq. Jur. § 140 et seq. Whether the facts alleged in the present bill could not have been pleaded in defense to the action at law is a question not before us. Decree affirmed.

(172 Mass. 36)

In re BISHOP.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 21, 1898.)

HABEAS CORPUS—GROUNDS OF REMEDY—WRIT OF ERROR.

In a criminal case, where the court has jurisdiction and errs merely in regard to the punishment, relief will not ordinarily be granted on habeas corpus. The remedy is by writ of error.

Exceptions from supreme judicial court, Suffolk county.

Petition by one Bishop for a writ of habeas corpus. The petition was denied, and petitioner brings exceptions. Overruled.

C. W. Rowley, for petitioner. J. M. Hallowell, for the Commonwealth.

MORTON, J. This was a petition for a writ of habeas corpus. The case was heard upon the petition, as is now the more common practice. At the hearing the petitioner requested the court to make certain rulings, which the court refused to do, and ruled instead "that, under the law of this commonwealth, when it is not contended that the conviction is illegal, but only that the sentence imposed is illegal and void, the remedy is not writ of habeas corpus, but by writ of error," and refused to grant the petition, and denied the writ. The petitioner excepted to the ruling of the court and to its refusal to rule as requested. It is doubtful if exceptions will lie in a hearing upon a petition for the writ, or, after the writ has issued, in a hearing upon the question of remanding or discharging the party. King's Case, 161 Mass. 46, 38 N. E. 685; Wyeth v. Richardson, 10 Gray, 240. In the latter case it is said that "the allowance of exceptions would be inconsistent with the object of the writ. The consequence of allowing exceptions must be either that all further proceedings be stayed, which would be wholly inconsistent with the purpose of the writ, or that exceptions must be held frivolous, and judgment rendered non obstante for the discharge of the party, in which case the exceptions would be unavailing. The allowance of the exceptions being thus inconsistent with the very purpose of the writ, the conclusion must be that exceptions do not lie." Reference is made to this and other cases in King's Case, supra, and it is there said that "in recent cases questions of law arising on habeas corpus have been reserved or reported or adjourned into the full court by a single justice."

But assuming, without deciding, that the case is properly before us, we find no error in the ruling of the presiding justice, or in his refusals to rule as requested. All of the requests were addressed to matters relating to the sentence. None of them involved matters affecting the jurisdiction of the court over the offense, or the regularity of the trial, even granting that there might be such irregularity as could be availed of on a petition for a writ of habeas corpus. The general rule is that where the court has jurisdiction, and errs merely in regard to the punishment, relief will not be granted by habeas corpus, but that the remedy is by writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed. In re Stalker, 167 Mass. 11, 44 N. E. 1068; Sennott's Case, 146 Mass. 489, 16 N. E. 448; Ross' Case, 2 Pick. 171; In re Belt, 159 U. S. 95, 15 Sup. Ct. 987; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542. In exceptional cases, relief may be granted by habeas corpus or questions of constitutionality considered. Feeley's Case, 12 Oush. 598; Plumley's Case, 156 Mass. 236, 30 N. E. 1127. We discover nothing in this case which takes it out of the general rule. Without meaning to intimate thereby that the case is properly before us on exceptions, we think the entry must be, exceptions overruled. So ordered.

(172 Mass. 11)

MAY v. WOOD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 23, 1898.)

SLANDER—PLEADING—DECLARATION—CONSPIRACY.

1. In an action for damages for loss of employment and revocation of a provision in the employer's will in favor of plaintiff, caused by the false and malicious statements of defendants to the employer, an allegation in the declaration of a conspiracy to effectuate such result is immaterial.

2. In an action by a servant for damages caused by false and malicious statements made by defendants to induce plaintiff's discharge, the statements must be substantially set out in the declaration.

Knowlton, Holmes, and Morton, JJ., dissenting.

Appeal from supreme judicial court, Suffolk county.

Action by Margaret May against William Wood and others to recover damages for an alleged conspiracy to induce one Mary A. Wood to discharge plaintiff from her employ. From a judgment sustaining defendants' demurrer, plaintiff appeals. Affirmed.

B. P. Curran, for appellant. Clapp & Glover and Robt. Chusman, for appellees.

FIELD, C. J. The declaration, after setting forth the agreement between the plaintiff and Mary A. Wood, which is alleged to have been "that the plaintiff should continue to reside as before with the said Mary A. Wood, and to receive \$4.00 as weekly compensation, and the said Mary A. Wood agreed

to provide by will a legacy of \$700, to be paid to the plaintiff upon the death of said Mary A. Wood," then alleges "that the defendants, for the purpose of depriving the plaintiff of the benefit of said agreement, and of the legacy provided for her by a codicil to the will of said Mary A. Wood, conspired together to influence and induce the said Mary A. Wood, by divers false and malicious statements, and by inducing said Mary A. Wood to believe that the plaintiff was a dangerous person and unfit associate, to break off her agreement with the plaintiff, and discharge her from her employment; and the plaintiff says that, by reason of the conduct of the defendants as aforesaid, the said Mary A. Wood was induced to break, and did break, her agreement with the plaintiff, and has discharged her from her employment, and has revoked the provision made by said Mary A. Wood in her will for the benefit of the plaintiff."

The allegation of the conspiracy is immaterial, and, taken alone, does not show a cause of action. In *Randall v. Hazelton*, 12 Allen, 412, 414, it is said in the opinion: "The averment of conspiracy in the first count of the declaration cannot change the nature of the action, or add anything to its legal force and effect. The gist of the action is the tort committed and the damage resulting therefrom. To charge both defendants, it is necessary to prove a combination or joint action on their part; and the allegation of a conspiracy may be a proper mode of alleging such joint action; but for any other purpose it is wholly immaterial. If the action cannot be sustained against one of the defendants, then it must fail, although another person is included and a conspiracy alleged. *Parker v. Huntington*, 2 Gray, 125; *Hutchins v. Hutchins*, 7 Hill, 104." See, also, *Bowen v. Matheson*, 14 Allen, 499; *O'Callaghan v. Cronan*, 121 Mass. 114; *Wellington v. Small*, 3 Cush. 145; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930; *McHenry v. Sneer*, 56 Iowa, 649, 10 N. W. 234; *Kimball v. Harman*, 34 Md. 407; *Huttlery v. Simmons* [1898] 1 Q. B. 181.

Disregarding, then, the allegations of a conspiracy, and without considering whether it can properly be alleged that the two defendants jointly induced Mary A. Wood, by divers false and malicious statements, to discharge the plaintiff, a majority of the court are of opinion that the declaration, if it had averred that the defendants made the false and malicious statements with the intent alleged, and that this had caused the discharge of the plaintiff, in substance would have described a well-known form of action, but that the false and malicious statements should have been set out in the declaration, either according to their tenor or according to their substance and effect. *Odgers, Sland. & L.* (3d Ed.) 342 et seq.; *Newell, Defam.* 837 et seq.; *Payne v. Beuwmorris*, 1 Lev. 248; *Rumsey v. Webb*, Car. & M. 104;

Hartley v. Herring, 8 Term R. 130; *Derry v. Handley*, 16 Law T. (N. S.) 263; *Corcoran v. Corcoran*, 7 Ir. C. L. 272; *Lynch v. Knight*, 9 H. L. Cas. 577; *Hutchins v. Hutchins*, supra; *Pollard v. Lyon*, 91 U. S. 225, 237; *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122; *Morassee v. Brochu*, 151 Mass. 567, 25 N. E. 74; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208; *Lee v. Kane*, 6 Gray, 495. In the opinion of a majority of the court, there is no occasion to consider the form of declarations in actions for enticing servants away from masters, such as *Walker v. Cronin*, 107 Mass. 555. There is, so far as we are aware, no form of declaration for enticing masters away from servants. Whatever may be the form of declaration for inducing masters to discharge their servants, by threats, intimidation, or force, we are of opinion that when the cause of action is alleged to be that the defendants, by false and malicious statements, induced a master to discharge his servant, it is essential that the statements made should be substantially set out in the declaration, that the court may see whether any such effect as is alleged could reasonably be attributed to the statements, although it is not necessary that the statements of themselves should be defamatory. *Morassee v. Brochu*, ubi supra. Demurrer sustained. Judgment affirmed.

HOLMES, J. (dissenting). I cannot agree with the decision of the majority, and, as the law in cases of this sort is somewhat unsettled, I think it may be useful that I should state my views. I regard it as settled in this commonwealth, and as rightly settled, whether it be consistent with *Allen v. Flood* [1895] App. Cas. 1, or not, that an action will lie for depriving a man of custom,—that is, of possible contracts,—as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted simply from malevolence, and without some justifiable cause, such as competition in trade. *Walker v. Cronin*, 107 Mass. 555, 566; *Morassee v. Brochu*, 151 Mass. 567, 25 N. E. 74; *Hartnett v. Ass'n*, 169 Mass. 229, 235, 47 N. E. 1002; *Delz v. Winfree*, 80 Tex. 400, 405, 16 S. W. 111. See *Vegelahn v. Guntner*, 167 Mass. 92, 99, 105, 44 N. E. 1077. I think that it does not matter what motive to abstain from dealing is given to the possible customer, whether it be fear or simply prejudice, if the motive be effectual, or whether it be produced by falsehood, or without it, by malevolently intended advice. I think it plain that the fact that the conduct of the possible customer in abstaining from dealing is lawful does not affect the liability of the person who induced him to do so, although this person is remoter from the damage complained of. I think this a principle which not only is obviously sound, but is established by the cases first cited above, by the recognition of loss of custom as an element in damages

(Walker v. Cronin, 107 Mass. 555, 565; Odgers, Sland. & L. [2d Ed.] pp. 298, 307, 309, c. 10, subds. 2, 3), and by the doctrine that a man who utters a slander may be liable for the privileged repetition of it, if reasonably to be expected, when he would not be liable unless he actually intended it, if the repetition were itself a wrong (Elmer v. Fessenden, 151 Mass. 359, 362, 363, 24 N. E. 208). See, also, Hayes v. Inhabitants of Hyde Park, 153 Mass. 514, 27 N. E. 522; Dels v. Winfree, 80 Tex. 400, 404, 16 S. W. 111.

A fortiori, under similar conditions and limitations an action will lie for inducing the breach of an actual contract. Walker v. Cronin, 107 Mass. 555; Tasker v. Stanley, 153 Mass. 149, 26 N. E. 417. As in the former case, the ground of liability is not false statements, but the intentional causing of temporal damage, without justifiable cause, by any means contemplated as effectual, and proving so in the event. One of the means alleged in the present declaration, namely, inducing Mary A. Wood to believe that the plaintiff was a dangerous person and unfit associate, might have been accomplished without uttering a falsehood, and might have been alleged as the only means without impairing the count.

I cannot make it plainer than it is upon simply reading the declaration that this is an action of the kind just supposed. It is not an action for slander with special damages, but it is an action for malevolently and without justifiable cause inducing a third person to break a contract. That is the gist of the action. And falsehood or slander is material only as one out of many possible, and two alleged, means of bringing about the wrong. It is one degree more remote than where the slander itself is the thing complained of, and by all analogy, when referred to, need not be set out specifically, as when slander is the gist. See the form of declaration held good on demurrer in Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333, 335, 338, 339; Steamship Co. v. McKenna, 30 Fed. 48. Compare Capron v. Anness, 138 Mass. 271; Y. B. 43 Edw. III, p. 11, pl. 1, Finchden, ad finem Middlefield v. Knitting Co., 160 Mass. 267, 271, 35 N. E. 780; Bernard v. Caferty, 11 Gray, 10.

Of Rice v. Albee, 164 Mass. 88, 41 N. E. 122, I will only say that, whether the decision be right or wrong, the reasoning always has seemed to me inadequate, but that, however that may be, in that case the action was for preventing the making of a contract, not for causing the breach of one already made. I do not understand that it was intended to overrule previous decisions, or to dissent from cases like Lumley v. Gye, which previously had been approved by the court.

I deal only with the ground which I understand to be relied on in the judgment of the court. I suppose that nothing else is open on the special demurrer (Parker v. Huntington,

2 Gray, 124, 126, 128); but I will add that the declaration, although informal, plainly means that the defendants not only conspired to do, but did, the acts by reason of which, as it is alleged, Wood was induced to break her contract with the plaintiff. If the defendants wanted a more formal allegation, they should have specified the defect in their demurrer. Windram v. French, 151 Mass. 547, 24 N. E. 914.

KNOWLTON and MORTON, JJ., authorize me to say that they agree with the foregoing.

(174 Ill. 126)

STINSON v. CONNECTICUT MUT. LIFE INS. CO.

(Supreme Court of Illinois. June 18, 1898.)

MORTGAGES—RIGHTS AND LIABILITIES OF PARTIES—TAXES.

1. A mortgagor was bound by the mortgage to pay the taxes on the property. The property was sold for taxes, and the mortgagee purchased, not for the purpose of holding the tax title against the mortgagor, but to protect his interest. *Held*, that the mortgagee was entitled, in a suit to foreclose, to a decree for the amount thus paid.

2. A mortgagor, knowing that the mortgagee has already redeemed the property from a sale for taxes, cannot avail himself of the right of redemption by payment to the county clerk, as provided by Rev. St. c. 120, §§ 210, 211.

3. A mortgagor covenanted to remove all incumbrances from the property. A vigintillionth part was sold for taxes, and the mortgagee redeemed. *Held*, that the mortgagor was liable therefor, although, on account of the diminutive quantity sold, there might be difficulty in obtaining possession under a writ.

Appeal from appellate court, First district.

Bill by the Connecticut Mutual Life Insurance Company against James Stinson, who by cross bill made William Mills a party. A decree granting complainant less relief than it demanded was reversed by the appellate court (62 Ill. App. 319), and defendant Stinson appeals. *Affirmed*.

This was a bill to foreclose a mortgage, brought by the Connecticut Mutual Life Insurance Company against James Stinson. The mortgage was executed March 9, 1881, to secure a loan of \$15,000, which Stinson obtained of the company, payable March 9, 1884, with interest payable semiannually, at 6 per cent. per annum. The mortgage was given on 10 acres of land in Chicago, and the interest was paid promptly as it became due, no interest being due when the bill was filed, on December 26, 1893. The mortgage contains a provision requiring Stinson to pay all taxes, assessments, rates, and other charges upon said premises, and remove all adverse claims, clouds, and incumbrances thereon; also "at once to repay all advances (which are also to be included in the sum hereby secured) made for insurance, taxes, assessments, rates, redemptions from sales for taxes or assessments; or in any otherwise to protect the security hereby given, with interest thereon until paid, at the rate of 8 per

centum per annum." In 1893 the mortgagor failed to pay certain special assessments levied on the mortgaged premises, one for \$572.85 and one for \$686.81, and on the 4th and 14th days of November of that year the premises were sold. At these sales the premises were bid in by one William Mills, who obtained two certificates of purchase, which, on the 9th day of December, 1893, he transferred by blank indorsement to the complainant. The complainant notified Stinson that the premises had been sold in payment of the special assessments, and requested him to redeem. Upon his failure to do so, this bill was filed to foreclose the mortgage. While the bill was pending the premises were again offered for sale for another special assessment, and on October 24, 1894, the east vigintillionth was sold to William Mills for \$603.33, and, a certificate having been issued, he transferred the same by blank indorsement to complainant. It appears, however, that the company was notified by Stinson, before it purchased the certificate, not to buy or redeem the tax certificate, for the reason it was not a cloud on the title of the mortgaged premises, and the mortgagor would resent any allowance under the mortgage on account of such sale. It also appears that on November 16, 1894, Stinson redeemed from the two sales of November 4 and 14, 1893, by depositing the amount bid at each sale with the county clerk, as is provided in section 211 of the revenue act (Hurd's Rev. St. p. 929), where the purchaser of premises suffers the same to be sold a second time before the expiration of two years from the date of sale. On the hearing in the circuit court on the pleadings and evidence, the court held that the sales of November 4th and 14th were properly redeemed from by Stinson, and complainant could recover nothing in the foreclosure proceedings on account of having purchased the certificates of purchase; that complainant was only entitled to the redemption money in the hands of the county clerk. The court also held that the sale on October 24, 1894, of the east vigintillionth was no cloud on the title of the mortgaged premises, and complainant was not entitled, in the foreclosure proceedings, to obtain a decree for the amount paid out in the purchase of the certificate of purchase on this sale. A decree of foreclosure was therefore rendered for the amount of the mortgage debt, disregarding entirely the amount claimed by the complainant on the purchase of the three certificates of purchase. To reverse this decree the complainant appealed to the appellate court, where the decree was reversed, and the cause remanded, with directions to enter a decree including the amount of the three sales on the mortgage indebtedness. To reverse the judgment of the appellate court the mortgagor, Stinson, has appealed to this court.

Enoch J. Price (H. S. Mecartney, of counsel), for appellant. E. Parmelee Prentice, for appellee.

CRAIG, J. (after stating the facts). The first question presented for determination is whether the appellate court erred in holding that the complainant in the bill was entitled to a decree for the amount paid for the tax certificates issued on the tax sales of November 4 and 14, 1893, with interest thereon at the rate of 8 per cent. It appears from the evidence that Mills, who purchased at the tax sales, was a clerk in the office of one Hamilton; that before the sale complainant made an arrangement with Hamilton to purchase at the tax sales all properties upon which complainant had mortgages, and after the sale the tax certificates were to be transferred to complainant, upon the payment of the amount bid and 25 per cent. Under this arrangement, Mills made the purchases as directed by Hamilton, and after the sales were made complainant paid Hamilton the amount of the respective bids and 25 per cent., and received the tax certificates indorsed in blank by Mills. It is not claimed in the argument that if the insurance company, after the sale, had gone to the office of the county clerk, and redeemed from the sale by the payment of the amount required by law, which would have been the same amount paid Mills, it would not be entitled to recover, under the mortgage, the amount thus paid. Nor is it denied that if complainant, after it acquired the tax certificates, had taken them to the county clerk, and had them canceled, it might recover the amount paid for the certificates. The cost in either case would have been the same, and the mortgagee was at liberty to pursue either course which it might think best. It could make no difference to the mortgagor what course was pursued, unless the mortgagee attempted to purchase at the tax sale, and set up a title to the premises under his purchase. If, therefore, the mortgagee did not, by the purchase of the tax certificates from Mills, obtain a title which it could in the end set up against the mortgagor, but was bound to hold the tax certificates for the benefit of the mortgagor as a redemption or a purchase, to be canceled, it would seem plain, under the provision of the mortgage requiring the mortgagor to repay advances for taxes, assessments, redemption from tax sales or assessments, the mortgagee was entitled to a decree for the amount advanced for the certificates of sale, and interest thereon.

We think the law is well settled that a mortgagee in possession is not entitled to obtain a tax title on the mortgaged premises and set it up to defeat the right of redemption in behalf of the mortgagor; but whether a mortgagee out of possession may lawfully acquire title through a tax sale, and thus cut off the equity of redemption of the mortgagor, is a question upon which the authorities are not harmonious. But we think the clear weight of authority establishes the rule that a mortgagee, whether in or out of possession, cannot acquire and set up a tax title

in the mortgaged premises against the mortgagor. In *Maxfield v. Willey*, 46 Mich. 255, 9 N. W. 272, it is said: "When the mortgagee, instead of making payment of the taxes, makes a purchase of the land at tax sale, either in his name or the name of another person who has his money for the purpose, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid, with interest. * * * Neither party to a mortgage can be suffered, against the will of the other, to buy at a tax sale, and thereby cut off the other's interest." In *Woodbury v. Swen*, 59 N. H. 22, in the discussion of the question, the court said: "Mortgagor and mortgagee have a unity of legal interest in the protection of their title against a sale for nonpayment of taxes, and against outstanding tax titles, and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore, the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned." See, also, the following cases, where the same principle is substantially announced: *Martin v. Swofford*, 59 Miss. 328; *Fair v. Brown*, 40 Iowa, 210; *Bank v. Bacharach*, 46 Conn. 513; *Fisk v. Brunette*, 30 Wis. 102. In *Ragor v. Lomax*, 22 Ill. App. 628, the question is thoroughly discussed, and the authorities cited, and the conclusion reached that a mortgagee cannot, whether in or out of possession of the mortgaged premises, acquire a tax title and set it up against the mortgagor.

It was primarily the duty of the mortgagor to pay the taxes on the mortgaged property, but when he failed to do so, and the property was sold for the taxes, the duty then devolved upon the mortgagee to relieve the property from the burden, and, under the possession of the mortgage, charge the amount, with interest, to the mortgage indebtedness. This was done by the mortgagee. It had no right to buy in the land for the purpose of acquiring and holding a tax title as against the mortgagor, and it never attempted to do so, as shown by what was done after it obtained the certificates of tax sale. Indeed, when the form of the transaction is disregarded, and the substance alone considered, it is manifest that the purchase of the certificates by the mortgagee amounted to a redemption, and nothing more. The amount so paid only equaled the amount required to redeem, and the fact that the money was paid to Mills, instead of the county clerk, when the rights of the mortgagor and mortgagee are only involved, is unimportant.

It will be observed that the sale of the mort-

gaged premises on October 24, 1894, was within less than a year from the date of the sales in 1893; and it is insisted that the mortgagor, under section 211 of the revenue law, had the right to redeem from the sales of November 4 and 14, 1893, by depositing with the county clerk the amount bid at said sales, respectively, without penalties, and, having done so, the court erred in including the sums paid for the certificates of sale of 1893. This redemption by the mortgagor was not made until the 26th day of November, 1894. Before this, however, on the hearing before the master in chancery, the two tax certificates were produced by the mortgagee and filed as evidence under which the mortgagee claimed to recover the amount paid out by it, and interest thereon, under the possession of the mortgage. After the mortgagor was thus notified that the mortgagee had in fact redeemed from these sales and produced the tax certificates, and filed them with the master for the purpose of recovering from the mortgagor the amounts advanced as a redemption, it was then too late for the mortgagor to avail of the right of redemption provided by the statute. Although the record in the office of the county clerk did not show a cancellation of the certificates of sale, they had, in fact, been canceled as certificates of sale, and the mortgagor knew this fact, and, knowing the fact, could not avail of the statute which authorizes a redemption in ordinary cases. We are therefore of the opinion that the court properly allowed and included in the decree the amount paid for the tax certificates issued on the sales of November 4 and 14, 1893, and interest thereon.

The next question presented is whether the court erred in allowing complainant the amount paid, and interest, for the tax certificate issued on the sale of October 24, 1894, for the east vigintillionth of the mortgaged premises. Mills purchased at this sale under the same arrangement that was made when he purchased at the sales of November 4 and 14, 1893, and after the sale the certificate was indorsed in blank, and transferred to complainant upon the payment of the amount of the bid and 25 per cent. It is claimed that the sale of the east vigintillionth of the mortgaged premises did not create such a claim, cloud, or incumbrance as, under the terms of the mortgage, the mortgagee might remove without the consent of the mortgagor. As has been seen, the mortgagor covenanted to pay all taxes, assessments, rates, and other charges upon the mortgaged premises, and remove all adverse claims, clouds, and incumbrances. It may be true that if this tax sale had not been removed, but allowed to repose into a tax title, the holder might not be able to maintain ejectment, or if judgment for possession was rendered there might be difficulty in obtaining possession under a writ, on account of the diminutive quantity of the land sold; but, while that may all be true, the sale for the unpaid assessment was neverthe-

less an incumbrance, which the mortgagee had the right, under the terms of the mortgage, to have removed. The question here involved is not what title would be acquired by a purchase under a sale of the east viginthillionth, but, as between mortgagor and mortgagee under the covenant of the mortgage, was the sale an incumbrance which the appellee had the right to insist should be removed? In *Roby v. City of Chicago*, 48 Ill. 130, where a person at a tax sale purchased only the millionth part of a lot, it was held that he had an interest which he was entitled to protect, and in order to protect that interest he was entitled to have it, on his application, separately assessed. So here, although the fraction sold was a minute one, the sale relieved the mortgaged premises of the burden except as to the minute fraction sold, and the purchaser acquired an interest which the mortgagee might properly insist should be removed in order that the premises should be free from all incumbrance, as provided in the covenant in the mortgage.

If we are correct in the view thus taken, it will not be necessary to consider the question of tender, raised and discussed in the argument of counsel, as there was not a sufficient amount tendered, at any stage of the proceedings, to cover the mortgage indebtedness and the several amounts paid out, and interest, so as to relieve the mortgaged premises from the several special assessments upon which the property was sold. The judgment of the appellate court will be affirmed. Judgment affirmed.

(174 Ill. 133)

WEIL et al. v. JAEGER.¹

(Supreme Court of Illinois. June 18, 1898.)

INSOLVENCY—JURY TRIAL—PARTNERSHIP.

1. The proceeding where exceptions are filed to a claim against an insolvent is a chancery proceeding modified by statute; and the court may try the issue, find the facts and the law without a waiver of a jury.

2. Four of the members of a banking firm transferred their interest to two remaining partners, who gave a bond to the retiring partners, obligating themselves to pay all claims against the bank. A depositor continued to do business with the new firm, which credited the amount of his claim against the old firm on its books, adding thereto deposits made by him. Thereafter the new firm became insolvent, and the depositor, in an action at law, obtained a judgment, against the retiring partners and the partners continuing business, for the amount of his deposit at the time of the transfer of the assets to the new firm and balance of deposits made with the new firm. *Held*, that he was not thereby deprived of his right to participate in the assets of the new firm.

Error to appellate court, First district.

Julius Jaeger filed a claim against Howe & Bodenschatz, insolvents; and Weil Bros. filed exceptions, which were overruled. Order was affirmed by appellate court (73 Ill. App. 271), and Weil Bros. bring error. Affirmed.

¹ Rehearing denied.

Moses, Rosenthal & Kennedy and H. P. Simonton, for plaintiffs in error. Winston & Meagher (Ralph Martin Shaw, of counsel), for defendant in error.

CARTWRIGHT, J. The defendant in error, Julius Jaeger, filed a claim in the county court of Cook county for \$1,933.85 against the estate of Howe & Bodenschatz, partners, doing business under the firm name of the Haymarket Produce Bank, insolvents. Weil Bros., plaintiffs in error, filed exceptions thereto, which, on a hearing, were overruled by the court, and upon a writ of error from the appellate court that court affirmed the order. Defendant in error asks that the judgment of the appellate court shall be affirmed because no propositions of law were submitted to the county court on the hearing of the objections to be held or refused. It is claimed that under these circumstances no question is presented to this court for determination. When exceptions are filed to the claim or demand of any creditor, the statute requires the court to proceed and hear the proofs and allegations of the parties in the premises, and to render such judgment thereon as shall be just. It provides that the court may allow a trial by jury thereon, but there is no right to a jury trial, and the law requires the court to try the case unless a jury shall be ordered. The proceeding is a chancery proceeding, modified and regulated by statute. *Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24. There is no necessity for a waiver of the jury to enable the court to try the issue and determine the questions of law and fact involved, and the statute invoked by defendant in error does not relate to such a case.

The facts were agreed upon in the county court, and were substantially as follows: In the year 1892 six persons, including Arthur J. Howe and Gustave A. Bodenschatz, formed a co-partnership in the banking business, to be known as the Haymarket Produce Bank. The partnership was to commence May 1, 1893, and to expire October 30, 1903. Julius Jaeger opened an account in the savings department of the bank, and there was given to him a pass book, in which his deposits were entered by the clerk of the bank. On November 4, 1895, this partnership was dissolved by the sale of the interests of the other partners in the assets of the bank to said Arthur J. Howe and Gustave A. Bodenschatz, who executed a bond, with sureties, to the retiring partners. This bond recited the existence of the partnership and the carrying on of the partnership business up to that time, and that said Arthur J. Howe and Gustave A. Bodenschatz were about to purchase the interest of the other partners in the partnership business, and said retiring partners were about to sell and transfer to said Arthur J. Howe and Gustave A. Bodenschatz all the right, title, and interest that they and each of them possessed in said co-

partnership. It was conditioned that said purchasers should pay all the liabilities and indebtedness of the partnership, and save and keep harmless said retiring partners therefrom. At the time of this change in the firm, said Julius Jaeger had on deposit in the savings department \$1,463.43. After the dissolution by said purchase, the said Arthur J. Howe and Gustave A. Bodenschatz continued the banking business at the same place and under the same name of Haymarket Produce Bank as before. Jaeger continued to deposit in the bank, and after the change deposited \$470 at the same place, which was entered by the same clerk of the bank in the same pass book in which his deposits had always been written. On January 1, 1896, and in July, 1896, interest was credited by the bank in the pass book on the total amount of money to the credit of Jaeger, including the money deposited before and after the date of the dissolution and change. The voluntary assignment was made August 24, 1896, by Arthur J. Howe and Gustave A. Bodenschatz, doing business as the Haymarket Produce Bank. In the schedule of liabilities of the firm, they put down the claim of Jaeger at \$1,933.85,—the total amount deposited with the Haymarket Produce Bank before and after the change. Jaeger filed his claim with the assignee for the amount set down in the schedule. Afterwards he brought suit in the circuit court of Cook county against the six persons constituting the original firm, suing them as partners doing business under the name and style of the Haymarket Produce Bank, and recovered a judgment for \$1,750 against all of them as partners and members of the firm, holding all liable for the whole amount due him.

Many authorities are cited by the learned counsel for plaintiffs in error, and many propositions contended for, which are unquestionably correct, but which we cannot regard as applicable to the facts of the case. Julius Jaeger dealt with this bank, and made deposits at different times in the savings department, and during the time of his dealing with the bank there was a change in the partnership, and dissolution, by the retirement of four of the partners. The two who continued the business acquired the assets and agreed to pay the liabilities of the firm. The four retiring partners took the individual bond of Arthur J. Howe and Gustave A. Bodenschatz, with surety, to secure the performance of this agreement, and this bond was a personal obligation. A liability arising out of that personal and individual agreement would not be a firm undertaking; and it is therefore argued for plaintiffs in error that Jaeger's claim for deposits before the change of the firm is against the individuals Arthur J. Howe and Gustave A. Bodenschatz, and that the creditors of the bank have a right to insist that the firm assets shall first go to pay creditors of the new partnership,

and that Jaeger, as to that claim, must come in afterwards. The claim of Jaeger is not based upon the bond or the contract between the parties, and the judgment which he recovered could not have been founded upon it. There can be no question that the new firm assumed his claim as a firm liability by continuing to receive his money, and crediting it in the same pass book, and crediting interest therein on the whole amount; so that the firm would be liable, and he would be entitled to participate with other firm creditors. It is substantially admitted that he became a creditor of the new firm, and might participate in its assets if he had abided by the assumption of his claim; but it is contended that he did not assent to such assumption, and disregarded it by suing the six partners. It is urged that his claim has been merged by his act into a judgment against the insolvents jointly with four others, and that by taking this judgment against the six he has only an individual liability against Arthur J. Howe and Gustave A. Bodenschatz, to be satisfied out of their individual assets. It seems that in an action at law Jaeger was able, for some reason, to hold the four retiring partners as continuing members of the firm up to the assignment. It is, of course, indisputable that, if he had no notice of the dissolution and change in the firm, the partners who continued to carry on the business were able to bind the retiring members, as to him, in the transaction of the usual firm business. When he brought his suit, he recovered for deposits made with the firm, and was able, for some good reason, to charge the others, as members of that firm, with liability for deposits. They might be liable as to him, and not liable as to those who had notice of the change. The retirement of those partners had no effect whatever as to a person dealing with the firm who continued his transaction in the usual course of the business conducted under the same name and at the same place. The fact that there was such a liability of persons whom he had a right to presume were members of the firm would not deprive him of the right to participate in the assets. If a creditor of an insolvent firm is entitled to hold some one liable to him, although not in fact a partner, because he has been held out as such, or because he has acted on the credit of such person who had been known as a member of the firm and of whose retirement he has had no notice, surely such fact could not deprive him of the right to participate in the assets of the partnership. We think that the exceptions were properly overruled.

We must decline to pass upon the propositions suggested by counsel as to the rights of creditors of the old firm under various conditions not arising in this case, and which have not been argued on both sides. The judgment of the appellate court is affirmed. Judgment affirmed.

(174 Ill. 177)

PEOPLE ex rel. KOCHERSPERGER, County Treasurer, v. BOARD OF DIRECTORS OF CHICAGO THEOLOGICAL SEMINARY.

(Supreme Court of Illinois. June 18, 1898.)

TAXATIONS—EXEMPTIONS IN CORPORATE CHARTERS—CONSTRUCTION—THEOLOGICAL SEMINARY.

1. Chicago Theological Seminary Charter, § 5, exempts property belonging or appertaining to the seminary from taxation, and section 6 provides that the act "shall be construed liberally in all courts for the purposes therein expressed." *Held*, that the "purposes expressed" should be ascertained by the application of the general rules of construction, and that, after the purpose is ascertained, liberal rules will be applied to give it effect.

2. Chicago Theological Seminary Charter, § 2, prescribes that the seminary shall be located in or near Chicago, etc., and section 5 provides "that the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation." *Held*, that the exemption of property "belonging or appertaining to said seminary" did not mean all property belonging to the corporation, and property owned by it, but not "appertaining to the seminary," though the income therefrom was used for seminary purposes, was not exempt.

Appeal from Cook county court; R. W. S. Wheatley, Judge.

Application by the people, on relation of D. H. Kochersperger, the county treasurer of Cook county, for a judgment of sale of property of the Chicago Theological Seminary. From a judgment sustaining objections thereto by the seminary, applicant appeals. Reversed.

W. F. Struckmann, Asst. Co. Atty. (Robert S. Iles and Frank L. Shepard, of counsel), for appellant. David Fales (John P. Wilson, of counsel), for appellee.

WILKIN, J. This is an appeal by the people, on the relation of the county treasurer and ex officio collector of Cook county, from a judgment of the county court of said county sustaining the objections of appellee to an application for a judgment of sale of certain of its property for nonpayment of taxes. The objection was that the property in question was exempt and free from all taxation whatever. It was stipulated that the appellee is the owner of a tract of land other than the tracts described in the objection, upon which is maintained a school for the purposes enumerated in the act of incorporation; also that the income from the property mentioned in the objection is used for the sole purpose of maintaining such school; that some of the lots are vacant and some are used; that where they are used all the rentals and income are held by the corporation for the exclusive use and support of the school, and for the objects contemplated in the charter; that all the parcels and lots were bought for the promotion of the objects mentioned in the charter; that the lands which are occupied by the buildings or other direct appliances of edu-

cation are not taxed, or included in the parcels represented by the objection; that since the passage of the charter the corporation has accepted the same, and has expended in the erection and purchase of buildings, apparatus, and other facilities and appliances for education, being for the promotion of the objects stated in the charter, over \$200,000 upon the lots in question, and also upon other lots owned by the corporation, and has built up an institution in which a large number of students are instructed, according to its charter. The act incorporating appellee was approved February 15, 1855, and is entitled "An act to incorporate the Chicago Theological Seminary." The first section creates certain persons named therein, and their successors, a body politic and corporate, to be styled "The Board of Directors of the Chicago Theological Seminary," with power to acquire, hold and convey property, real and personal. The second section prescribes that the seminary shall be located in or near the city of Chicago; that its object shall be to furnish instruction and the means of education to young men preparing for the gospel ministry, and that the institution shall be equally open to all denominations of Christians for this purpose. The fifth section is as follows: "That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation, for all purposes whatsoever."

The only question presented for our determination is whether or not the property of appellee, described in the application for judgment, is exempt from taxation by section 5 of its charter. Its contention is that by the language, "that the property, of whatever kind or description, belonging or appertaining to said seminary," all the property owned by it and used for the sole purpose of maintaining its school, of whatever kind or description, wherever situated, is exempt from all taxation. On the other hand, it is insisted on behalf of the people that section 5 is only applicable to and exempts from taxation the property belonging or appertaining to the seminary, which, by the second section of the charter, was to be located in or near the city of Chicago, and which has been so located and maintained.

The following propositions laid down by counsel for appellant are supported by the authorities cited, and are, we think, properly applicable to the decision of the issue here presented: First. All laws exempting property from taxation must be strictly construed. *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845. Second. The charter is a contract, but it is well settled that nothing can pass by implication. *U. S. v. Arredondo*, 6 Pet. 738; *Charles River Bridge v. Warren Bridge*, 11 Pet. 544. Third. It should not be presumed that the legislature intended to exempt property from taxation. That intention must appear affirmatively. *Bank v. Billings*, 4 Pet.

514. Fourth. And when such intention appears it cannot be extended beyond the letter and spirit of the act of incorporation. *Beaty v. Knowler*, 4 Pet. 163. Fifth. And such intention will be construed strictly. *Theological Seminary v. People*, 101 Ill. 578; *In re Swigert*, 123 Ill. 267, 14 N. E. 32. Sixth. There can be no ambiguity as to what is exempt. All ambiguities in the terms of the contract must operate against the grantees and in favor of the public, and the objector can claim nothing that is not clearly given by the act. *Charles River Bridge Case*, supra. Seventh. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the favor of the corporation, that construction is to be adopted which works the least harm to the state. *In re Binghampton Bridge*, 3 Wall. 51. That laws exempting property from taxation are generally subject to these rules of construction is not seriously questioned, but counsel for appellees say they are not to be resorted to, because by section 6 of the charter it is provided that the act "shall be construed liberally in all courts for the purposes therein expressed." We do not think this language was intended to or could be held to change or qualify the general rules of construction applicable to the section under consideration. Here the very question to be determined is, what is the purpose expressed in that section? And to say that liberal rules of construction must, under section 6, be applied in favor of the contention that all property belonging or appertaining to the corporation is exempt would be to beg the whole question. In determining what purpose is expressed in the section, resort must necessarily be had to the general rules for considering such laws. When that purpose is ascertained, liberal rules of construction, if necessary, are to be resorted to, to give effect to such purpose. Of course, the foregoing propositions, relied upon by appellant, will not justify an unreasonable construction against the claim of exemption. If, however, taking the express words of the act, and without extending their meaning by implication, they may be held to include all property belonging or appertaining to the "seminary" mentioned in the second section, or to include all the property belonging or appertaining to the corporation, and there is reasonable ground for doubt which was intended by the legislature, that doubt must be resolved in favor of the state. In other words, if the language is capable of a broad or more restricted meaning, the latter must be adopted. The second section of the charter mentioning certain property to be located in or near the city of Chicago, and which is denominated "the seminary," we think the words in the fifth section, "said seminary," refer to that particular property; and to so hold seems to do no more than to

give the language of the two sections their literal and ordinarily understood meaning. To say, as is contended by appellee, that "said seminary" was intended to mean the corporation, is to extend the meaning of those words by implication, which is not permissible. It is said that the only entity mentioned in the charter capable of owning property is the corporation, and therefore it could not have been intended that property belonging or appertaining to the seminary was meant by section 5. We think this position is based upon a too limited meaning of the words "belonging or appertaining," as here used. Of course, if the language of section 5 had been that the property, of whatever kind or description, owned by said seminary shall be forever free from all taxation, etc., or if, as counsel seem to assume, the words "belonging or appertaining" here necessarily meant ownership of the property, then there would be force in this argument of counsel. It is undoubtedly true that the word "belonging" may mean ownership, and very often does. But that is not its only meaning. Webster's International Dictionary defines it: "(2) That which is connected with a principal or greater thing; an appendage; an appurtenance." He also defines the word "pertain" as meaning "to belong or pertain, whether by right of nature, appointment, or custom; to relate, as 'things pertaining to life.'" Manifestly the purpose of section 5 was to exempt property owned by the corporation, but it does not follow that the intention was to include in that exemption all property owned by it used for purposes of the school.

It is said the question for determination in this case has been decided in favor of the contention of the appellee in the case of *People v. Soldiers' Home*, 95 Ill. 561, following the decision of the supreme court of the United States in *Northwestern University v. People*, 99 U. S. 309, reversing the decision of this court in 80 Ill. 333. We do not so understand the case cited. The language of the charter of the Soldiers' Home and the Baptist Theological Union, under discussion in that case, is as follows: "The property, real and personal, belonging to such corporation, at any and all times hereafter, shall be free and exempt from all taxation and assessments, special or general, for any and all purposes;" and the language of the charter of the Northwestern University is "that all property, of whatever kind or description, belonging to or owned by such corporation, shall be forever free from taxation for any and all purposes,"—so that there was and could have been no question, upon these charters, as to whether the exemption clause referred only to some particular property or class of property belonging to the corporation, because those charters in unmistakable terms exempt all property belonging to the corporation. We think this case turns upon whether or not the words "said seminary," used in the fifth clause, should be given the meaning of "said corpo-

ration." In our opinion the application of the rules of construction above referred to do not warrant such a construction. The judgment of the county court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. Judgment reversed.

(174 Ill. 140)

**FIRST NAT. BANK OF JOLIET v.
ILLINOIS STEEL CO.**

(Supreme Court of Illinois. June 18, 1898.)

**MORTGAGES—RENTS AND PROFITS—APPLICATION
ON DEFICIENCY JUDGMENT—RECEIVER—PAY-
MENT OF TAXES—OBJECTIONS—WAIVER.**

1. Where a mortgage of land also includes the rents and profits thereof, the mortgagee has an equitable lien thereon, during the statutory period of redemption, for the payment of any deficiency arising upon the sale of the mortgaged premises, which may be enforced by the appointment of a receiver after the sale.

2. Where a creditor petitions for the appointment of a receiver for an insolvent corporation to protect the property and pay the taxes, he cannot afterwards question the validity of the payment of such taxes under an order made with his consent.

3. A creditor of an insolvent corporation cannot complain of the act of its receiver in paying taxes out of the rents and profits, where they were subject to the deficiency arising on a sale of the premises under a mortgage which also included such rents and profits.

Appeal from appellate court, Second district.

Creditors' bill by the First National Bank of Joliet against the Ashley Wire Company and others for the appointment of a receiver, with which was consolidated a petition by the Illinois Steel Company, also for the appointment of a receiver. From a decree of the appellate court (72 Ill. App. 640) affirming a decree in favor of the Illinois Steel Company, the First National Bank of Joliet appeals. Affirmed.

This was a bill in the nature of a creditors' bill, filed December 26, 1893, by the First National Bank of Joliet, the appellant, against the Ashley Wire Company, a corporation in Joliet, Will county, Ill., which for many years had been engaged in the manufacture of barbed fence wire, wire nails, etc. The bill alleged the recovery of a judgment by said First National Bank of Joliet on the 14th day of December, 1893, for \$12,657.77, against said Ashley Wire Company; that execution was issued and delivered to the sheriff the same day, which execution was returned, after demand made, "No property found." Alleged the recovery of a judgment on the 8th day of December, 1893, by John Y. Brooks against said Ashley Wire Company for \$11,090, upon which execution had been issued and levied upon all the tangible personal property of said Ashley Wire Company, and that the value of such property so levied upon would not exceed \$5,000; that the sheriff had not sold said property so levied upon, and it was not

sufficient to satisfy the said Brooks execution. Alleged the execution by said Ashley Wire Company on the 19th day of July, 1893, to the Illinois Steel Company, of a note for \$67,246.24, payable on or before two years after date, with interest at 5½ per cent. per annum, payable semiannually, and secured by a mortgage on its manufacturing plant; that said Ashley Wire Company is insolvent, and for many months has suspended its business, and its plant has remained idle; that it has not been able for the last year to meet its trade obligations, and has been seriously embarrassed in its financial affairs; that said wire corporation is and remains in the possession of its real estate and manufacturing plant, and, while it is not worth said mortgage indebtedness, is a valuable property, and ought not to be allowed to deteriorate in value or be greatly hazarded by neglect or want of care; that watchmen should be in charge, insurance should be kept up, and taxes paid; that all this should be done in the interest of said corporation, its stockholders and creditors generally; that said corporation is without means to protect and preserve said property, and keep up its insurance or taxes; that the tangible property levied upon is of a kind and character so peculiar in its nature that it could not be sold at ordinary execution sale, except at a grievous sacrifice. Avers that the interests of defendant and all its creditors demand that a receiver should be appointed of its assets, both equitable and tangible; that said receiver should be directed to take possession of said manufacturing plant, its books of account, and its equitable assets and property. The Ashley Wire Company, John Y. Brooks, and Thomas Henneberry, as sheriff, were made parties defendant. Although the bill showed that the Illinois Steel Company, of Chicago, held a first mortgage on the Ashley Wire Company plant, machinery, etc., and was the principal creditor, yet it was not made a defendant to the bill. The appearance of the defendants was entered, and on the 26th day of December, 1893, the defendants not objecting, the court appointed George W. Bush receiver. The order invests him with all the authority and power usually granted receivers of courts of chancery, and directs that he at once take possession of the real estate and manufacturing plant of said Ashley Wire Company, together with all the machinery, tools, implements, and appliances connected therewith, and constituting real estate, as part and parcel of said plant; that he care for all such property, that it may not be wasted or deteriorate for want of proper care; that he keep the buildings insured in responsible insurance companies in a reasonable amount; and that he pay all taxes legally levied upon such real estate. It was further ordered that the said sheriff turn over to the receiver all the personal property levied upon by him under the ex-

ecution in favor of John Y. Brooks, such sheriff to retain the execution, and the lien of such execution is preserved upon all such property levied upon, and the proceeds thereof levied upon by said sheriff, and turned over to said receiver. The receiver presented a petition on February 19, 1894, as to the payment of taxes, which states that there was duly assessed against and levied upon the personal property of the Ashley Wire Company for the year 1893 \$799.10 taxes, and that he has no money with which to pay said taxes, or the real estate taxes then due, and prays that an order be entered authorizing him to pay such taxes, and that he may be permitted to borrow money therefor. On the 26th of February, 1894, an order was entered authorizing the receiver to pay the taxes assessed upon the real estate, and authorizing the receiver to borrow money for that purpose at such legal rate of interest as he may be able, and to issue therefor his receiver's certificate, which was by the order of the court declared to be a first and prior lien upon the real estate of said Ashley Wire Company. The court denied the prayer of the petition as to the payment of the personal property tax. On March 5, 1894, the Illinois Steel Company asked leave of the court to make George W. Bush, receiver, a party defendant to a chancery proceeding, which the court granted; and on the 7th day of March, 1894, the steel company filed a bill to foreclose its mortgage against the Ashley Wire Company plant, making said Ashley Wire Company, the First National Bank of Joliet, John Y. Brooks, and George W. Bush, the receiver, defendants. On the 12th day of July, 1894, after the commencement of the foreclosure proceedings, the receiver borrowed of the Illinois Steel Company \$2,037.82, in pursuance of the court's order, for the purpose of paying taxes, and issued a receiver's certificate therefor. The mortgage upon which the foreclosure proceedings were based, against the Ashley Wire Company, was to secure the note for \$67,246.24, payable on or before two years after date, with interest at 5½ per cent. per annum; and the mortgagor expressly covenanted to keep the buildings insured for \$50,000, for the benefit of the Illinois Steel Company, mortgagee. It also contained a clause authorizing the appointment of a receiver, with power to collect the rents, issues, and profits during the period of redemption, in case of a foreclosure of the mortgage, and that such rents and profits should be applied towards the payment of the indebtedness. Answers were filed by the Ashley Wire Company and the First National Bank, defendants. A final decree of foreclosure was awarded the Illinois Steel Company January 14, 1895, and the property was sold to the said steel company for \$70,000. The master reported an unpaid balance, and a deficiency decree or judgment under the statute was entered for

the deficit of \$5,316.50, with interest from March, 1895, and execution was awarded thereon. On the 10th of April, 1895, the Illinois Steel Company filed its petition in the foreclosure case, setting up the decree of foreclosure and the sale, the deficiency decree for \$5,316.50, and the foregoing provision in regard to the appointment of a receiver by the court to collect rents until the time of redemption, and asking for the appointment of a receiver. A hearing was had June 20, 1895, and the court refused to appoint a new receiver, but extended the receivership of George M. Bush existing over the property of the Ashley Wire Company by virtue of an order in the case of the First National Bank of Joliet, so that said receiver should stand as a receiver appointed in the case of the Illinois Steel Company against the Ashley Wire Company, and that the receivership be extended to include the property and effects of the Ashley Wire Company; and the receiver was directed to receive the rents, and hold the same for all persons who should be found entitled thereto. The receiver had previously, under the order of the court, leased the Ashley wire plant for one year from December 1, 1894, for \$6,000, with the privilege of another year, at the option of the lessee, on the same terms. The receiver collected in all for rents \$12,000, and after paying the taxes and expenses there was left in his hands \$4,373.48. On March 8, 1897, the petition of the Illinois Steel Company was, by agreement of parties, consolidated with the cause of the First National Bank of Joliet against the Ashley Wire Co. et al., and was to be heard and disposed of as one case by decree to be entered in the case of the First National Bank of Joliet against Ashley Wire Co. et al. The principal contention is over the distribution of the balance of \$4,373.48; the trial court decreeing this amount to be paid the Illinois Steel Company out of the moneys in the receiver's hands derived from rents, to be indorsed on the deficiency decree. From this decree of the circuit appellant appealed to the appellate court for the Second district, which affirmed the decree of the circuit court; and from the judgment of the appellate court appellant has appealed to this court, and asks for the reversal of the judgment of the appellate court.

George S. House, for appellant. Garnsey & Knox (Elbert H. Gary, of counsel), for appellee.

CRAIG, J. (after stating the facts). It is first contended by appellant that the Illinois Steel Company, the mortgagee, having obtained its decree of foreclosure and sale, and applied the proceeds, the mortgage has accomplished its purpose, and is functus officio; that no further rights or equities can be enforced by the Illinois Steel Company. The claim of appellee is that the provision in the mortgage authorized the appointment of a receiver by

the court to collect the rents and profits during the period of redemption, and, as the sale under the foreclosure decree did not pay the debt, to apply them in payment of the deficiency. The agreement in the mortgage is as follows: "Upon the filing of any bill to foreclose this mortgage, in any court having jurisdiction thereof, such court may appoint A. F. Knox, or any proper person, receiver, with power to collect the rents, issues, and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this mortgage shall expire; and such rents, issues, and profits, when collected, may be applied towards the payment of the indebtedness and costs herein mentioned and described." Under this clause in the mortgage a lien is given, by express words, upon the rents and profits, and such an equitable lien a court of equity will enforce. Rents and profits are the subject of mortgage. Jones, in his work on Mortgages (volume 1, § 140), says: "A mortgage may be made of rents under a lease, and, although a right of entry be given the mortgagee, the mortgage is a mere security, like any other mortgage of real estate, and the mortgagor remains the real owner until foreclosure and sale." In section 771 he says: "A mortgagee has no specific lien upon the rents and profits of the mortgaged land, unless he has, in his mortgage, stipulated for a specific pledge of them as part of his security." This was expressly stipulated in this mortgage given by the Ashley Wire Company to appellee. Had there been no deficiency after the foreclosure sale of the Ashley Wire Company property and plant, the rents would have belonged to the owner of the equity of redemption. Under the express agreement in the mortgage, there being a deficiency of \$5,316.50 after the sale, the Illinois Steel Company had an equitable right to have the rents and profits applied towards the payment of the deficiency decree, from the time of the foreclosure sale until the expiration of the time of redemption, and this right might properly be enforced on an application to the court to appoint a receiver. The contention by appellant in this case that the enforcement of this provision rests entirely in the sound discretion of the chancellor is not tenable. The chancellor was authorized to act under this clause in the mortgage, and appoint a receiver for the collection of the rents and profits during the period of redemption, to be applied on the deficiency decree. In the case of *Oakford v. Robinson*, 48 Ill. App. 270, which is similar to the one at bar, the mortgage contained a clause authorizing the appointment of a receiver, with power to take possession of the premises and collect the rents due and to become due thereon during the period allowed for redemption, and to apply the same in payment of any deficit, should the premises prove insufficient to pay the amount secured by the mortgage. In the decision of the case the

court said: "The rents and profits of the land, as well as the land, were pledged by the mortgage for the security and payment of the amount due the appellee. This authorized the appointment of a receiver, in the discretion of the court, without regard to the solvency of the mortgagor. 2 Jones, *Mortg.* § 1516; 8 Am. & Eng. Enc. Law, p. 234. And such appointment was lawfully made, though by a decree subsequent to the original decree. *Id.*, p. 239. By the appointment of the receiver the appellants obtained an equitable lien on the rents and profits of the land during the statutory period allowed for redemption, it necessary for the full payment of any deficiency in the security. In support of this view, see 1 Jones, *Mortg.* §§ 773-775; 2 Jones, *Mortg.* § 1536; High, *Rec.* §§ 643, 644; Beach, *Rec.* § 532." That a court of equity has power to appoint a receiver and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits derived from the property is conceded. In such a case, whether relief will be granted is dependent upon the facts and circumstances at the time the application is made. This court said in *Haas v. Society*, 89 Ill. 498, at page 502: "We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues, and profits arising therefrom. Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined, and in one or more of the states it is held necessary still other elements should be conjoined to these before such procedure is justified." Tested even by this requirement, if the mortgage did not give a lien by express words, or authorize the appointment of a receiver, the facts in the case at bar show that the court committed no error. The deficiency decree itself evidences the fact that the Ashley Wire Company's property was insufficient security for the mortgage debt, and the facts established the allegation in the petition that the Ashley Wire Company, the mortgagor, was insolvent. Undoubtedly, a court of equity exercises a certain discretion, even where express words are used for the purpose of giving a lien on the income of the mortgaged property. The court must determine whether the language used in the mortgage is sufficient to give a lien on the income. In the one case the authority arises from the contract, the express words giving a lien on the rents and profits; in the other, the court exercises its equitable powers under the facts and circumstances presented at the time the application to appoint a receiver is made.

Appellant also contends that the final de-

crec foreclosing the mortgage ought to have provided for a receiver to take possession of the rents and profits of the Ashley Wire Company pending the redemption; that a decree of foreclosure and sale, as to all questions that might have been adjudicated between the parties, is final. It could not be ascertained until after the sale whether there would be a deficit requiring the appointment of a receiver to collect the rents and profits during the time of redemption. Under the decree of foreclosure the property described in the mortgage was sold. The rents and profits to accrue during the period of redemption were not sold, and no order could be entered until it was ascertained at the foreclosure sale that the mortgaged premises were insufficient to pay the indebtedness evidenced by the mortgage. In *Haas v. Society*, supra, it was said (page 506): "The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after sale may not warrant a similar procedure. The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true, the mortgagee has elected to foreclose and sell; but then he has pursued that remedy to the end, and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue, —not that he may have such extraordinary remedy in all cases of a deficit in the proceeds, but only where it is indispensably necessary for his protection, and just and equitable. We hold, then, both upon the principles of equity that lie at the foundation of the chancery court, and upon authority, a receiver may sometimes be allowed after decree and sale, and that a mortgagee does not in all cases exhaust his security by a foreclosure and sale. It is, however, a power that the chancellor will be slow to exercise, except in an extreme case, and to prevent palpable wrong and injustice." The cases of *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, and *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215, cited by appellant in support of its contention that a decree of foreclosure and sale extinguishes the mortgage and renders the mortgage functus officio, are decided on a state of facts entirely different from the facts in this case. In *Seligman v. Laubheimer*, after a sale for less than the debt a junior mortgagee redeemed, and a petition was filed to order a resale to pay the balance due the first mortgagee. It was held that as to the property sold the mortgage was not operative, and a resale could not

be had. No question of a mortgage of rents accruing during the statutory period of redemption was involved. In *Ogle v. Koerner* the facts were the same as to the mortgage, the sale, and redemption by an assignee of a second mortgage, who was a party, as in the *Seligman Case*. The tenor of the case, as to its application here, may be seen by the following quotation from the court's opinion (page 179, 140 Ill., and page 565, 29 N. E.): "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure, and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it." In *Davis v. Dale* a mortgage was foreclosed. Pending foreclosure a receiver was appointed. The property was sold for the full amount of the debt, interest, and costs; but the receiver was continued, as appears, unnecessarily. The court said (page 243, 150 Ill., and page 216, 37 N. E.): "The only purpose of appointing a receiver at the instance of the mortgagee or cestui que trust under or trustee in the trust deed is to preserve the security of the mortgage or trust deed, and apply the rents, issues, and profits, when necessary, in discharge of the indebtedness; and it follows, necessarily, that where the property is bid off at the foreclosure sale for the full amount of the decree, interest, and costs, as was here done, the necessity for continuing the receiver ceases, and he should be discharged, and the possession restored to the owner of the equity of redemption. In any event, the possession of the receiver, and his receipt of the rents and profits arising from the property, would be for the benefit of the person entitled to the same, so that the parties acquired no additional right because the fund is in the hands of the receiver." The question involved in this case, to wit, where the property sold does not pay the mortgage debt, and where the mortgage has a provision that the rents and profits may be applied towards the payment of the indebtedness and costs, was not before the court in either of the cases cited by appellant. Here the receiver was properly appointed after the foreclosure decree and sale, as the security of the steel company was not exhausted by the sale. Moreover, the necessity for the appointment of a receiver, and the collection of the rents and profits, and their application to the payment of the deficiency, did not appear until after the foreclosure decree and sale.

Appellant also contends that the court erred in directing the receiver, in its several orders, to pay the taxes on the property of the Ash-

ley Wire Company out of the funds in his hands derived from rents of the real estate. Appellant filed its bill to have the equitable assets of the Ashley Wire Company applied to the satisfaction of its judgment, and also to have these taxes paid by the receiver out of moneys collected by him. The bill alleges that said corporation defendant is and remains in the possession of its real estate and manufacturing plant, and, while not worth the said mortgage indebtedness, is a valuable property, and ought not to be allowed to deteriorate in value or be greatly hazarded by neglect or want of care; that watchmen should be in charge, insurance should be kept up, and taxes paid; that all this should be done in the interest of said corporation, its stockholders and creditors generally; that said corporation is without means to protect and preserve said property, keep up its insurance, or pay the taxes, and is without means to preserve, care for, and collect its equitable assets. The receiver was appointed on appellant's motion, and its own solicitor's name is recited in the order of the court December 26, 1893, *inter alia*: "That upon obtaining possession he properly care for all such property, to the end that it may not be wasted or deteriorate for want of proper care, that he keep the buildings and all improvements insured in responsible insurance companies in a reasonable amount, and that he pay all taxes and assessments legally levied upon such real estate." This order of the court has never been rescinded, so far as the record shows. The order of March 11, 1895, authorizing the receiver to pay the taxes of 1894, recites: "It is therefore ordered, adjudged, and decreed by the court that the said George W. Bush, as receiver, out of the moneys in his hands pay to the said township collector the personal property taxes assessed against the said Ashley Wire Company for the year 1894, being the sum of \$669.12, taking proper receipt therefor, and that said receiver in the making of said payment, all parties in interest in open court consenting thereto," etc. On June 20, 1895, the receiver, by appellant's counsel, presented his petition, and in the order of the court directing him to pay the taxes on the real estate the same order of consent appears. In *Armstrong v. Cooper*, 11 Ill. 540, this court said: "A decree made by consent cannot be appealed from, nor can error properly be assigned upon it. Even a rehearing cannot be allowed in the suit, nor can the decree be set aside by a bill of review. 1 Barb. Ch. Prac. 373." *Smith v. Kimball*, 128 Ill. 583, 21 N. E. 503; *Roby v. Trust Co.*, 166 Ill. 336, 46 N. E. 1110. These orders being made at the request of appellant, and by consent, it cannot question their validity.

Objection is also made to the order of court directing the payment of the real and personal taxes for the year 1895 by the receiver. The amount paid was \$1,874.41. The order extending the receiver on the petition of the Illinois Steel Company was made June 20,

1895, authorizing him to receive the rents and profits, to be held by him subject to the order of court. The redemption from the sale under the mortgage foreclosure of the Illinois Steel Company against the Ashley Wire Company expired June 9, 1896. This money derived from rents belonged to the Illinois Steel Company by virtue of the specific lien in the mortgage, and, the receiver having paid these taxes from funds belonging to appellee, appellant cannot complain. Finding no reversible error in the record, and the decree of the court appearing to be equitable, the judgment of the appellate court is affirmed. Judgment affirmed.

(172 Mass. 28)

WEED v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 16, 1898.)

CERTIORARI—WHEN LIES—PRACTICE—EMINENT DOMAIN—COMPENSATION—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—MUNICIPAL CORPORATIONS—SEWER ASSESSMENTS—VALIDITY.

1. When an application for certiorari is heard on petition and answer, all material facts well alleged in the answer, and all material facts well alleged in the petition, which are not put in issue by the answer, and are consistent with the record of respondents, must be taken as true.

2. Whether a sewer assessment is invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute under which it is made, is properly tested by certiorari.

3. Declaration of Rights, art. 10, providing that when the property of an individual is taken for public use, he shall receive compensation, does not apply to St. 1892, c. 402, which provides for an unreasonable method of assessing the cost of constructing a sewer.

4. The fact that St. 1892, c. 402, provides for no appeal from the apportionment of the assessable cost of a sewer by the superintendent of streets, does not render the statute invalid, since, if the superintendent commits an error of law, it may be corrected on certiorari, and petitioner may also apply for an abatement.

5. St. 1892, c. 402, makes the expense of constructing a sewer, to an amount not exceeding four dollars for each lineal foot of sewer, assessable on the owners of adjacent lands according to frontage on the sewer. *Held* that, inasmuch as lots adjacent to a sewer constructed, not in a street or way, but in a strip of private land taken for the purpose, may vary greatly in size or depth and value per foot, and may be inadequate to bear the burden of the assessment, the method of assessment as applied to such case is void as unreasonable and disproportionate.

Report from supreme judicial court, Suffolk county; James M. Morton, Judge.

Petition by Otis S. Weed, Jr., against the city of Boston for certiorari. Submitted on report. Writ to issue.

J. W. Pickering, for petitioner. T. M. Babson, for respondent.

FIELD, C. J. As the case was heard upon the petition and answer, all material facts well alleged in the answer, and all material facts well alleged in the petition which are not denied or put in issue by the answer, and are consistent with the record of the respond-

ents, must be taken to be true. This is in accordance with the practice which has been adopted in proceedings like the present, when the case is set down for hearing on petition and answer. *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908. The case has been reserved upon the following questions: "(1) Whether certiorari is the proper remedy? (2) Whether the assessment is invalid in law for any reason disclosed by the entire record, or by reason of the unconstitutionality of chapter 402, Acts 1892?" Certiorari undoubtedly is a proper remedy to try the question whether the assessments are invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute. *Bowditch v. Superintendent*, etc., 168 Mass. 239, 46 N. E. 1026; *Holt v. City Council*, 127 Mass. 408; *City of Boston v. Boston & A. R. Co.*, 170 Mass. 95, 49 N. E. 95. The report recites as follows: "The respondents did not appeal to the discretion of the court, but admitted that the nature and purpose of the sewer, and the manifest injustice and hardship of the assessments, were such that the writ ought to issue if certiorari was the proper remedy and the act was unconstitutional, or the entire record disclosed such error in law as to warrant the issuing of the writ." The answer of the respondents is not so full and definite as it should have been. It does not contain a statement of the amount of expenses incurred in the construction of the sewer. A schedule of the number of the lots, of the number of feet assessed in each lot, and of the amount of the assessments with reference to each lot, is annexed to the answer. It is impossible to make out from this schedule in what manner the assessments were made. The papers do not disclose whether the expense of constructing the sewer exceeded four dollars for each lineal foot of it or not. In the schedule the amount assessed is sometimes a little more, and sometimes a little less, than two dollars per lineal foot of the lot assessed. The averments of the petition in this respect are as follows: "(3) Your petitioner is ignorant of the actual cost of said sewer, and as to the details of the expenses incurred for the work so ordered and performed, as aforesaid, and has no means of ascertaining the same. But the said city of Boston and its said superintendent of streets claimed, and claim and insist, that the said expenses amounted to four dollars, or more than four dollars, for each lineal foot of said sewer, and that the said expenses, to the amount of four dollars for each lineal foot of said sewer, constitute, by force and by virtue of chapter 402 of the Acts of the year eighteen hundred and ninety-two, the assessable cost of said work, to be repaid to said city by the owners of the several parcels of land bordering on the strip of land in which said sewer is made. (4) The said superintendent of streets has made, or attempted to make, an apportionment of the said alleged assessable

cost to certain parcels of land, claimed and alleged by him to be the several parcels of land bordering on the strip of land in which said sewer is made, and has given notice thereof to your petitioner, so far as same relates to the several parcels of land owned by your petitioner, as hereinafter set forth; but your petitioner has no means of knowing or ascertaining whether the said apportionment is just and true, and in accordance with said act, or otherwise." The averments of the answer in this respect are as follows: "Now come the respondents, and for answer to the plaintiff's petition say that they admit a sewer was constructed in Railroad street, and the cost thereof assessed upon the estates benefited thereby, including certain land of the petitioner, as alleged in said petition," etc. In view, however, of the argument addressed to us, the want of a sufficiently definite answer is not very material, because it is not contended in argument that the assessments have not been made in literal compliance with the terms of the statute. The hardship of the case appears from the averments of the petition. The petitioner's land is alleged to be land of little value, which can be made valuable only by filling it, and then using it for the erection of buildings. The sewer is a large brick sewer, and is a part of a long main sewer designed principally for draining a considerable territory of valuable land situated at some distance from the land of the petitioner. To assess the cost of such a sewer, or the cost not exceeding four dollars per lineal foot of such a sewer, upon the petitioner's land, according to the proportion of the number of lineal feet of the boundaries of his lots on the strip of land in which the sewer has been laid to the number of lineal feet of the boundaries of all lots on said strip, is, he contends, grossly unjust. One contention is that the statute violates article 10 of the Declaration of Rights. But the present proceedings do not relate to the taking of the petitioner's land for the purpose of constructing the sewer, and to the payment of compensation therefor, but to the assessments upon the petitioner's land for the purpose of collecting, in whole or in part, the expenses incurred in the construction of the sewer. The strip of land in which the sewer has been laid was taken, as we understand, under other provisions of statute, presumably under Pub. St. c. 50, §§ 1-3. The assessments, although local, have been laid, by virtue of the taxing power of the legislature, in the method prescribed by St. 1892, c. 402, and the amendments thereof. *Howe v. City of Cambridge*, 114 Mass. 388; *Chapin v. City of Worcester*, 124 Mass. 464; *City of Boston v. Boston & A. R. Co.*, 170 Mass. 95, 49 N. E. 95.

It is argued that the statute provides for no appeal from the apportionment of the assessable cost of the sewer made by the superintendent of streets. If the superintendent in determining the assessments has com-

mitted any error of law, this may be corrected on certiorari, if material. *Bowditch v. Superintendent, etc., supra*; *Brown v. Mayor, etc.*, 128 Mass. 282. The petitioner also can apply for an abatement under St. 1896, c. 359, and perhaps under other provisions of statute. The principal objection to the statute is that it authorizes the cost of a sewer, not exceeding four dollars per lineal foot, to be assessed upon the owners of abutting land according to the proportionate length in feet of the boundaries of the different lots of land on the sewer, without regard to the value of the land, or the depth or size of the lots, or the size of the sewer as adapted to the drainage of the lots; that the statute is arbitrary and absolute, and excludes everything in the nature of an adjudication with reference to each lot affected by the construction of the sewer. It is not contended that the present sewer cannot be used to drain the petitioner's lots, but it is contended that the land is not worth the expense of draining it until it has been filled, and that the sewer is larger and more costly than is necessary for that purpose, and that the mode of assessment, in its application to lots of different sizes and to land of different values, is disproportionate and unjust. Different methods of making assessments for the construction of sewers or drains have been sustained by the courts. *City of Springfield v. Gay*, 12 Allen, 612; *Butler v. City of Worcester*, 112 Mass. 541; *Workman v. Same*, 118 Mass. 168; *Snow v. City of Fitchburg*, 136 Mass. 183; *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690; *Ayer v. Mayor, etc.*, 143 Mass. 585, 10 N. E. 457. See *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521. In 2 Dill. Mun. Corp. (4th Ed.) § 752 et seq., there is a large collection of cases on the subject. The result of the authorities is more specifically stated in section 761, cl. 6, and section 809, Id. Section 809 reads as follows: "The legislation in this country, however, as to the mode of making assessments to pay the expense of constructing sewers, although the burden is usually cast wholly or in part on the abutting property, is various. As in other local assessments, so in the case of sewers, the correct principle is that the assessment upon each parcel of contributing property shall be according to the special benefits which the particular parcel receives. Benefit, actual or probable, is the only foundation upon which an assessment can lawfully rest. The legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but, even in the absence of express constitutional restriction, its power is not unlimited. This ascertainment may be made, and usually is, by a separate and actual estimate of special benefits. But where the lots in a town or city are small, of the same depth, and similarly situated, an assessment, under the conditions mention-

ed in a previous section, may be authorized on the basis of frontage, which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where, from the circumstances, it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from this adoption," etc. See *In re Washington Ave.*, 69 Pa. St. 352; *Seely v. City of Pittsburgh*, 82 Pa. St. 360; *State v. City of Newark*, 37 N. J. Law, 415; *Thomas v. Gain*, 35 Mich. 162; *Clapp v. City of Hartford*, 35 Conn. 66; *Cooley, Const. Lim.* p. 624 et seq. The weight of authority is that an assessment according to the frontage of lots abutting upon a street or public way in a city sometimes may be a reasonable mode of making an assessment for the cost of constructing a sewer in such street or way, because of the similarity of the lots, but that such an assessment, when the sewer is not constructed in a street or way, or is constructed in the country where the lots abutting are not laid out as building lots, often would be unreasonable. Pub. St. c. 50, § 7, is confined to lots on a street or way. In the present case the order of the board of aldermen of July 11, 1892, directed the superintendent of streets to "make a sewer in a certain unaccepted street called 'Railroad St.,' and in private land, * * * located as shown on a plan on file in the office of the superintendent of streets marked 'Roslindale Main Sewer,' and dated July, 1892." The land to be taken is described in Exhibits D and F annexed to the respondents' answer, wherein it appears that on July 11, 1892, the board of aldermen "Resolved, that it is necessary for the public convenience that a main drain or common sewer should be laid in and through a certain unaccepted street called 'Railroad St.,' in Ward 23, and in and through certain private lands," etc., and they proceeded to take for that purpose a strip of land eight feet wide in a certain unaccepted street called "Railroad St.," of which the supposed owners of the fee were William S. Mitchell, Otis S. Weed, Jr., Lewis F. Rogers, and Charles A. Morss. The description of the so-called "Railroad Street" in the petition is as follows: "Said parcel marked and called 'Railroad Street,' and all other lots above mentioned, consist of low, wet meadow land, unfit for dwelling houses, and of little or no value for agriculture or pasturage purposes, and not capable of being utilized for any purpose of business or profit, either by erecting buildings thereon, or otherwise, without great outlay and expense, especially for filling." The petitioner, among other things, contends that "if said act is held to be valid, then the said assessment is void, so far as same affects said lots of your petitioner, for the reason that none thereof

is subject to assessment on account of said sewer, under said act; the said lots 1, 2, 16, 17, 18, 19, 20, 21, 22, and 23, and said triangular lot not abutting on any highway or strip of land within which said sewer is made, within the plain meaning and intent of said act." We understand the petitioner to aver that he is the owner in fee of the whole of the parcel called "Railroad Street." The meaning of the averments of the petition, as we understand them, when taken in connection with the record, is that the so-called "Railroad Street" is not a highway or a public street, or a street at all, except on paper; that it is merely a long strip of land, about 40 feet wide, according to a plan of house lots exhibited to us, and that it has not been wrought for travel or used as a street. There is no evidence or suggestion that any lot of land has been conveyed bounding on the so-called "Railroad Street." The board of aldermen have taken a strip eight feet wide, in or near the center line of this so-called "Railroad Street," and in this strip the sewer has been laid. The land bordering on this strip taken is the lot called "Railroad Street" on either side of the strip. If the lots, according to the plan, be considered as separate parcels of land, the lot called "Railroad Street" is the only lot which borders upon the strip of land taken, so far as the sewer has been laid within the limits of Railroad street. The lots bordering upon the sides of the lot called "Railroad Street" do not themselves border on the strip of land which has been taken for the sewer. It may be that, as these lots appear only on the plan, and are therefore separate lots only upon paper, the superintendent of streets in making the assessments should have disregarded the plan, and made the assessment upon all the land of the petitioner bordering on each side of the strip of land taken for the sewer. But, if this is so, the assessments in their present form cannot be sustained, as, with the exception of lot 15, they purport to be assessments upon lots bordering upon Railroad street, and not upon land bordering upon the strip of land taken. If the lot called "Railroad Street" is to be considered as the only lot bordering on the strip of land in which the sewer has been laid, then the whole assessment, so far as the cost of constructing the sewer in Railroad street is concerned, should have been laid on Railroad street. It may be that the assessment so laid would be more than the value of the land in Railroad street. These considerations show the difficulty of applying the statute where the sewer is constructed, not in a street or way, but in a strip of private land taken for the purpose. The lots of land bordering on this strip may vary greatly in size or depth and in value per foot, and may be inadequate to bear the burden of the assessments. Assessments, under such circumstances, according to the frontage of lots on the strip taken, may be grossly

disproportionate to the benefit to the land received from the construction of the sewer. Confining ourselves to the present case, where the sewer has been laid, not in a street, but in a strip of private land taken for the purpose, we are of opinion that the method of laying the assessments prescribed by the statute is unreasonable and disproportionate, and that the statute in this respect is unconstitutional. Writ of certiorari to issue.

(172 Mass. 39)

HANCOCK NAT. BANK v. ELLIS.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 23, 1898.)

CORPORATIONS—STOCKHOLDERS—LIABILITY FOR
CORPORATE DEBTS—ENFORCEMENT—MODE—JURISDICTION—TRANSITORY ACTIONS—RECEIVERS—CONFLICT OF LAWS—PROVINCE OF COURT.

1. Gen. St. Kan. 1889, par. 1204, allowing suit to be brought against any or all the stockholders of a dissolved corporation to enforce the proportionate liability of each, does not preclude a judgment creditor of a dissolved corporation from suing under paragraph 1192, which allows a judgment creditor of a corporation, after a return nulla bona, to enforce the judgment against any stockholder by suit.

2. Gen. St. Kan. 1889, par. 1192, allows a judgment creditor of a corporation, after a return nulla bona, to enforce the judgment against any stockholder by separate suit against him. Paragraph 1205 provides that a stockholder who pays more than his proportion of a corporate debt may compel contribution by the other stockholders. Paragraph 1206 provides that no stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him. *Held*, that the cause of action under paragraph 1192 is transitory, and the liability of a stockholder of a Kansas corporation will be enforced by the courts of Massachusetts when the stockholder resides in that state.

3. The individual liability of a stockholder of such a corporation is directly to the creditors, and does not pass to a receiver of the corporation.

4. Where the evidence of foreign laws consists entirely of statutes or law reports, their construction and effect are usually for the court alone; but when the decisions are conflicting, or when inferences of fact must be drawn, the question of what the law is becomes one of fact.

Exceptions from supreme judicial court, Suffolk county.

Action by the Hancock National Bank against D. Warren Ellis to enforce his statutory liability as a stockholder of a Kansas corporation under the laws and decisions of that state. Plaintiff brings exceptions. Sustained.

H. J. Jaquith and W. R. Bigelow, for plaintiff. A. Hemenway and E. B. Adams, for defendant.

FIELD, C. J. This case was once before considered by us, on demurrer to the declaration. *Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349. The demurrer having been overruled, the defendant answered, and the cause was heard by a justice of the superior court without a jury. At the close of the evidence

both the plaintiff and the defendant made numerous requests for rulings. The presiding justice gave the third, fourth, fifth, sixth, and eighth of the rulings requested by the plaintiff, and all of the rulings requested by the defendant, and made the following special findings: "(1) I find that the Commonwealth Loan & Trust Company ceased to do business on February 21, 1891. (2) I find from the evidence that such corporation did not resume business thereafter, and that by virtue of the statutory law of Kansas there was a dissolution of the corporation previous to the date of this writ. (3) There was no legal or competent evidence given at the trial which enabled me to find what were the assets or the liabilities of this corporation at the date of the original judgment against the corporation, or at the date of the issue of execution against it, or at the date of the writ in this action." The first four rulings requested by the plaintiff, which the court gave, were as follows: "(3) Upon all the evidence in the case, as a matter of law the court is bound to find that, under the laws of Kansas, stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corporation who pursue the remedy provided by paragraph 1192 of the General Statutes of Kansas of 1889. (4) Upon all the evidence in the case, as a matter of law the court is bound to find that, under the laws of Kansas, stockholders in Kansas corporations who appear as stockholders upon the books of the corporation are conclusively presumed to be stockholders of the corporation, within the meaning and liability of said paragraph 1192, already referred to. (5) Upon all the evidence in the case, as a matter of law the court is bound to find that under the laws of Kansas the stockholder's liability under said paragraph 1192, already referred to, is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guarantied payment to the creditors of the corporation of an amount equal to the par value of the stock held and owned by him. (6) Upon all the evidence in the case, as a matter of law the court is bound to find that under the laws of Kansas the stockholder, who is liable under said paragraph 1192, is liable to the judgment creditor of the corporation who first pursues his remedy under the statutes, and is discharged from all further liability by once paying the full amount thereof to such creditor." Among the rulings requested by the plaintiff which the court declined to give is the seventh, which is as follows: "(7) Upon all the evidence in the case, as a matter of law the court is bound to find that, under the laws of Kansas, an action to enforce the stockholder's liability under said paragraph 1192, already referred to, is transitory, and may be

brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder." The rulings requested by the defendant which the court gave are to the effect that the obligations imposed by the statutes of Kansas will be enforced in Massachusetts only as a matter of comity; that the courts of Massachusetts will not enforce them against a resident citizen of Massachusetts, unless it appears that no injustice will be done; that the courts of Massachusetts are unable to do justice to stockholders who have paid the debts of the corporation, and are entitled to sue other stockholders to enforce contribution, especially if the corporation has been dissolved or has suspended business; that the statutes of Kansas which provide for contribution are a part of a scheme established for ultimately compelling stockholders ratably to pay the debts of the corporation, and concerning as they do the relations between the corporation and its stockholders they can be effectually and completely enforced only by the courts of Kansas; and the enforcement of these should be left to those courts, as the whole scheme cannot properly be enforced by the courts of Massachusetts.

The Commonwealth Loan & Trust Company is a private corporation established under the laws of the state of Kansas on February 2, 1887, for the purpose of transacting the business of a loan and trust company, and having places of business at Kansas City, in Kansas and in Missouri, and in the city of Boston, in Massachusetts. The plaintiff, the Hancock National Bank of Boston, is the same corporation as the Traders' National Bank of Boston. On September 1, 1891, the Traders' National Bank of Boston, having previously lent the loan and trust company \$25,000, received its promissory note therefor, signed by the loan and trust company, indorsed on which appear payments of interest, and certain sums of money on account of the principal. On September 9, 1893, the bank commenced suit against the loan and trust company on this note in the circuit court of the United States for the district of Kansas, and on December 8, 1893, recovered judgment therein against the loan and trust company in the sum of \$16,136.76 damages, and \$28.45 costs of suit; and on April 27, 1894, execution issued therefor, which was returned on May 29, 1894, by the marshal of the United States for said district, wholly unsatisfied, after he had made diligent search for any property of the defendant on which to levy the execution, and had found none. The present suit was brought in the superior court for the county of Suffolk, in this commonwealth, on May 25, 1895, and the defendant is a resident of the commonwealth. On April 27, 1894, the defendant owned one certificate of five shares of stock of the loan and trust company, and had in his possession, as collateral security for the payment of a debt due to him, another

er certificate of five shares, both of which he continued to hold down to the time of the trial, and the certificates of which were produced at the trial. The certificates are each dated February 7, 1887, and they each certify that the defendant is the owner of five shares in the capital stock of the loan and trust company, "transferable only on the books of the said company on the surrender of this certificate properly indorsed." They differ only in this: That one certificate describes the defendant as "owner of, as collateral security, five shares," etc., while the other omits the words "as collateral security." A record of these certificates appears in the transfer book and in the stock ledger of the corporation. On July 16, 1894, by a decree entered in a suit in the circuit court of the United States for the district of Kansas, William S. Hinman, of Boston, Mass., and Waldo H. Howard, of Kansas City, Kan., were appointed receivers of the loan and trust company, for the purpose of winding up the affairs of the corporation. The order appointing the receivers did not purport to dissolve the corporation. The corporation had been established to exist for 50 years from February 2, 1887, and had a capital stock of \$100,000, divided into 1,000 shares, of \$100 each. There was evidence that a great many of the stockholders resided outside of the state of Kansas.

The plaintiff in the present suit put in evidence the General Statutes of Kansas of 1889, paragraphs 1192, 1193, 1199, 1205, 1206, 4080, 4081, 4083-4085, 4087, 4167-4170. Paragraphs 1192, 1205, and 1206 are printed in the margin.¹ These statutes, so far as material, had been in existence for some time before the defendant became the owner of the certificates of stock, and before the organization of the loan and trust company. The plaintiff also put in evidence the official reports of the following decisions of the courts of Kansas: *Howell v. Manglesdorf*, 83 Kan. 194, 5 Pac. 759; *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148; *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. 426; *Abbey v. Long*, 44 Kan. 688, 24 Pac. 1111; *Plumb v. Bank*, 48 Kan. 484, 29 Pac. 699; *Hoyt v. Bunker*, 50 Kan. 574, 32 Pac. 126; *Howell v. Bank*, 52 Kan. 133, 34 Pac. 386; *Van Demark v. Barons*, Id. 779, 35 Pac. 798; *Achenbach v. Coal Co.*, 2 Kan. App. 857, 42 Pac. 734; *Pump Co. v. Davies*, Id. 611, 42 Pac. 590; *Bulst v. Bank*, 4 Kan. App. 700, 46 Pac. 718. The defendant, subject to the exception of the plaintiff, put in evidence the General Statutes of the State of Kansas of 1889, article 12 of the constitution, par. 211, and paragraphs 1200 and 1204 of the statutes, which are printed in the margin,¹ and also the of-

ficial report of the decision of the supreme court of Kansas in *Hentig v. James*, 22 Kan. 328.

The courts of Kansas, from the nature of the question, can never directly decide that the liability of a nonresident stockholder under paragraph 1192 of the General Statutes of Kansas is one that may be enforced in any court of general jurisdiction in any other state or country where personal service can be made upon the stockholder. Only courts of other jurisdictions can decide that question. The courts of Kansas can only express an opinion to that effect, if they entertain it in cases before them, as one of the reasons for the judgment they render in those cases. That opinion the supreme court of Kansas has expressed in *Howell v. Manglesdorf*, 33 Kan. 194, 195, 5 Pac. 759. The other decisions cited of the courts of last resort in Kansas tend to confirm that opinion. None is inconsistent with it. The courts of the United States inferior to the supreme court have uniformly held that the liability under the statutes of Kansas which we are considering can be enforced against a stockholder in any state or district where he can properly be served with process. *Whitman v. Bank*, 51 C. C. A. 536, affirming on error the judgment of the circuit court in *Bank v. Whitman*, 76 Fed. 697; *Brown v. Trail* (U. S. C. C. Md. April 1, 1898) 89 Fed. 641; *Mortgage Co. v. Woodworth*, 79 Fed. 951, 82 Fed. 269; *McVickar v.*

poration, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment. Gen. St. 1868, c. 23, § 32; Oct. 31.

Article 5. Dissolution of Corporations.

(1200) How Dissolved. Sec. 40. A corporation is dissolved—First, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act, fail to resume its usual and ordinary business. Gen. St. 1868, c. 23, § 40, as amended by Laws 1883, c. 46, § 1; March 7.

(1204) Action against Stockholder. Sec. 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons, who were stock-

¹ General Statutes, 1889, Kansas.

Chapter 23. Corporations.

Article 4. Miscellaneous Provisions.

(1192) Execution against Stockholders; Action. Sec. 32. If any execution shall have been issued against the property or effects of a cor-

Jones, 70 Fed. 754; Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512; Bank v. Rindge, 57 Fed. 279. See Auer v. Lombard, 19 C. C. A. 72, 72 Fed. 209; Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co. (U. S. C. C. Pa. May 7, 1898) 87 Fed. 113. These decisions are in accordance with the principles of the decisions of the supreme court of the United States with reference to statutes of other states somewhat similar to those of Kansas. Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224. The decisions of state courts other than those of Kansas are not uniform upon the question whether the statutory liability of a stockholder to creditors of the corporation under these statutes of Kansas can be enforced by a suit against the stockholder in any state where he resides and can be served with process. In favor of such a doctrine are Guernsey v. Moore, 131 Mo. 650, 32 S. W. 1132; Bagley v. Tyler, 43 Mo. App. 195. See Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023; Cushing v. Perot, 175 Pa. St. 66, 34 Atl. 447. Contra are Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932; Tuttle v. Bank, 161 Ill. 497, 44 N. E. 984, and Bank v. Farnum (R. I. April, 1898) 40 Atl. 341. Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, is a case which arose upon demurrer, and somewhat resembles Bank v. Rindge, 154 Mass. 203, 27 N. E. 1015, and the decisions in both depended upon the averments of the declaration.

This court has many times decided that the statutes of other states creating the liability

holders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt, for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved. Gen. St. 1868, c. 23, § 44; Oct. 31.

(1205) Contribution. Sec. 45. If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action. Gen. St. 1868, c. 23, § 45; Oct. 31.

(1206) Liability. Sec. 46. No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him. Gen. St. 1868, c. 23, § 46; Oct. 31.

Constitution of the State of Kansas.

Article 12. Corporations.

(211) Dues from Corporations. Sec. 2. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes.

of stockholders to creditors of a corporation which provide for a suit of a special kind, to which the corporation and all stockholders are to be made parties, will not in general be enforced by the courts of this state. It often happens that the courts of this state could acquire no jurisdiction over the corporation, which is a necessary party, or over many of the stockholders; and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the state under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of an assessment ratably upon all the stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes. The special remedy provided by the statutes must be pursued, and as the statutes of a state have no force, *ex proprio vigore*, beyond the territorial limits of the state, the remedy usually must be pursued in the state where the corporation has been established and the statutes passed. Erickson v. Nesmith, 15 Gray, 221, 4 Allen, 233; New Haven Horseshoe Nail Co. v. Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540; Bank v. Rindge, 154 Mass. 203, 27 N. E. 1015; Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928. See Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757; Lowry v. Inman, 46 N. Y. 119; May v. Black, 77 Wis. 107, 45 N. W. 949; Rice v. Merrimack Hosiery Co., 56 N. H. 114; Nimick v. Iron-Works Co., 25 W. Va. 184. In Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. 534, the grounds on which the courts of this state entertain an action at law founded on the statutes of another state are stated to be as follows: "Assuming that the cause of action is one not existing at the common law, but created by the statute of another state, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it

offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure the state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if, under our forms of procedure, an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. *Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, Id. 20, 24; *Ingraham v. Geyer*, Id. 146; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 438, 443; *New Haven Horseshoe Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353, 7 N. E. 773; *Bank v. Rindge*, 154 Mass. 208, 27 N. E. 1015." In *Post v. Railroad Co.*, supra, this court say: "The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is quasi ex contractu. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the people or the legislature of each state to determine to what extent, if at all, the stockholders of corporations created by the laws of that state shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member. See *Child v. Iron Works*, 137 Mass. 516. And although this policy has now been changed, and the liability restricted to specific cases and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws." When the liability is distinctly imposed by statute upon the stockholders severally, it would be unfortunate if it should not be enforced against stockholders not resident within the state under whose laws the corporation has been established for the reason that due process could not be served on them within that state, and the courts of the state where they reside would not take jurisdiction of suits to enforce the liability. It certainly concerns the due administration of justice that nonresident stockholders should be compelled by proceedings somewhere to perform the statutory obligations towards creditors of the corporation which they have assumed by becoming stockholders. The remedy provided by paragraphs 1200 and 1204 of the General

Statutes of Kansas, even if applicable to the present case, was not intended to be exclusive when a judgment has been obtained against the corporation. The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally, and not jointly. The stockholder who pays more than his proportion of any debt of the corporation may compel contribution from the other stockholders by action. The creditor can by action collect the amount of his judgment remaining unpaid of any stockholder, "to any extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon." The stockholder is discharged, as against all creditors of the corporation, when he has paid the debts of the corporation to this extent. We are unable to see in what manner the enforcement of these statutes by the courts of Massachusetts against stockholders resident here, at the instance of a creditor of the corporation, does any injustice to the citizens of Massachusetts. If they pay what they are required to pay, they have the same remedy for contribution which any other stockholders have. This remedy may be difficult to enforce, because the stockholders may reside in many different states or countries; but the same remedy for contribution is given to all stockholders, wherever they reside. The legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation. This somewhat resembles the law of Massachusetts, whereby judgment creditors of cities and towns can levy execution on the property of any inhabitant, and such inhabitant is left to enforce contribution from the other inhabitants. Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the state or country under which the corporations are organized, and they cannot complain if this liability is enforced against them.

We are unable to assent to the decision of the supreme court of Pennsylvania, in *Cushing v. Perot*, 175 Pa. St. 66, 84 Atl. 447, that the liability of the defendant passed to the receivers of the corporation as an asset, because we think that the liability, as created by the statutes of Kansas, is directly to the creditors, and cannot be enforced by receivers in their own name, or in the name of the corporation. *Bank v. Ellis*, 166 Mass. 414-

419, 44 N. E. 349; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563, 567; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532.

The law of Kansas was a fact to be proved in the present suit. Where the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the construction and effect of the statutes and decisions are usually for the court alone. *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745; *Reyer v. Association*, 157 Mass. 367, 32 N. E. 469; *Gibson v. Insurance Co.*, 144 Mass. 81, 10 N. E. 729. Where the decisions are conflicting, or where inferences of fact must be drawn, the question of what the law is becomes one of fact. *Wylie v. Cotter*, 170 Mass. 358, 49 N. E. 746.

Upon the evidence introduced at the trial a majority of the court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889 was intended to be a transitory action, of such a nature that it might be brought in any court of general jurisdiction over similar actions in any state or country where service according to the laws of that state or country could be made upon a stockholder. A majority of the court are of opinion that the superior court should have found in accordance with the seventh request of the plaintiff. This almost necessarily follows, in the view we have taken of the statutes of Kansas, from the four rulings requested by the plaintiff which the court gave, whether they be regarded as rulings of law or findings of fact. It is unnecessary now to consider the other questions which have been argued, or which appear in the bill of exceptions. The entry must be: Exceptions sustained.

(174 Ill. 262)

FLETCHER v. SHEPHERD et al.¹

(Supreme Court of Illinois. June 18, 1898.)

DEED—SURRENDER—PROOF OF CONTENTS—DELIVERY—DOWER—WITNESS.

1. Surrender by the grantee of an unrecorded deed must be with the intention or request that it be destroyed, for the purpose of revesting title in the grantor, in order that the grantor may thereby acquire even the equitable title.

2. In an action by an heir for partition of deceased's estate, defendant, whose contention that a certain tract belongs to him by reason of a deed from decedent would reduce the estate, is incompetent to testify, under 2 Starr & C. Ann. St. (2d Ed.) c. 51, § 2, declaring a party interested in the event of a suit incompetent to testify of his own motion or in his own behalf, where an adverse party sues as heir of deceased.

3. Contents of lost deed is sufficiently proved by evidence of the parties, consideration, and the property conveyed, and that it was a quitclaim.

4. Title passes on delivery of deed to grantee notwithstanding verbal understanding that it shall take effect only on certain conditions.

5. Quitclaim deed, by one having unassigned dower in a certain tract, of all her interest

therein, to one owning an undivided one-third of the tract, releases the dower only in the undivided one-third interest.

Appeal from circuit court, Champaign county; Francis M. Wright, Judge.

Bill by Jane F. Fletcher against Minnie B. Shepherd and others. Decree for defendants. Complainant appeals. Reversed.

This is a bill for the partition of 40 acres of land, alleged to have been owned by one George W. Whipple at the time of his death, and was filed at the March term, 1896, of the circuit court of Champaign county by the appellant, Jane F. Fletcher, a daughter of said George W. Whipple, against the appellees Minnie B. Shepherd and George Whipple, a daughter and son of the said deceased, and appellee Emily Whipple, his widow. Answer was filed to the bill, and replication was filed to the answer. The cause was referred to a master in chancery to take testimony and to report his conclusions, which conclusions are substantially in accord with the views expressed in the opinion. Exceptions were filed to the master's report, and were sustained by the circuit court, which found that the equities of the cause were with the defendants, and dismissed the bill for want of equity. The present appeal is prosecuted from such decree of dismissal.

Cunningham & Boggs, for appellant. J. L. Ray, for appellees.

MAGRUDER, J. (after stating the facts). George W. Whipple died intestate on June 12, 1895, leaving him surviving his widow, the appellee Emily Whipple, and three children, as his only heirs at law, to wit, his daughter the appellant, Jane F. Fletcher, his daughter the appellee Minnie B. Shepherd, and his son, the appellee George Whipple. In his lifetime he was the owner in fee of the 40 acres of land involved in this controversy, but whether he was the owner thereof at the time of his decease is a disputed question in the case, and is the main, if not the only, question to be determined in order to settle the issues made by the pleadings.

On December 18, 1884, George W. Whipple executed a quitclaim deed, conveying the said 40 acres to his daughter the appellee Minnie B. Shepherd. At the same time Minnie B. Shepherd executed back to him a quitclaim deed reconveying the said 40 acres. The deed from the deceased to Mrs. Shepherd was recorded on January 2, 1885. The deed, however, executed by Mrs. Shepherd conveying the property to the deceased, was never recorded during his lifetime. George W. Whipple remained in possession of the premises from December 18, 1884, when these deeds were executed, up to the date of his death, on July 12, 1895, leasing the land, or parts thereof, in the meantime, to other parties, and collecting the rents himself, and paying the taxes and exercising acts of ownership over the land.

¹ Rehearing denied.

The circumstances in regard to the execution of the deeds are substantially as follows: On December 18, 1884, George W. Whipple went to the office of a justice of the peace named J. M. Mullen, at Pesotum, in said county, and requested the justice to execute two quitclaim deeds. The justice wrote out both quitclaim deeds, being the same which have already been mentioned, at the same time. The deceased signed and acknowledged the quitclaim deed from himself to Minnie B. Shepherd at the justice's office. He then requested the justice to take the other quitclaim deed, which had been drawn up to be executed by Minnie B. Shepherd to the said George W. Whipple, to her house, which was half a mile distant from the justice's office, and there have her sign it and bring it back. The justice took the deed to the house of Minnie B. Shepherd, where she signed and acknowledged it, and then carried it back to his office; and George W. Whipple took both deeds, and carried them away with him.

No question seems to be made between the parties as to the delivery of the deed from the deceased to Minnie B. Shepherd. Certainly, the recording of the deed on January 2, 1885, was prima facie evidence of its delivery. The appellees take the ground that this deed was delivered to Mrs. Shepherd, because they now claim that the title to the whole of the property is in her. The appellant in her bill, although attacking the deed to Mrs. Shepherd as colorable, and as a cloud upon her title, admits that it was executed and delivered to Mrs. Shepherd.

As to the deed executed by Mrs. Shepherd to her father, the facts show that there was a delivery thereof to the grantee therein. Mrs. Shepherd signed and acknowledged the deed before the justice of the peace at her house, and handed it to the justice, in order that he might deliver it to her father, the grantee therein, and it was so delivered on the day of its execution. When a party acknowledges before a proper officer the execution and delivery of a deed made by him, and allows the officer to hand the same to the grantee without objection, this will amount to a delivery. *Hewitt v. Clark*, 91 Ill. 605. If, then, the deed executed by Mrs. Shepherd to the deceased was delivered to him, the title passed from her to him. Prior to his death George W. Whipple never conveyed away the 40 acres thus deeded back to him by his daughter Mrs. Shepherd. It would, therefore, seem to follow that, at the time of his death, the title thereto was in the deceased, and by his death passed by descent to his three children above named, subject to the dower of the appellee Emily Whipple. The contention of the appellant is that she is the owner of an undivided one-third part of the land upon the alleged ground that her father owned it when he died, and that the appellees Minnie B. Shepherd and George Whipple are also the own-

ers each of an undivided one-third part thereof. The fact that the quitclaim deed from Mrs. Shepherd to her father was not recorded would make no difference, so far as the passage of the title from her to him is concerned, the deed having been duly executed and delivered.

No consideration was paid by Mrs. Shepherd for the deed executed to her by her father, nor did she ever take possession of the premises thereunder in his lifetime. The consideration named in the deed was one dollar. It is claimed by the appellees that the deceased intended to give the land to his daughter Mrs. Shepherd, and that the only object sought to be accomplished by the execution of the quitclaim deed by her conveying the land back to him was that he might hold such deed as a protection to himself, so as to give him the right to use and control the land and receive the rents thereof during his lifetime. In other words, it is said that he deeded the land outright to his daughter, but intended only to retain a life estate in himself, with the right to use the land and draw its rents as long as he lived. He did not, however, reserve such life estate in express terms in the deed which he executed to her, and the deed which she executed back to him was absolute upon its face, and contained no provision whatever in reference to a life estate.

But it is said that, before the death of George W. Whipple, he surrendered the deed, executed by his daughter to himself, to her husband, with directions to the latter to surrender it to Mrs. Shepherd to be destroyed. It is claimed that Shepherd took the deed from the deceased, and handed it to his wife, and that thereupon she put it in the stove and burned it up. Where a conveyance of a tract of land is executed and delivered, the subsequent destruction or surrender of the deed will not revert the title to the land in the grantor. *Duncan v. Wickliffe*, 4 Scam. 452; *Oliver v. Oliver*, 149 Ill. 542, 36 N. E. 955; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305. The mere fact of the destruction of the deed after it was delivered to the deceased would, therefore, be of no particular significance, so far as revesting the title in the grantor, Mrs. Shepherd, is concerned. It is said, however, that when the deceased delivered the deed to Shepherd, to be taken to Mrs. Shepherd, it was so delivered with the intention on the part of the grantee, George W. Whipple, that the deed should be destroyed, and with directions that his daughter should so dispose of it, in order that she might be fully reinvested with the title to the land. It has been held by this court in several cases that if the grantee, in surrendering up an unrecorded deed that has been executed and delivered to him, does so with the intention, or with the request, that it be destroyed, for the purpose of revesting the title in the grantor, in that case the grantor acquires the equitable,

though not the legal, title. *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39; *Sanford v. Finkle*, 112 Ill. 146; *Gillespie v. Gillespie*, supra. It is to be noted that, in the case of *Happ v. Happ*, supra, where an unrecorded deed was surrendered by the grantee to the grantor, the grantor was in possession of the land named in the deed. The grantor, Mrs. Shepherd, was never in possession of the land here involved during her father's lifetime, but he retained the possession thereof up to the day of his death. Under the authorities here referred to, Mrs. Shepherd might be regarded as the equitable owner of the land, if there was any competent evidence in the record establishing the fact that the deed was surrendered by the deceased to her with the directions already specified. But the only witnesses, by whom the surrender of the deed and its destruction under the circumstances already narrated are proven, were not competent witnesses, and should not have been allowed to give the testimony upon this subject appearing in the record.

Mr. Shepherd, to whom the deed is alleged to have been handed by the deceased for delivery to Mrs. Shepherd, was not examined as a witness in this case, as he died before the hearing thereof. The only witnesses, who testified to the alleged surrender and destruction of the deed and the alleged directions of the deceased in reference thereto, are the appellees Minnie B. Shepherd and Emily Whipple. They were incompetent witnesses, in this proceeding, as to matters occurring prior to the death of George W. Whipple, under section 2 of chapter 51 of the act in relation to evidence. That section says that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, where any adverse party sues or defends as the * * * heir, legatee or devisee of any deceased person, * * * unless when called as a witness by such adverse party so suing or defending," etc. 2 Starr & C. Ann. St. (2d Ed.) p. 1824. Here the appellees Minnie B. Shepherd and Emily Whipple are parties, and the adverse party is Mrs. Fletcher, the appellant, who sues as the heir of her deceased father, George W. Whipple. This is not merely a proceeding for the partition of land between the heirs and for an adjustment of advancements made to some, nor are the matters here involved merely the relative rights of heirs as to the distribution of an estate. On the contrary, the decision here sought by the appellees would tend to reduce or impair the estate, and deprive the heirs of it, because the contention of the appellees is that Minnie B. Shepherd is the owner of the whole property as against her brother and sister, not by reason of being an heir of the deceased, but by reason of a deed alleged to have been executed to her by the deceased. We have held that the object of the statute

above quoted is to protect the estate of deceased persons from the assaults of strangers, and relates to proceedings where the decision sought by the party testifying would tend to reduce or impair the estate. *Ebert v. Gerdling*, 116 Ill. 216, 5 N. E. 591; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082. In addition to what has already been said, the appellee Emily Whipple was further incompetent, under section 5 of said chapter 51, as being the widow of the deceased, George W. Whipple, and testifying to conversations had with her husband and admissions made by him during their married life. *Gillespie v. Gillespie*, supra; *Pyle v. Pyle*, supra. When this incompetent testimony of Mrs. Shepherd and Mrs. Whipple is excluded, there remains no evidence in the record showing a surrender by the deceased of the deed to himself with the request that it be destroyed for the purpose of revesting the title in the grantor therein, Mrs. Shepherd. The case must, therefore, be considered as though the title was in the deceased, George W. Whipple, at the time of his death, by virtue of the quitclaim deed executed to him by his daughter Mrs. Shepherd. Under this view, it is not necessary to consider the allegations of the bill as to the purpose for which the deed from the deceased to his daughter Mrs. Shepherd was executed. The bill alleges that George W. Whipple owned the land at the time of his death, and that, by reason of such ownership, his three children, surviving him, were the owners each of an undivided one-third thereof. The allegation of ownership at the time of the decease is as well established through proof of the execution of the deed from Mrs. Shepherd to her father as it would have been by any proof showing the alleged void character of the deed executed by her father to her.

It is true that, in this case, no copy of the quitclaim deed executed by Mrs. Shepherd to her father was produced in evidence. Notice was served upon the defendants below to produce the original deed, and the oral evidence introduced to prove its contents was not objected to. The proof shows that the deed was executed by George W. Whipple to Minnie B. Shepherd on December 18, 1884, and also shows the consideration named in the deed, what property it conveyed, and that it was a quitclaim, and not a warranty, deed. This was sufficient evidence to prove its contents. *Perry v. Burton*, 111 Ill. 140. Indeed, the execution of the quitclaim deed from Mrs. Shepherd to her father is substantially conceded by both parties.

It cannot be said that George W. Whipple held the title to the premises for Mrs. Shepherd under an express trust. There was no writing manifesting any express trust. 1 Starr & C. Ann. St. p. 1200; *Walter v. Klock*, 55 Ill. 302; *Stevenson v. Carpnell*, 114 Ill. 19, 28 N. E. 379; *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596; *Mittel v. Karl*, 133 Ill. 65,

24 N. E. 553; *Stodder v. Hoffman*, supra. In case of an actual delivery of a deed by the grantor to the grantee, the title will pass, notwithstanding a verbal understanding that it is to take effect only on certain conditions. This is so, because a deed, voluntarily placed in the hands of a grantee, cannot be treated as an escrow. *Weber v. Christen*, 121 Ill. 97, 11 N. E. 893.

On July 12, 1895, Mrs. Emily Whipple, the appellee, executed a deed to her daughter Minnie B. Shepherd, conveying to her, in consideration of one dollar and love and affection, all her interest in the whole tract of 40 acres. This deed was executed for the purpose of releasing to Mrs. Shepherd all of her mother's dower interest in the property. It is contended by the appellant that although, at the time when the last-mentioned deed was executed, Mrs. Shepherd was not the owner of the whole of the 40-acre tract, yet she was the owner of an undivided one-third thereof, and that the execution of the quitclaim deed to her by the widow, Emily Whipple, had the effect of releasing her dower in the whole tract. It is claimed by the appellees that the deed from Emily Whipple to Minnie B. Shepherd was executed upon the theory that Mrs. Shepherd at that time, under the deed of December, 1894, from her father to herself, was the owner of the whole tract, and that, if she is held not to be such owner, she is entitled to her dower, as though the deed had not been made. It is well settled that unassigned dower is not the subject of transfer or sale, and can only be released to one in privity with the title under which the dowress claims. *Hart v. Burch*, 130 Ill. 426, 22 N. E. 831. It may be released in favor of the owner of the fee, but it cannot be invested in another separately from the fee. *Best v. Jenks*, 123 Ill. 447, 15 N. E. 173. Mrs. Whipple could have released her dower in an undivided one-third part of the premises to her daughter Mrs. Shepherd as the owner of an undivided one-third part thereof. A widow, having dower in the common estate, may release to one tenant in common for his or her share without releasing her dower to another tenant in common who has a different share. *Hart v. Burch*, supra. But the quitclaim deed executed by Mrs. Whipple to Mrs. Shepherd did not purport to convey Mrs. Whipple's interest in an undivided one-third part of the premises; it purported to convey her interest in the whole tract. As to two-thirds of the tract, Mrs. Shepherd was not the owner in fee thereof. There could not then have been a release of Mrs. Whipple's dower in the two-thirds not owned by Mrs. Shepherd. To hold that there was such release would be to hold that a dowress can release her dower in favor of a person who is not the owner of the fee. We are inclined to the opinion that the deed executed by Mrs. Whipple only had the effect of releasing her dower in the undivided one-third interest owned by Mrs. Shepherd,

and that she is still entitled to her right of dower in the one-third owned by the appellant, Mrs. Fletcher, and in the one-third owned by the appellee George Whipple.

Our conclusion is that George W. Whipple, deceased, was the owner of the 40 acres at the time of his death; that the appellant and the appellees Mrs. Shepherd and George Whipple are each entitled to an undivided one-third part of the tract of land, as heirs of the deceased; that the undivided interests of the appellant and of the appellee George Whipple are subject to the dower of the appellee Emily Whipple. Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court, with directions to proceed with a partition of the property in accordance with the views herein expressed. Reversed and remanded.

(174 Ill. 164)

CLARK v. McCORMICK et al.¹

(Supreme Court of Illinois. June 18, 1898.)

STREETS — COMMON-LAW DEDICATION — EFFECT — OWNERSHIP OF LEGAL TITLE — TRANSFER.

1. Where the owner of land divides it into blocks, a sale by him of a portion thereof, under a plat showing streets, amounts to a common-law dedication to the public of all the streets in the plat belonging to him, and is irrevocable.

2. Under a common-law dedication of streets, the legal title thereto rests in the abutting lot holders, not absolutely, but subject to the public's easement, and can pass only with a conveyance of the abutting land.

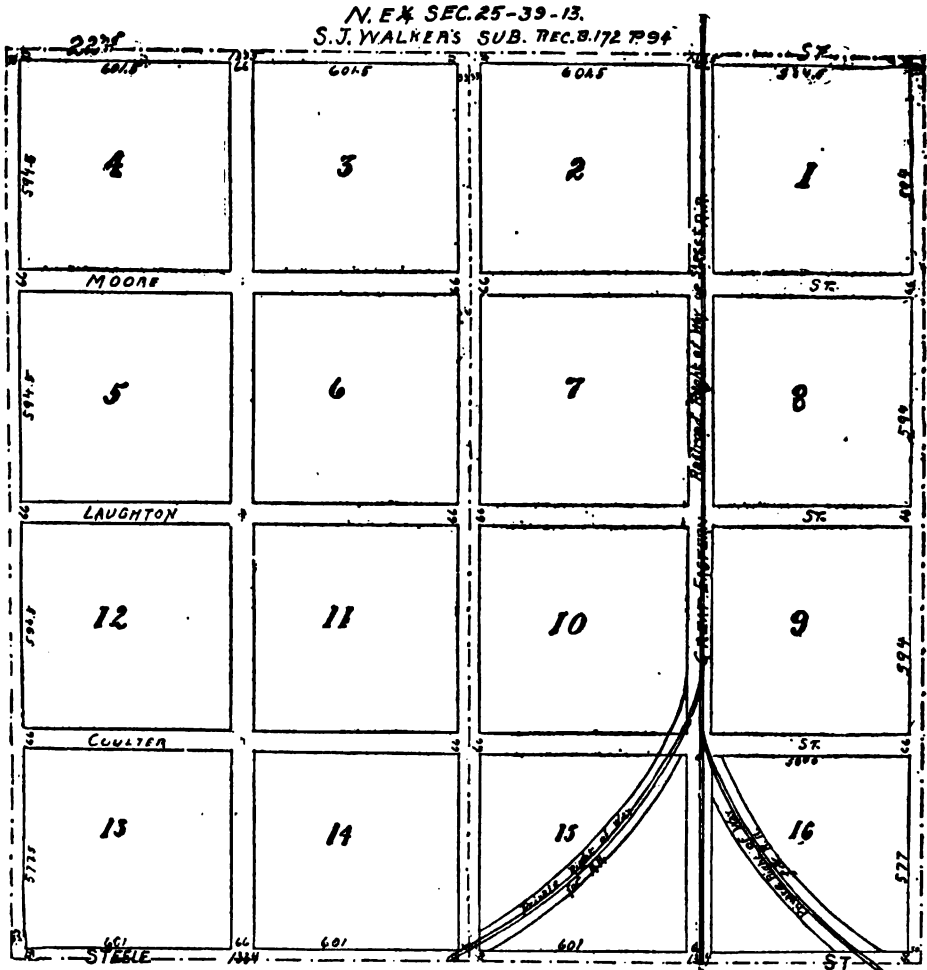
Error to circuit court, Cook county.

Petition by Nettie F. McCormick and others against William H. Clark and others to establish title to a strip of land. From a decree for petitioners, defendant William H. Clark brings error. Affirmed in part, and in part reversed.

Thompson, Delamater & Clark and William H. Wilkins, for plaintiff in error. Wilson, Moore & McIlvaine, for defendant in error National Malleable Castings Co.

BOGGS, J. On the 4th day of January, 1871, one S. J. Walker, the owner of the N. E. $\frac{1}{4}$ of section 25, township 39 N., range 13 E. of third P. M., subdivided the said tract into blocks and streets, and made, and caused to be recorded in the office of the recorder of deeds within and for the county of Cook, a plat showing such subdivision. The record of the plat was destroyed in the great fire in Chicago in October, 1871. A decree was entered in a proceeding brought for the purpose of restoring the record of the plat; but as restored it did not appear that the plat had been acknowledged by the maker, or that in other respects it had been executed and framed as required by the statute. It is conceded, and seems to be indisputable, that the plat, as restored, is insufficient to constitute a statutory dedication of the streets. Said plat as restored is as follows:

¹ Rehearing denied.



The proprietor of the plat sold and conveyed to different persons and corporations the blocks of land appearing on the plat, designating and describing them in the deeds of conveyance according to their numbers as shown on the plat. The title to block 2 passed by mesne conveyances to Nettie F. McCormick and Cyrus H. McCormick, Jr., in their capacity as trustees for Harold McCormick under the last will and testament of Cyrus H. McCormick; and the title to block No. 7 of said subdivision passed to and became vested in the same trustees under the will of said Cyrus H. McCormick, deceased, as trustees for Anita McCormick Blaine; and the title to block No. 10, as platted in said subdivision, by like mesne conveyances, passed to and became vested in the National Malleable Castings Company. The respective petitioners each held a portion of the east part of each of said blocks by a different chain of title than that by which they became seised of the other portions of the block, and each claimed to own the strip of land intervening between the east line of the blocks and the west line of the right of way

of the railroad shown on the plat. Various deeds and other instruments affecting, or purporting to affect, the title to the said parts of blocks 2, 7, and 10, and said strip between the block lines and the right of way, were destroyed by the said fire in Chicago, in 1871. On the 17th day of May, 1894, the said trustees and the said National Malleable Castings Company, so owning the said blocks 2, 7, and 10 in the said subdivision, filed separate petitions under the burnt record act, for the purpose of obtaining decrees establishing and confirming their respective titles to the said portions of the east parts of the said blocks, and also establishing and declaring title in each of them to the strip of land lying between the east line of the said block by them respectively owned and the west line of the right of way of the said railroad. The plaintiff in error, the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company, and the city of Chicago were made parties defendant to each of said petitions, and filed answers thereto. The plaintiff in error also filed a cross petition to each of said petitions, in which he contested the

claim of the said petitioners, and each of them, to the strip of ground outside the limits of the respective blocks, and lying between the said blocks and the said right of way, and asserted that the title to the said strips of ground between the block lines and the right of way had become vested in him, and prayed that a decree might be entered establishing his title thereto. The causes were heard and a decree rendered in each case awarding the petitioner in each case relief according to the prayer of the petition. The plaintiff in error prosecuted a writ of error out of this court, and brought the record in each case before us for review. The cases involved precisely the same questions, and were for that reason consolidated in this court and submitted together for decision.

Prior to the subdivision of the tract by Walker, the then owner, a former owner, one George S. Robbins, who also owned another tract of land immediately north thereof, executed and delivered to the Chicago & Great Eastern Railway Company a deed conveying to the said railway company, for a right of way, a strip of land 60 feet in width, running from north to south through the said tract. The center line of the said strip so conveyed for a right of way intersected the north line of the said tract subdivided by the said Walker at a point 654.3 feet west of the east line of said tract. The title to this right of way passed by mesne conveyances to the said Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company. The location of this right of way is indicated on the plat hereinbefore set out. It was proven that, in surveying and establishing the boundary lines of blocks 1, 8, and 9 of the said subdivision, the westerly lines of said blocks were located a distance of 10 feet over and upon the said right of way, and a strip marked "Railroad Right of Way or Street," 66 feet in width, was laid out and platted immediately adjoining said blocks on the west. The effect of this was to locate the westerly boundary line of said strip marked on the said plat "Railroad Right of Way or Street" 16.7 feet west of the westerly line of the right of way. It is this strip, 16.7 feet in width, adjoining each of said blocks 2, 7, and 10 on the east, that is the subject-matter of contention in these causes.

It was alleged in each of the original petitions and in each of the cross petitions filed by plaintiff in error that the said strip marked "Railroad Right of Way or Street" has never been occupied and used by the public or the city of Chicago for street or other public purposes; and in each of said cross petitions it was averred the proprietor of the said subdivision never dedicated or offered to dedicate the said strip in question to the public or to the city of Chicago for public use, but, on the contrary, reserved the said strip (except that portion formerly conveyed for said right of way) to his own private use and benefit; while it is alleged in each of

the original petitions that the offer of the proprietor of the said plat to dedicate the said strip (except the said right of way) was never accepted by the city of Chicago or by the public. After the plat had been executed and recorded, and after the greater number of blocks had been sold, the strips of ground in controversy were levied upon and sold by virtue of process issued upon certain judgments and a decree which had been entered against the said Walker, the proprietor of the plat; and, in default of redemption, deeds were made purporting to convey the title to said strips to the purchaser at said sale. The purchaser at such sale conveyed to plaintiff in error whatever title he thus received. The position of plaintiff in error is that such conveyance to him vested in him the title to said strips between the block lines and the westerly line of the right of way.

On the 17th day of September, 1892, about 21 years after the execution and recording of the plat of said subdivision, the said petitioners, who then owned blocks 2, 7, 10, and 15 in said subdivision, filed in the office of the recorder of deeds of Cook county, and caused to be recorded on the deed records of the said office, an instrument in writing, by the said parties duly signed and sealed, in which they declared that the offer made by the proprietor of the plat to dedicate the said strip marked "Railroad Right of Way or Street" to the uses of a public street has never been accepted by the public or the city, and was by them withdrawn, and was no longer in force, and declaring it to be their intention to hereafter devote said strip to the private use of the respective parties so signing said declaration. The position of the petitioners below is that the fee in the strip to the center of the street passed by the operation of law to the owners of the blocks abutting thereon, subject to the offer of dedication; and that as they had acquired the title to all of the blocks abutting on the west side of the said strip which the proprietor of the plat offered to dedicate as a street, and as such dedication had not, as they claimed, been accepted by the public or the city, it was within their power to withdraw the offer of dedication; and that, having so withdrawn said offer, they themselves became possessed in fee of the title to the center of the said proposed, but now, as they alleged, abandoned, street. The circuit court denied the contention of the plaintiff in error (the cross petitioner), and accepted that of the defendants in error (the petitioners below), and entered a decree confirming and establishing the title of the said petitioners to the strip in question.

We think it is evident from the face of the plat that the original proprietor of the subdivision intended to set apart the strips of ground, 66 feet in width, running north and south between the blocks, for the use of the public as streets or ways of ingress and

egress. It was not necessary that a declaration, either oral or written, should be established, in order to show it was the intention of the proprietor to dedicate the strips to such uses. Such intention may be established in any conceivable way by which it may be made manifest. A survey and plat alone are sufficient to establish a dedication if it is evident from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use. *Godfrey v. City of Alton*, 12 Ill. 30; *Smith v. Town of Flora*, 64 Ill. 94; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866. It not appearing that all the requirements of the statute were observed in making the plat, and it not appearing that the city of Chicago had accepted the plat as an addition to the city or the streets therein marked as public ways of the city, the dedication was not a statutory one, and the title in fee to the strips intended to be dedicated as streets did not vest in the city, but remained in the original proprietor. The dedication was, however, good as a common-law dedication, and the legal title in the grounds so set apart as for streets remained in the original owner. *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 23; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373. The title thus remaining in a proprietor of such a plat is not an absolute fee, but is a fee burdened with the offer of dedication; and it is retained only so long as the proprietor goes no further than to hold out an offer to dedicate. If he shall sell lots or blocks laid out and shown upon the plat according to their description or number given by the plat, the title resting in him in fee to one-half the street next adjoining the lot or block so sold passes, by operation of law, to the purchaser of such lot or block. *Thomsen v. McCormick*, supra; *Hamilton v. Railroad Co.*, 124 Ill. 235, 15 N. E. 854; *Rusk v. Berlin* (filed at June term, 1898) 60 N. E. 1071; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Henderson v. Hat-terman*, 146 Ill. 535, 34 N. E. 1041. Had the plat been executed in conformity with the statute, the fee title to the streets would have vested in the city, in trust for the public. Not having been so executed, the fee remained in the proprietor, but also in trust for the lot owners and the public.

Without conceding that the title to streets and ways resting in the proprietor of such a plat, or in the owner of lots or blocks therein, can be made the subject of levy and sale by virtue of a judgment or decree against such proprietor or owner, yet, as it appeared that the original proprietor of the plat had conveyed all of the blocks here involved before the lien of the judgment and decree, upon which the claim of title of the plaintiff in error to the strips could have attached, it is manifest that the plaintiff in error could not take any title in said strips by virtue of such sales thereof made by authority of said judgments and decree, for the reason that the title of the judgment and decree debtor, as we

have seen, passed, by operation of law, to the purchasers of the blocks before becoming subject to the liens of the judgments or decree. The decree of the circuit court that the plaintiff in error was not seised of title to the strips of land in question was therefore correct, and must be affirmed. But we think the court erred in establishing and confirming title in the petitioners in and to said strips. Being seised of the title of their blocks, respectively, the law devolved upon the petitioners title to the center of the streets upon which said blocks abutted, which in this instance would include the strips in question; but the title so vested in the petitioners, by operation of law, is not an absolute fee in the premises, but is a title resting in them by virtue of their ownership of the abutting blocks, subject to the rights of all other owners of blocks in the subdivision.

The following quotation from the opinion in the case of *Zearing v. Raber*, 74 Ill. 409, is here in point: "If one owning land exhibit a map of it, on which a street is defined, though not as yet open, and building lots to be sold by him with reference to a front or rear on that street, or lots he conveyed being described as by streets (*Schenley v. Com.*, 36 Pa. St. 62, and *Id.* 29), this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever (*Wyman v. Mayor*, etc., 11 Wend. 487; *Livingston v. Mayor*, etc., 8 Wend. 85; and see *In re Opening of Twenty-Ninth St.*, 1 Hill, 189; *In re Opening of Thirty-Ninth St.*, *Id.* 192); and this principle is not limited in its application to the single street on which such lots may be situated. If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchaser may use these streets or other public places according to their appropriate purposes, but a right vesting in the purchasers that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the street and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use. *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232, 237. See, also, *Town of Bowling Green v. Hobson*, 3 B. Mon. 478, 481; *Huber v. Gazley*, 18 Ohio, 18; *Dummer v. Doe*, 20 N. J. Law, 86, 106; *Wickliffe v. City of Lexington*, 11 B. Mon. 163." *In Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370, the true doctrine

was declared to be "that if the owner of land exhibits a map or plan of a town, or addition platted thereon, and on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever. And such right is not a mere right that the purchaser may use that street, but is a right vesting in the purchasers that all persons may use it; that the sale and conveyance of lots according to the plat imply a grant or covenant to the purchasers of lots, and their grantees, that the public street indicated upon the plat shall be forever open to the use of the public as a public highway, free from all claim or interference of the proprietor or those claiming under him inconsistent with such use; and that the owner and all claiming under him will be perpetually estopped from denying the existence of the street." The same principle is referred to with approval in *Prouty v. Tilden*, 164 Ill. 163, 45 N. E. 445.

The petitioners, and each and every other owner of a block or blocks in the subdivision, hold title to the center of each street upon which the block or blocks abut; but each and all of said owners have also a like general interest and right in all the streets, and no one owner may assume absolute and exclusive ownership or control of the one-half of the street upon which his premises may abut. But it is urged in behalf of the petitioners that the offer to dedicate the strips in question to the public was withdrawn by them, and thereupon the title to said strips which passed to them, by operation of law, as owners of the blocks abutting thereon, was relieved of the burden of the offer of dedication, and became an absolute title in fee. When a plat of lots, blocks, streets, and alleys is executed in compliance with the statute, and is accepted by a city or village, it may be vacated by proceedings in conformity with the provisions of the statute, for such statute is framed with the view of protecting the rights of all interested; and, moreover, the purchaser of a lot or block in such a plat buys in view of the statutory provisions for vacating the plat. But this is a common-law dedication, and the right does not attach to each individual block owner to withdraw the offer as to the parts of the streets upon which his lot abuts. Each purchaser of a block in the subdivision is presumed to have bought in view of the system of streets and ways designed by the proprietor of the plat to provide means of ingress and egress to and from all parts of the platted ground, not only for the use of the owners and occupants of the lots or blocks, but all who might desire to pass along such streets and ways. The arrangement of streets and ways formed a part of the consideration of the purchase of each block or part thereof, not only as between the original proprietor of the plat and those who purchased from him, but also as between all subsequent vendors and vendees. The original proprietor sold to his

vendee the rights and privileges of the streets, and each subsequent vendor passed such rights to his vendee. The law implies mutual agreements between all such parties that the streets shall always remain open for use as platted. It was not, therefore, within the power of the petitioners, as owners of the blocks along the west side of the street in question, being but a portion of the blocks in the subdivision, to withdraw the dedication of the streets, as against the private rights of any other owners of blocks or parts of blocks in the subdivision. *Zearing v. Raber*, supra; *Cihak v. Klekr*, supra; *Earl v. City of Chicago*, supra; *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269.

The declaration filed and recorded by the petitioners in which they assume to declare the dedication at an end, and that the absolute and exclusive title in fee rested in them, was without legal effect. The fee to the strips in question is attached to the fee in the blocks upon which the streets abut, and rests in the owners of such blocks. It is not a title, vesting in the owners of the blocks the ownership of the strips as separate, independent property, which may be detached from, and sold distinct from, the blocks, but it passes to any subsequent holder of the block. The decree to the effect that the petitioners are vested with an absolute fee title in the strips is erroneous, and must be reversed. The decree confirming and establishing the title to the blocks had the legal effect to vest in the petitioners the full interest and title they respectively have in these strips, and no further declaration of title should have been made than that the petitioners were seised of the title in fee to the portions of blocks respectively owned by them.

The plaintiff in error, after the master to whom the cause had been referred had filed his report, entered his motion to continue the cause and re-refer the same to the master, in order that he might produce certain alleged newly-discovered testimony; but the court overruled the motion, and such ruling of the court is assigned as for error. This alleged newly-discovered evidence was deemed material by the plaintiff in error, because, as he insisted, it tended to show it was not the intention of the original proprietor of the plat to dedicate the strip marked on the restored plat "Railroad Right of Way or Street" for street purposes. The evidence consisted in two other plats made by the same proprietor. The first of these was the plat of the subdivision of the tract of land lying immediately north of the track covered by the subdivision involved in this cause, and the other was a plat of a subdivision made by the said proprietor, of block No. 9 in the subdivision here involved. The resubdivision of block 9 was made some two years after the subdivision of the tract of which it is a part; and it is contended by the plaintiff in error that by this plat the proprietor showed that he claimed as his individual property the strips

in question. We have examined the plat as preserved in the record, and do not think it had any tendency to indicate that the proprietor claimed any individual interest in the strips in controversy. We find on the plat a line intended to represent the western boundary line of the right of way of the railroad, and another line intended to represent the eastern line of block No. 10, with a space intervening between said lines, without anything in such space to indicate that it is not a part of the public street which we find from the original plat was laid out between said blocks 9 and 10. Moreover, it appeared from the stipulation entered into by the parties hereto that the said proprietor of the plat in controversy and the plat subdividing said block 9, after making the original plat, and before subdividing said block 9, had sold much the greater number of blocks in the original subdivision. It was therefore beyond his power, by the subsequent subdivision of block 9, to change the streets created by the original plat of which said block 9 was a part. It does not appear from the other plat, to secure the production of which a continuance was asked, a copy of which is preserved in the record, when or by whom the same was made. It purports to show the location of certain lots, blocks, and streets in another and different tract of land from that covered by the plat herein involved. We are unable to see it had any proper connection with the matter involved herein, and think the chancellor correctly refused to continue the cause in order to allow the production of these plats.

The decree of the court, so far as it purports to establish and confirm title in the petitioning trustees and the said National Malleable Castings Company in and to the strips of ground outside of the lines of the blocks by them respectively owned, must be and is reversed; otherwise, the decree is affirmed. It is ordered the costs be paid as follows: The plaintiff in error shall pay one-half of the costs in each of the cases; the National Malleable Castings Company shall pay one-half of the costs in the case to which it is a party; and the trustees, in the respective cases to which they are parties, shall, in the due course of the administration of their trust, pay one-half the costs in such cases. Affirmed in part, and in part reversed.

(174 Ill. 272)

DAVIES v. GIBBS et al.¹

(Supreme Court of Illinois. June 18, 1898.)

PARTITION SALES—CONCLUSIVENESS.

Action cannot be maintained against purchaser at partition sale to recover an alleged balance due on the theory that he purchased by the acre, instead of by the tract, as shown by the report of the master of the sale, to which there was no exception, and which was duly approved by the judge, and on which deed

issued; Act 1889 entitled "Partition" (section 29) providing that within 10 days after sale the master shall file report, that exceptions thereto may be filed within 20 days, and that, if none are then filed, the judge may approve the same; and section 30 providing that on confirmation of the sale, deed shall issue, which shall be a bar against parties and privies to the proceedings and persons claiming under them.

Appeal from circuit court, Coles county; Frank K. Dunn, Judge.

Bill by Herbert Gibbs and others against George W. Davies. Decree for complainants. Defendant appeals. Reversed.

Neal & Wiley, for appellant. L. C. Henley and J. F. Hughes, for appellees.

BOGGS, J. This was a bill in chancery by the appellees against the appellant. The bill alleged that in a certain proceeding in chancery for partition of certain premises belonging to the heirs of one B. F. Jones, deceased, a decree was entered declaring such premises not susceptible of partition, and directing that said premises be sold by the master in chancery for the purpose of making distribution of the proceeds of the sale among the owners; that the said master sold certain of the premises, and on the 7th day of February, 1895, filed in the office of the clerk of the said Coles circuit court a report of his acts and doings under such decree; that in and by said report the master reported that by virtue of such decree he had sold to the appellant, G. W. Davies, the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, township 12 N., range 8 E. of third P. M., except that part of said tract included in the plat of the original town of Stockton, and except also the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, at and for the sum of \$79.75 per acre; that the said report of the said master was approved in vacation, on the 7th day of March, 1895, by one of the judges of said court; that in pursuance of such decree, report of sale, and approval thereof, the master, on the 18th day of April, 1895, executed and delivered to the said appellant, Davies, the said tract above described (except said part of said town plat and said right of way of said railroad). The bill alleged that the said master in chancery, in making settlement with said Davies, estimated that the said tract of land, exclusive of the said town plat and right of way aforesaid, contained 25 acres of land, and that he accepted from the said appellant, in payment for said land, the sum of \$1,993.75, as the amount due for 25 acres of land at \$79.75 per acre. The bill further alleged that said premises so sold and conveyed to Davies contained 33 acres of land. The bill proceeded upon the theory that Davies had paid for only 25 acres of the said tract, and that the alleged remainder was not paid for, to wit, 8 acres, and remained the property of the said heirs of the said B. F. Jones, deceased, to wit, the complainants and certain others of

¹ Rehearing denied.

said heirs who appeared as defendants with Davies to the said bill. The bill prayed that a decree be entered to that effect, and ordering that said eight acres be partitioned and allotted among the heirs of the said B. F. Jones, deceased.

At a former term of this court the question whether this bill was obnoxious to a demurrer was presented by the record in the case of *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. We then held that the report of the master, and its approval and confirmation, and the execution of the deed by the master, invested Davies with the title possessed by the Jones heirs to the entire tract of the land, less the parts in the said town plat and in said right of way, and that the eight acres in question were not subject to be partitioned; that the allegations of the bill were sufficient to entitle the complainants therein to a hearing upon their assertion that the master had reported that he had sold the land to Davies by the acre, at a designated price per acre, and that such report was approved by the court, but that the master, in accounting with Davies, erroneously estimated the tract sold to contain eight acres less than it actually included, and to a decree against Davies for the value of the number of acres, if any, erroneously omitted by the master, at the price per acre bid thereupon, as shown by said report. Under this ruling the cause was remanded, and has since been heard and determined, the result being a decree requiring the said Davies should, in 30 days, pay to the said complainants and others, heirs of said B. F. Jones, deceased, the sum of \$638, as being the value of eight acres of land at \$79.75 per acre, and in default of such payment the deed executed by the said master to Davies for the said tract of land should be vacated and set aside, and the premises resold by the master under and by virtue of the terms and conditions of the original decree of partition. This is an appeal prosecuted by the said Davies to reverse the decree.

Upon the hearing the report of the master of the sale of the premises in controversy was produced in evidence. It did not sustain the allegations of the bill that the master sold the tract in controversy to the appellant by the acre, but, on the contrary, that said Davies bid the given sum of \$1,993.75 for the said quarter section, less the excepted parts before mentioned, and that said tract was struck off and sold to him at and for such given sum. The appellees offered, and, over the objection of the appellant, were allowed to produce, evidence tending to show that the premises were struck off and sold by the master to said Davies by the acre, and at a fixed sum per acre. Whether it was competent to receive and consider this testimony is the first question to be determined, and one which, in the view we have taken of the cause, makes it unnecessary that we should notice a number of other questions which the respective parties have presented and ar-

gued in their briefs. It appeared from the record the sale in question occurred on the 31st day of January, 1895, and that this report of the master was filed with the clerk of the circuit court wherein the decree was rendered on the 7th day of February, 1895; that no exceptions or objections were filed or presented thereto; that on the 7th day of March, 1895, the said report was presented to the judge of the court in which the decree was rendered, and was examined and duly approved by the said judge, who indorsed upon the said report an order in writing, and signed by the said judge, approving the said sale. It further appeared that after the approval of the said report said appellant, Davies, complied with the terms and conditions of the said sale, whereupon the master executed and delivered to him a master's deed conveying to him said tract of land, except the excepted portions hereinbefore mentioned. All that was sought to be established by the testimony in question, but constituted exceptions or objections to the report of the master of the sale of the premises. The time and manner in which such objections or exceptions may be made is regulated by the statute. Sections 29 and 30 of the act entitled "Partition" (Laws 1889, p. 215) are as follows:

"Sec. 29. The master, special commissioner or other officer making such sale shall, within ten days thereafter, file a report of his doings in the matter, in the office of the clerk of the court decreeing such sale. Any person interested therein may, within twenty days after the filing of said report, file exceptions thereto, and if no exceptions are filed within such time the report shall be presented by the officer or other person making the sale, to the judge of the court, who shall examine the same, and shall have power, in vacation, to make such order in reference to the approval thereof as he shall deem proper. If exceptions are filed to such report in vacation, no action shall be taken thereon until the next succeeding term of the court.

"Sec. 30. Upon the confirmation of the report, the master, special commissioner or other officer making the sale, or some person specially appointed thereto, shall execute and deliver to the purchaser or purchasers of the premises sold, proper conveyances thereof, taking, in case of sale on credit, security as required by the decree, which conveyance shall operate as an effectual bar against all parties and privies to said proceedings and all persons claiming under them."

Prior to the enactment of said section 29, as amended by the act in force July 1, 1889, it was not within the power of the judges of the circuit courts to approve and confirm sales of land made by virtue of partition decrees, except when judicially sitting in term time. After a sale under such decree the whole matter remained in fieri until the court could convene in regular session, the bid be-

ing regarded as but an offer to purchase subject to the approval or disapproval of the court. *Hart v. Burch*, 130 Ill. 436, 22 N. E. 831. Neither the buyer nor the parties interested in the proceeds of the sale could know with certainty whether the sale would be approved or not. This condition of affairs was highly inconvenient and unsatisfactory, and often prejudicial to the interest of all concerned. It tended to discourage persons from becoming bidders for lands at such sales, and in consequence thereof to restrict competition for property so to be disposed of, and often deprived all parties concerned of the use and benefit of the land and of its proceeds during the time intervening between the sale and the next session of the court. In many counties within the state, circuit courts convene but twice in each year, and the delay thus occasioned in all such counties was a matter of serious moment. In other counties, where the terms were more frequently held, the delay was not so great, yet it was felt to operate disadvantageously, for the reason there is a common disinclination to tender a bid upon real property to be accepted or rejected in the future. These evils were intended to be remedied by the amendment to said section 29, which provided that the master should, within 10 days after making the sale, file a report of the sale with the clerk of the court wherein the decree was rendered, and that exceptions thereto might be filed within 20 days after the filing of the report, and that, if no exceptions were filed within that time, the judge of the court should be fully empowered to approve and confirm the sale. This statute remedied the evil, and yet preserved the right of every one to present exceptions or objections to the report of sale. The master in the case at bar complied with the statute. The appellees had ample opportunity to interpose any and every objection, if any they had, to the confirmation of the report. No circumstance of fraud, accident, or mistake intervened to prevent them from availing themselves of the opportunity and privilege. The court approved and confirmed the sale. The appellant complied with the terms and conditions of the decree and sale, and became entitled to receive, and did receive, a deed from the master. The action of the judge in approving and confirming the report of sale, being fully authorized by the statute, became binding upon and concluded the appellees as effectually as though the report had been acted upon and confirmed by the court judicially convened. It is declared by said section 30 a deed so made by a master shall operate as an effectual bar against all parties and privies to the proceeding, and all persons claiming under them. The appellees had full right and ample opportunity to present as exceptions to the master's report the matters they now seek to have considered and remedied in this proceeding. Having failed to so present them, the order of approval and con-

firmation of the report forms a conclusive bar to any further litigation concerning them. *Freem. Jud. Sales*, § 44; *Speck v. Car Co.*, 121 Ill. 33, 12 N. E. 213. For this reason it was not competent to receive the testimony tending to show that the sale of the land to the appellant, Davies, was upon terms and conditions other and different from the report thereof made by the master and approved by the judge of the court. If we are right in the conclusions we have reached, and as herein expressed, it is manifest there is no ground upon which appellees can recover. The decree is therefore reversed, and the cause will not be remanded. Decree reversed.

(174 Ill. 279)

LEHMAN v. CLARK.¹

(Supreme Court of Illinois. June 23, 1898.)

BENEFICIAL ASSOCIATIONS—UNILATERAL CONTRACTS—FORFEITURE OF POLICY—LIABILITY ON ASSESSMENTS—RECEIVERS.

1. A contract with a benevolent association, by which, on the death of a member, each member shall be assessed for the benefit of deceased's family, and on failure to pay his assessment shall forfeit his membership, is unilateral.

2. A contract for insurance in a benevolent association, a part of which is the application, certificate of membership, and by-laws, all providing for a forfeiture of membership on failure to pay any assessment, is self-executing in creating the forfeiture.

3. No right of recovery exists in a benevolent association against a member for the nonpayment of assessments, when, by the constitution and by-laws thereof, he forfeits all benefits by nonpayment. The only remedy is forfeiture.

4. A receiver empowered by court to collect the assets of a benevolent association, the contract of which with its members is unilateral, cannot enforce, by suit, the payment of assessments due the association.

Appeal from appellate court, Third district.

Action by James H. Clark, receiver, against Lewis L. Lehman. A judgment for plaintiff was affirmed by the appellate court (71 Ill. App. 366), and defendant appeals. Reversed.

Henley & Henley and J. W. & E. C. Craig, for appellant. J. F. Hughes and Andrews & Vause, for appellee.

PHILLIPS, C. J. Appellee brought this suit as receiver of the Masonic Benevolent Association of Central Illinois to recover the amount of assessment made by him as such receiver, under an order of the court, against appellant, a member of the association, to cover death loss accrued while the association was doing business. The general issue is pleaded, together with the stipulation that all defenses might be made under that plea. On trial a verdict was rendered for the plaintiff, and damages assessed at \$158.40. A motion for a new trial was overruled, and remittitur of \$19.80 being entered, judgment was rendered for \$138.60 and costs. The appellate court of the Third district affirmed that judgment,

¹ Rehearing denied.

and made a certificate of importance, under which the case is brought to this court.

The Masonic Benevolent Association, of which appellee is receiver, was organized under an act concerning corporations, approved April 18, 1872; and the amendments to that act, approved March 28, 1874, May 22, 1883, and June 4, 1889, are to be considered in the discussion of the question here presented, together with an act approved June 22, 1893, under which the bill in this case was filed and the receiver appointed. It was held in *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, that the two acts approved June 22, 1893, were designed to create certain classes of corporations furnishing life insurance or indemnity under various former acts, and to enact and create a complete code for each. The Masonic Benevolent Association, of which appellee is receiver, belongs to a class governed by one of the acts of June 22, 1893, which was entitled "An act to incorporate companies to do the business of life or accident insurance on the assessment plan, and to control such companies of this state and other states doing business in this state, and to repeal certain acts therein named, and for providing and fixing the punishment for the violation of the provisions thereof." Acts 1893, p. 117. This act was a revision of the subjects mentioned in its title, and provided by section 7 that such an association as the one for which appellee was receiver was declared to be engaged in the business of life insurance upon the assessment plan, and subject to the provisions of that act. The act further provided for reincorporation under it of corporations theretofore existing, but was not made obligatory thereon, and, if the corporation did not reincorporate, it could continue to exercise such existing powers and privileges as were not inconsistent with the act; but corporations were to be governed by the provisions of the act. Sections 18 and 19 provide for and authorize the attorney general to file a bill when any incorporated organization under the laws of this state doing business in this state of the character prescribed in the act shall be insolvent, and so reported by the auditor, under which the court may dissolve the corporation, appoint a receiver, etc.

The question presented by this bill is as to the authority of the court to order an assessment of the members to pay liabilities and the right of the receiver to recover. The liability of appellant with the association of which appellee is receiver is to be decided by determining whether his contract of life insurance is a unilateral contract or not. The contracts for life insurance are almost universally held to be unilateral in their character, unless clearly expressed otherwise. The business transacted by the Masonic Benevolent Association of Central Illinois was a life insurance business, so far as it pertains to the issuing of beneficiary certificates payable upon the death of the holders or collection of mortuary

assessments and the payment of death benefits. In *May on Insurance* (section 550) it is stated: "There are certain organizations prevalent in this country and elsewhere under the name of relief, benefit, or benevolent societies, or some similar name, which generally have for their object aid to their members or their widows and children after the decease of their respective members. These associations, though not speculative, and not based upon capital paid in as an investment, have nevertheless a general purpose of mutual protection.

* * * Their certificates often resemble, both in form and substance, ordinary policies of life insurance; and the courts have with great uniformity treated them as substantially life insurance companies, applying to them and to the virtual relatives of the members the rules and principles applicable to the contract of life insurance." In *Com. v. Wetherbee*, 105 Mass. 161, it is said: "This is not the less a contract of mutual insurance upon the life of the assured because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof." In *Association v. Robinson*, 147 Ill. 138, 35 N. E. 168, it is held that a mutual benefit association is a life insurance company for all purposes except that it is relieved from certain conditions and rules provided by the statute in the act of March 26, 1869. In that opinion it is held: "The object and purpose for which the defendant was incorporated * * * was to furnish pecuniary aid to the widows, heirs, devisees, and representatives of deceased members of the association, * * * and on proof of such death the association should assess and collect from each surviving member the sum of \$2.50 for the benefit of the heirs or devisees of the deceased member, the same to be paid to him or them, to the amount of not exceeding \$2,500, within thirty days after collection of the assessment. There can be no doubt, we think, that the benefits provided for by the constitution and by-laws of the association are in the nature of life insurance, and that the contract between the association and the member, evidenced by the constitution, by-laws, and membership certificate, is, in substance, a policy of insurance upon the life of the member." In *Rockhold v. Society*, 129 Ill. 440, 21 N. E. 794, it is held: "That the undertaking evidenced by the certificate is one of insurance * * * cannot be seriously questioned. It is an undertaking by a society, in view of the ascertained age and condition of health of one of its members, in consideration of a present payment of a sum of money and of the undertaking to pay other contingent sums in the future by him, to pay a sum to him, or to his widow or heirs, etc., contingent

as to time, upon the duration of his life; and it has been held that the undertaking is not the less a contract of insurance because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premium is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by members, the contract provides no means of enforcing payment thereof." It is stated in Bacon on Benefit Societies and Life Insurance (section 357): "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor." In *People v. Golden Rule*, 114 Ill. 35, 28 N. E. 384, it was held: "Although the payment of dues to a corporation on account of * * * assessments upon its members may be purely voluntary, persons may acquire legal rights to share in them when they are paid. Through forfeiture of benefits * * * payments of * * * assessments may be almost, if not quite, as effectually enforced as by legal process." In *Association v. Hunt*, 127 Ill. 257, 20 N. E. 55, it was held: "The contention is that the certificate of membership is a personal contract between the member and the association, and that, as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. We may admit in the broadest sense that these societies are founded upon the principles of entire mutuality in relation to burdens as well as benefits, yet we are unable to see how that principle places the membership of infants upon any footing different from that of adults. While the certificate of membership is a contract, such contract, in the absence of an express stipulation to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments, * * * the certificate becomes void, and the membership ceases. * * * 'The making of an assessment * * * does not make the member a debtor to the association, so as to authorize it to bring suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion.'"

Under these authorities, a contract for insurance in any benevolent association is a unilateral contract, and by the association provision is made that, for a failure to pay the assessments made on a member who holds a certificate, all benefits he may have under and by virtue of such certificate are forfeited, and all payments theretofore made are forfeited. Such is the rule with reference to insurance under almost all circumstances. If any other rule should exist than that a contract is purely unilateral, then, in effect, a partnership

would be formed by which every person insured would become liable to all others insured, and the benefits derived from life insurance would be rendered so doubtful and uncertain, and so prejudicial to those seeking insurance, that their individual interests would require them to abstain from taking out a policy or a certificate of membership. If by taking out a certificate of membership or a policy they create a continuous liability against themselves which might be enforced by the company, association, or by the court through its receiver, then few men would avail themselves of the benefits of a policy or certificate of membership which would create a liability they could not throw off at pleasure, but would make them indefinitely liable for assessments or premiums. The whole scheme of insurance is based on a contract purely unilateral, and, whether the payment for insurance be termed a premium or an assessment, the right of the association or company is to declare a forfeiture for nonpayment of premium or assessment, and not a right to recover assessment or premium in a suit. Section 1 of article 5 of the by-laws of the association of which appellee is receiver provides: "The board of directors shall furnish each member of the association with a certificate of membership, * * * which shall contain the agreement on the part of the association and the member." The certificate of membership provides "that the Masonic Benevolent Association of Central Illinois, in consideration of the representations and warrants made to it in the application for this membership, which is hereby made part," declares the application is a part of the certificate of membership and the basis of the contract. The application for membership declares: "I acknowledge and agree that the above statement shall form the basis of the agreement with the association, and constitute a warranty; and I further agree, if accepted as a member of the association, to faithfully abide by all its rules and regulations. Nor shall the association be liable for any benefit thereon until a certificate duly signed and sealed shall issue from the principal office of the association; or if any omission or neglect to pay any of the dues or assessments on the above on the dates on which they shall be due and payable shall take place, or if any fraudulent and untrue answers and misrepresentations have been made, in either event said certificate shall become null and void, and all money which shall have been paid forfeited." By this application and the certificate, each referring to the other, which must be taken together as constituting the contract, and by the by-laws above quoted, the agreement is contained in the certificate of membership and the application. By this application and certificate of membership there is no promise to pay, but a purely unilateral contract is made. Section 1 of article 3 of the by-laws provides that upon the death of a member the secretary shall send notice by mail of the assessment due from each mem-

ber, which shall be deemed and taken to be lawful and sufficient notice for the payment of the assessment called for, and any member failing to pay such assessment within 15 days after such notice shall forfeit his membership, and all benefits therefrom. By the provisions of the constitution of the association, section 1 of article 7 provides that upon the death of a member of the association each member shall be assessed and shall pay according to the class in which he is a member. This provision of the constitution and these several by-laws, together with the application and certificate of membership, must be held to create the contract of insurance between the association and the member. It is a contract of life insurance. By article 8 of the constitution it is provided a surplus fund shall be raised from admission fees, from that portion of the assessments not used for the payment of benefits, etc., and the surplus fund shall be limited to \$40,000, and shall be held for the following purposes: That benefits may be paid to the heirs of deceased members before assessments are collected from survivors; to insure stability and perpetuity, and make up deficiencies caused by those who fail to pay assessments, and to provide for contingencies that may arise; to pay for medical examinations, printing, and other expenses of management. Admission fees were in no way connected with mortuary assessments, except as provided by that article of the constitution under which benefits were to be paid to the heirs of the deceased members before assessments were collected from the survivors when it became necessary. When a person became a member of this association by an application and certificate of membership, which were to be considered together with the by-laws and constitution, he became entitled to all the benefits of membership, and by the payment he had thus made he paid for his insurance up to the time of the maturity of the next assessment upon the death of a member. The application, certificate of membership, and by-laws all provided that upon failure to pay any assessment for a death benefit within the time specified the certificate of membership shall become void, and the member shall forfeit all benefits in the association, and all moneys paid. The provisions of the contract make the forfeiture a part of the contract, and a failure to pay within the time limited causes the forfeiture, and the contract is self-executing in creating the forfeiture. In *Association v. Schauss*, 148 Ill. 304, 35 N. E. 747, as held in *Association v. Hunt*, supra, it is said the making of the assessment does not make the member a debtor to the association, so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. From the principles underlying the whole business of life insurance, whether by what may be termed the old companies, or by mutual benefit associations, the unilateral character of the contract is well expressed in the case last cited. The making of an as-

essment does not make the member a debtor to the association, so as to authorize it to bring a suit for recovery in case of his neglect or refusal to pay, and it would be an anomaly if the law would authorize a proceeding to be had by an officer appointed by a court of equity to have a recovery in favor of, and for the benefit of, a corporation, where the corporation itself could not sue and recover. No principle would authorize such a recovery.

It is insisted that a member who has had the benefit of insurance ought to be required to pay the death benefit of other members, who die while he thus had the benefit of insurance. The payment of admission fee is insurance in advance up to the maturity of the first assessment provided for by the constitution and by-laws and by the certificate of membership and the application. If he paid no more, he simply forfeited all that he had paid, and all benefits under his certificate, but had paid for all he had received. By paying the first assessment, and continuing to pay assessments thereafter, made from time to time, each time he so paid an assessment his assessment was for his insurance until the maturity of the next assessment. Only when he failed to pay an assessment made did he cease to be a member, and forfeit all benefits thereunder; and no equitable principle exists against a member, and to give the right of recovery against him who thus elects to no longer pay an assessment, and who has paid for all he received by way of insurance. By ceasing to pay, he ceases to be a member, and a forfeiture existed, and he acted in accordance with the contract, and he paid for all he received. The provisions of the constitution, by-laws, application, and certificate of membership provided for the payment of assessments, and also created the full penalty for the failure to pay such assessments, which is a forfeiture of insurance, of membership, interest in the surplus fund, and all benefits by reason of belonging to the association, together with all moneys paid.

Appellee urges the principles established in the case of *Association v. Rossiter*, 132 Pa. St. 314, 19 Atl. 140. In that case the application contained the agreement that "the members and beneficiaries shall jointly and severally be liable for all death claims," etc. The promise in that case is express and absolute, and constitutes a joint and several promise and undertaking, and cannot be held to constitute in the application a provision for a unilateral contract. Great reliance is had on the authority of *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384. In that case three of the seven judges dissented. The opinion of the court is based on the position that the contract is not really an insurance contract, and that the assessments ought to be treated, not as premiums, but as lodge dues. In the latter case the supreme court of Missouri said: "The unilateral feature contended for in this contract has been very generally imposed upon the contract of the regular, old-line,

premium-collecting life insurance companies. These companies were unable to commence business except upon capital paid in by the members or stockholders, to be used in meeting death losses as they occurred. Until called for, the capital, along with all premiums not wanted for expenses, was required to be invested for profit and accumulation. The premiums were paid annually, and invariably in advance. Upon payment of the first premium, as a condition precedent, the assured received a policy covering him for one year, with the option to continue it by payment of other premiums. This payment constituted the full consideration of value to be paid during the year of insurance. Nothing in the shape of dues or assessments could be exacted from him for the period covered by the premiums paid. If any of the old-line companies should suddenly stop insuring, and decline to issue another policy, every policy outstanding would be paid from the accumulated capital as it matured. An inability to do so would put it out of line in the business of insurance, and indicate that it had not been conducted and managed according to the principles upon which it was founded." But in speaking of the certificate in the Masonic Benefit Society of Missouri it was held: "Hence the certificate of membership in such an organization is a contract with every member of it, to be enforced by the managing officers as representatives or trustees for all the members of the concern. When the member joins, he pays the admission fee, which is to defray necessary expenses, but which is altogether too small to constitute a fund or capital wherewith to satisfy death losses. No fund or capital is kept on hand or invested for such a purpose. Indeed, the economy underlying the plan of the organization aims at doing away with the expense and loss incident to management, investment, and accumulation of capital. As a substitute therefor, each member promises to contribute an equal share with every other member upon occasion of every death in the membership, which is collected and paid over by the officers of the association to the wife or children of the deceased member, as the case may be. The ascertainment and declaration of death losses are left to the members of the association, and their action in that behalf is known as an assessment. They are bound to make these assessments on occasion of every death, and the wife or children of the deceased member or other beneficiary have the right to compel them to make and collect the assessments inuring to their benefit. It is manifest that these assessments, in their nature, bear a near resemblance to the dues incident to membership in a friendly society, and constitute a consideration for the promised insurance of the association, materially differing from the annual premium stock companies. When considered in the light of society dues, it will be admitted that a person cannot, by discontinuing his membership, escape the ob-

ligation of paying those dues which accrued before the termination of his membership." The contract in this case is in no sense for the assessment and collection of lodge dues. By the provisions of the constitution and by-laws of this association assessments made are not lodge dues, but are assessments for the payment of death benefits. The payment of the premium is optional with the insured, and, if he makes default, the insurer has no other remedy than a forfeiture of the policy. 2 May, Ins. (3d Ed.) § 341a. And the same principle applies to certificates issued by mutual benefit life insurance societies as is applicable to ordinary life insurance companies. In re Protection Life Ins. Co., 9 Biss. 188, Fed. Cas. No. 11,444; Nibl. Ben. Soc. & Acc. Ins. § 276; Bac. Ben. Soc. § 357. The constitution and by-laws define the duty of the association and its officers, and provide the mode of obtaining and maintaining membership. An applicant possessing certain qualifications provided in the constitution and by-laws, upon performance of certain things required therein, may become a member, and by doing and refraining from doing certain things required by the constitution and by-laws he may maintain his membership. If he fails to do any of the things required or does any of the things forbidden, he forfeits his membership, and all benefits and all interest in all the money he has paid. He agreed, in effect, that so long as he remained a member he would obey all the rules and regulations established for the government of the conduct of members, and the association on its part agreed that the sole and only penalty or liability for failure to obey should be the forfeitures above mentioned. There is no express, absolute promise to pay, or to continue to pay, assessments. There is nothing that can be tortured into a direct, express undertaking to remain a member, and continue to pay, as long as one lives. The language deliberately selected by the association in which to express its contract, as appears in the certificate, application, and by-laws, all makes the forfeiture self-executing; makes the member without any action on the part of the association, by mere force of his failure to pay eo instante, to cease to be a member. This is not like those cases where the association must do something or refrain from doing something to make the forfeiture complete. 148 Ill. 304, 35 N. E. 747. The language here is: "Any member failing to pay such assessment within fifteen days after such notice has been served upon him shall forfeit his membership in the association and all benefits therefrom." Under the holdings in the cases above cited the forfeiture is absolutely self-executing.

The reasons why the option is not with the association are apparent. We have no statute in this state concerning withdrawing members, or providing for any mode of withdrawing, etc., and no one ever contemplated

that every person who joins such an association or society is bound to stay in for life. There is no other provision in the constitution or by-laws of the association, in the application, in the certificate, or anywhere else, providing for the withdrawal of a member. Such contracts have heretofore always been considered unilateral, and so the whole plan for withdrawing is embraced in these self-executing clauses of the by-laws and contract. The member's failure to pay is his declaration of severance, and the forfeiture provided in the by-laws and contract is the association's compensation. The option is with the member, and not with the association. When appellant became a member, he was required, among other things, to pay a sum into the mortuary surplus fund. This sum was two maximum assessments on his \$4,000 certificate. This money went direct into the fund for paying death losses, not a cent of it for dues or expenses. This more than paid his insurance from the date of his admission to the date of the maturity of his assessment for the first death benefit after he became a member. When he had paid the first assessment, that paid for his insurance to the maturity of the second, and so on. The requirements for admission, not only in this association, but in all benefit associations or societies, more than cover the member's insurance from the date of his admission to the maturity of the first assessment after he becomes a member.

The statute under which the receiver was appointed contemplates that, if the court shall find that the association cannot longer continue in operation, and properly serve its purpose, then the court shall appoint a receiver, and wind up its affairs; or, if the court shall find that it might longer continue in business, and properly serve its purpose, if its officers would do their duty in making assessments, then the court need not appoint a receiver, and wind up the concern, but may order an additional assessment to be made to meet deficiencies, and allow the concern to continue in operation. This shows that the legislature treated these contracts as unilateral. It did not contemplate the making of an assessment after the association had been found unable to longer properly serve its purpose. It is true that, a receiver having been appointed by the court, the court has power independent of any statute to order him to collect assets, but that power does not change the character of the contract between the association and the member, and make the member a debtor who, by his contract, is not so. When such association or society for any reason becomes unable longer to properly carry out its purpose, some must lose. All must lose except those that died and were paid before the association became disabled. Those that have died, and not been paid, should have all there is left, and lose the balance; those who continue to live get nothing, and lose all. But

it is said those that continue to live had their insurance all the time. They had just that kind of insurance that those that died had, and no better, and paid just as much for it. Those that have died get the surplus fund, and whatever else there is, and those that have lived get nothing. The mistakes or mismanagement which caused the ruin, if fault of the members at all, was as much the fault of the dead as of the living, and was equally the misfortune of all.

A majority of the court holds that under the provisions of this certificate of membership, taken together with the application and the constitution and by-laws of this association, the contract was purely unilateral, and no right of recovery could be had thereunder by the association against the member, and for the same reason a recovery could not be had by a receiver appointed by the court to take charge of the assets of the association. The judgments of the appellate court of the Third district and of the circuit court of Coles county are each reversed, and the cause is remanded. Reversed and remanded.

BOGGS, J., took no part in the decision of this cause.

(174 Ill. 184)

SMITH et al. v. HENLINE et al.¹

(Supreme Court of Illinois. June 18, 1898.)

WILLS—CONCLUSIVENESS OF VERDICT—UNDUE INFLUENCE—ILLICIT RELATIONS—MENTAL CAPACITY—PRESUMPTIONS—EVIDENCE—INSTRUCTIONS.

1. The verdict in a suit in equity to set aside a will, based on conflicting evidence, and acted on by the trial judge, where not clearly against the weight of evidence, is as conclusive on appeal as if it were in an action at law.

2. Where the material evidence as to the validity of a will is irreconcilable, the decree of the lower court will not be disturbed, if the evidence of the successful party, when considered alone, is clearly sufficient to sustain the verdict.

3. A bachelor, 73 years of age, while stricken with aphasia, and unable to write or speak, except to mumble "Yes" and "No," signed a codicil by which he devised to defendants (his mistress and her daughter) some 800 acres of land, in addition to an hotel and 40 acres of land given them in the will. It appeared that he had sustained illicit relations with the elder defendant for some 25 years; that she had given birth to a daughter during the early years of such relations, soon after she was married to a third person, who shortly afterwards died; that thereafter the three lived together as one family, and for about five years previous to his death conducted an hotel; that at such time and previous thereto the daughter was living in adultery in the hotel, and the mother was carousing with another man; that in his last sickness the mother induced a friend of testator to ask him to will herself and daughter a certain 160 acres of land, and to tell him that his brothers refused to come to see him (which was false), and that both the mother and daughter would give up their lovers if he would will them the 160 acres; that on being told these things he only mumbled, "Ah," that on the next day, in the presence of only the mother, one of her friends, and a doctor, the will was drawn by a justice, who used a map of the

¹ Rehearing denied.

lands, and asked questions, to all of which testator responded simply by nodding his head; that his relatives were not present, nor informed of the making of the codicil. The nurse who attended him testified that he could not say a word which any one could comprehend. *Held*, that the codicil was properly set aside on the grounds of undue influence and mental incapacity.

4. A child born while its mother is living with her lawful husband is presumed to be legitimate.

5. An objection that the allegations of fraud in a bill are not sufficiently specific cannot be first urged on appeal.

6. A statement by a joint devisee showing an attempt to procure a third person to urge testator to give devisee and her co-devisee certain property is admissible against the co-devisee, where she has a joint interest in the suit to uphold the will.

7. On an issue as to whether a writing was the codicil of testator, it was not error to use the expressions "alleged execution of the codicil," and "supposed codicil," in the instructions.

8. An instruction that if fraud was practiced on testator in procuring the execution of the will, etc., is sufficient without stating the nature of the fraud, or by whom exercised.

9. The burden of proving a will and codicil is, in the first instance, on the proponents alleging their validity.

10. An instruction that "if you further believe from the evidence that he [testator] was too weak to resist repeated urging, and that undue influence was brought to bear on him," etc., is not defective on the ground that it assumes testator was subjected to "repeated urging."

11. Repeated urging of testator to make a will may be considered by the jury on an issue as to undue influence.

Appeal from circuit court, McLean county; Thomas F. Tipton, Judge.

Bill by James J. Henline and others against Dellilah Smith and others to set aside the will and codicil of David Henline. From a decree declaring the codicil void. Defendants appeal. Affirmed.

This is a bill filed by the appellees, as heirs of one David Henline, deceased, against the appellants, Dellilah Smith and Paulina Smith, and one Shelton Smith, executor, and others, as defendants below, to set aside the will and codicil of the said David Henline. The bill was answered by the defendants, and replication was filed to the answer. The bill sought to set aside the will and codicil upon the alleged grounds that the testator was lacking in testamentary capacity, and was subjected to undue influence from the arts and fraudulent practices of the defendants Dellilah Smith and Paulina Smith at or about the time of the execution of the will. The question as to the validity of the will and of the codicil was submitted to a jury. The jury returned a verdict finding the paper purporting to be the will of David Henline, deceased, to be his last will and testament, but finding the paper purporting to be the codicil of the last will and testament of David Henline, deceased, to be not the codicil thereto. In other words, the jury found in favor of the validity of the will, but against the validity of the codicil. The court below rendered a decree in accordance with the verdict of the jury, declaring the probate of the will to

be valid and binding, but declaring the instrument purporting to be the codicil to be null and void, and ordering the probate thereof to be set aside. The present appeal is prosecuted from the decree thus entered.

The will of David Henline bears date the 24th day of December, 1890, and was executed on that day. The codicil thereto bears no date, and is shown by the proof to have been made, if it was made, on April 22, 1895. David Henline died on May 4, 1895. The will and codicil were admitted to probate in the county court of McLean county on May 13, 1895. The will gave to Dellilah Smith and Paulina Smith, her daughter, to be held by them jointly, or the survivor of them, 40 acres of land in said county, and also 3 lots in the town of Lexington, in said county, on which was an hotel building. The will directed that if, at the time of the testator's decease, anything was due upon said 40 acres and said lots, payment should be made of the same, so that Dellilah Smith and Paulina Smith should have said premises clear of any incumbrance. The will also directed that the remainder of the testator's estate, both real and personal, should be distributed among his "legal representatives," in accordance with the statutes of Illinois, unless disposed of by him prior to his decease by deed or otherwise. Shelton Smith was appointed executor. The will was witnessed by John E. Covey and Alfred B. Davidson. The codicil is as follows: "I, David Henline, of Lexington, McLean county, Illinois, having made my last will and testament, dated the 24th day of December, 1890, I do by this, my writing, desire to add the following, and hereby direct that this shall be added to my said will, as a codicil thereto: Whereas, no particular bequest was made by me of the farming lands owned by me, and I now desire to make a specific bequest of a portion of said real estate, it is therefore my will, and I hereby give, devise, and bequeath to Dellilah Smith and Paulina Smith, jointly, eight hundred (800) acres of farming land now owned by me, and situated in sections sixteen (16), seventeen (17), nineteen (19), twenty (20), twenty-nine (29), thirty (30), and thirty-one (31), in township twenty-five (25) north, range five (5) east, third principal meridian; also, the northwest quarter of section twenty-four (24) north, range four (4) east, third principal meridian,—all in McLean county, Illinois. It is my will that the quarter section in Martin township shall be taken first, and the remainder of the eight hundred (800) acres shall be selected by the said Dellilah Smith and Paulina Smith out of any lands owned by me in Lawndale township in this will described. And it is my will that this codicil shall be attached to and form a part of my will, the same as if contained in my said will, and I direct that my executor do carry out the same in all respects." The witnesses to the codicil are W. Hill, Joseph Humphrey, and Alfred B. Davidson. The will is signed

by David Henline with a seal, but the codicil is signed by David Henline by his mark with a seal. It is admitted that a mistake was made in the description of a part of the property in the codicil. The number of the township in which one quarter section of the land was located is used instead of the number of the section, and the true number of the section is omitted.

T. C. Kerrick and Welty & Sterling, for appellants. A. J. Barr, B. F. McKennan, and Beach & Hodnett, for appellees.

MAGRUDER, J. (after stating the facts). The decree of the court below was in favor of the present appellants, so far as it held the will of the testator to be valid, and against the appellees, who sought to set aside the will as well as the codicil. The decree was adverse to the appellants in holding the codicil to be invalid and setting it aside, but in that respect it was in favor of the appellees. The present appeal, prosecuted by the appellants, seeks to reverse the decree in so far as it holds the codicil to be invalid. The appellees assign no cross errors in relation to that part of the decree which sustains the will, and make no complaint of the same. The only question in the case, therefore, is whether or not the codicil of the deceased testator, David Henline, was invalid and properly set aside.

The grounds upon which it is sought to impeach the codicil are lack of testamentary capacity, and the exercise of undue influence. As is usual in cases of this character, there is great conflict in the testimony. The appellants here (proponents of the will below) examined 26 witnesses. The appellees here (complainants below) examined 22 witnesses. Of these 48 witnesses, many give it as their opinion that the testator had such mental capacity as that he was able to transact ordinary business, while many of them are of the contrary opinion. In cases of this character the verdict of the jury is to have the same force and effect as is given to a verdict in a case at law under a like state of facts; and, when the verdict in such case is not manifestly against the weight of evidence, the court is bound by it in the same manner and to the same extent as if it were a case at law. The jury had before them and saw the witnesses. The judge who tried the case was satisfied with the verdict, and acted upon it. The evidence, particularly upon the question of mental capacity, is conflicting, but a careful consideration of it does not show that the finding of the court below is clearly against its weight. Where the testimony is thus conflicting, and is not clearly against the weight of the evidence, the finding of the jury must be regarded as conclusive. *Calvert v. Carpenter*, 96 Ill. 65; *Buchanan v. McLennen*, 105 Ill. 59; *Greene v. Greene*, 145 Ill. 271, 33 N. E. 941. There is another rule upon this subject well settled by the decisions of this court; and that rule

is that, where there is an irreconcilable conflict in the testimony touching the facts upon which the validity of the will depends, the decree of the lower court will not be reversed, if the evidence of the successful party, when considered alone, is clearly sufficient to sustain the verdict. *Calvert v. Carpenter*, supra; *Moyer v. Swygart*, 125 Ill. 268, 17 N. E. 450; *Bevelot v. Lestrade*, 153 Ill. 629, 38 N. E. 1056; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113. A reference, however, will be made to some of the facts, so far as it is necessary to understand the questions of law involved, and the objections made to the admission of evidence and to the instructions given upon the trial of the case in the court below.

The deceased, David Henline, was about 78 years of age when he died, on May 4, 1895. He was a bachelor, never having been lawfully married. He had two brothers at the time of his decease, named William and John, and several nephews and nieces. He had been engaged in business with his brother William many years, and was a partner with him in the ownership of a considerable quantity of land. In 1868 or 1869 the brothers met with reverses in business. David's mind seemed to have been so seriously affected thereby that he secluded himself in a room in the second story of his house for about a year, and during that time declined to do any business. During the remainder of his life he permitted his brother William to manage their business, and relied mainly upon his judgment in matters relating thereto. It is conceded by both parties that the deceased for many years prior to his death (perhaps as much as 25 years) sustained illicit relations with the appellant Delliha Smith. Some time after this illicit relationship began, the said Delliha married a man by the name of Smith, with whom she went to Missouri, and there lived for some months. During their stay there the appellant Paulina Smith was born. Not long thereafter Delliha Smith and her husband returned to McLean county, where Smith died, and David Henline and Delliha Smith and Paulina Smith (the latter being called in this record "Susie Smith") lived together as one family until the death of David Henline. It is claimed by counsel for appellants that Paulina Smith was the daughter of David Henline; but she was born in lawful wedlock, while Delliha Smith and her husband were living together, and the presumption of law is that she was their child. In 1890 the deceased, David Henline, while living with Delliha Smith, and while sick in bed, was induced to buy an hotel in the town of Lexington for the sum of \$4,000. He moved into the hotel with Delliha Smith, who took charge thereof, and he lived there with her and her daughter until his death. While he was sick in the hotel in 1890 he made his will, dated December 24, 1890. In the summer of 1894 the deceased complained of a numb feeling in his right foot, leg, and hand, and said that "it divided

him up the back of his right side, and when it got to his head he did not know anything, and he felt as if he was cut in two." About April 15, 1895, while visiting with one of his brothers, the deceased, David Henline, was taken sick, and complained of the numbness in question, and said of it, "When it gets into my head, I don't know anything." One of his brothers took him to the hotel at Lexington on Monday, April 15, 1895. On the afternoon of Tuesday, April 16, 1895, he was obliged to go to bed, and remained there until he died. He was paralyzed. The right side of him and his right hand were numb and dead. He was unable to sit up in bed, and had to be propped up. He lost his power of articulation, and was unable to talk or to write. He did not recognize his friends, and, when spoken to, could only answer a part of the time "Yes" or "No," and a part of the time he would mumble out, in reply to questions, some such expressions as "Um" and "Ah." Those waiting upon him were obliged to rub his hands and body in order to promote circulation of the blood. The disease of which he died was softening of the brain. This disease progressed, and more and more affected his brain, from the time he went to bed, on Tuesday, April 16th; up to the day he made his mark to the codicil, which was Monday, April 22d. During the week before the codicil was signed, Delilah Smith and her daughter, Paulina Smith, were living in the hotel where the deceased was lying sick, and most of the time were in the same or an adjoining room. The testimony shows that at this time, and for some time before, the appellant Paulina Smith was living at the hotel in a state of adultery with a man named Al. Smith, the son of Shelton Smith, the executor named in the will. Al. Smith lived at the hotel, or was there most of the time, and was the father of an illegitimate child by said Paulina. A man named William Costello lived and boarded at the hotel. One of the witnesses says that one evening, during the sickness of the testator, Delilah Smith and Costello were in the cellar drinking beer; they had a keg of beer there, and made such a noise as to seriously disturb the deceased.

On the evening of Wednesday, April 17th, one Buel Stevens, a livery stable keeper in Lexington, was sent for by Delilah Smith, and had a talk with her and her daughter at the hotel. She requested Stevens to go into the room where the deceased was sick, and ask him to make a will giving a certain 160 acres of land to her and her daughter, Susie or Paulina. Stevens went into the room in pursuance of this request, and asked the deceased if he would make such a will. He refused to do anything of the kind. Again, on Sunday morning, April 21st, Delilah Smith went to the stable after Stevens, but failed to find him in his stable. Later in the day she sent a messenger for him, but still failed to find him. On Sunday evening,

April 21st, Joseph Humphrey was present in the room where Al. Smith and Mrs. Smith and Susie were. He came to inquire how David Henline was, and was requested by Delilah Smith to go in and talk to the testator upon the subject of making a will; but Humphrey declined to do so, and told them to send for Stevens. He says, however, that he went into the room where the deceased was, and the latter was lying with his eyes and mouth half open, and seemed to be half asleep. Al. Smith then went for Stevens, and Stevens came over. Stevens says that Mrs. Smith had sent over and requested him to come immediately; that he found Mrs. Smith and her daughter and Humphrey; that Mrs. Smith told him she wanted him to talk with David; that she said she thought David was crazy; that she wanted him to tell David she had sent for his brothers, William and Jack, and his nephew John, and that they would not come to see him, and were only waiting for him to die to get what property he had. She had not sent for his brothers and nephew as she thus stated. She also told Stevens to tell him that if he would make a will, and give her and Susie the 160 acres, "she would fire Costello, and Susie would fire Smith." Stevens says that he told her it would do no good, as he had tried the same thing on the Wednesday previous without success, but that he went in to see the deceased at her request, and spoke to him. He was lying on his left side; he paid no attention. Stevens sat down by his side and took hold of his hand. It was cold. He asked him how he was feeling. He made a mumbling noise, and said, "Ah, ah, ah." Stevens further says that he told the deceased that he had been talking to Delilah and Susie, and they said they had sent for his brothers and nephew, and they refused to come and see him; that Delilah and Susie had promised that if he would make a will, and give them 160 acres of land, Susie would fire Al. Smith, and she would fire Costello. All Stevens could get out of him was the mumbling noise heretofore referred to. At times he seemed to know what Stevens was talking about, and again he seemed either not to know, or paid no attention. He would turn his head away. Stevens returned to the room where Mrs. Smith and Paulina and Humphrey were, and told them that he had stated to the deceased all that he had been requested to state. A day or two before this, Shelton Smith, the father of Al. Smith, had gone to a justice of the peace to get a description of the land owned by the deceased. This was done at the request of Delilah Smith. On Monday morning, April 22d, a justice of the peace named Davidson was seen by Stevens or Smith, and requested to come to the hotel to make the codicil. When the codicil was made, Delilah Smith and Shelton Smith were in the room. A doctor named Hill and the justice, Davidson, were also there. It appears from the testimony

of these witnesses that the deceased was unable to write; that a slate and pencil were brought in and handed to him, but he shook his head, not being able to use them; that he could not tell what he wanted, except as questions were asked; that a map was used and pointed to to indicate the location of his lands, but to all that was said and done he merely nodded his head and said nothing; when the mark was made, Davidson held the pen, and the deceased took hold of the top of it, and Davidson wrote his name. Dr. Hill says that he had the disease of the brain which causes aphasia, an impairment of the mind; that the cause of his death was the spreading of the disease over his brain; that his mind was impaired so far that he could not use language, and could not write, and all he could do was to nod and shake his head; that his cerebrum was probably inflamed at that time. None of his relatives were present when the codicil was made, and none of them were informed of the making of it until after his death. Mrs. Edwards, an old lady, and the mother of the appellant Dillah Smith, says that her daughter refused to send for the deceased's brother William; that she (Mrs. Edwards) nursed the deceased during his sickness; that they could not understand what the deceased said or wanted; that she tried to make him understand, but he could not say a word that any one could comprehend.

In view of such testimony as has been above referred to, we are unable to say that the jury were not justified in returning the verdict which they rendered. The existence of an illicit relation between a deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law, but undue influence is more readily inferred in case of a will made in favor of a mistress than in the case of a will in favor of a wife. The existence of the relation is a circumstance to be considered by the jury along with other facts in the case. "The influence of a lawful relation may result in testamentary dispositions which ought not to be set aside, when, if they resulted from the influence of an unlawful and immoral relation, they would produce deep suspicion;" the question to be determined being whether the influence exerted was undue or not. The jury have a right to consider the fact of the unlawful relationship where there is proof, as there is in the case at bar, tending to show constraint and interference, impaired mental capacity, loss of will power, and sickness or disease at the time of the making of the will. *McClure v. McClure*, 86 Tenn. 174, 6 S. W. 44; *In re Johnson's Estate*, 159 Pa. St. 630, 28 Atl. 448; *Monroe v. Barclay*, 17 Ohio St. 302; 27 Am. & Eng. Enc. Law, p. 514. This codicil was drawn, in the absence of the near relatives of the deceased, at the instance and dictation of the beneficiaries in the will, and after false statements made by them as to the conduct and feelings of the

absent relatives; and its terms are hostile and opposed to the terms of the will of December 24, 1890, executed in favor of such beneficiaries. These beneficiaries, moreover, lived with the testator, who was old and feeble. His mind was evidently so impaired that he was more or less under the domination of Dillah Smith and her daughter. The will previously executed had given appellants 40 acres of land, and an hotel building, and had given the remainder of his property to his legal heirs or representatives. The codicil signed by the testator under the circumstances already detailed went further, and gave them 800 acres of land in addition to what had been devised by the terms of the will. There is nothing in the testimony of the witnesses to show that the previous will was present or called to the attention of the testator when he signed the codicil, although the codicil, upon its face, refers to the will. The proof also shows that the quantity of land mentioned by Mrs. Smith in her instructions to Stevens as being desired by her through the will of the deceased was 160 acres. Humphrey also testifies to 160 acres of land as being the amount mentioned in the conversation. But when the codicil was drawn the quantity of land given thereby was 800 acres, instead of 160 acres. It appears that a map was used for the purpose of calling the attention of the testator to the location of the lands, but whether he in any way pointed to or designated the particular sections referred to in the codicil does not clearly appear. Many authorities mention as features unfavorable to the validity of a will, and as indicating the probable exercise of undue influence, such concurring circumstances as the following: The departure from the terms of a previous testamentary disposition; the false impressions under which the instrument is made; the active agency of the beneficiary in procuring it to be drawn; the absence of those who had at least equal claims upon the justice of the testator; old age, accompanied by feebleness and disease. *Tyler v. Gardiner*, 35 N. Y. 559; *Delafield v. Parish*, 25 N. Y. 85; *Blewitt v. Blewitt*, 4 Hagg. 463; *Greenwood v. Cline*, 7 Or. 17; *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614, and note to same in 81 Am. St. Rep. 685; 2 Lead. Cas. Eq. p. 2, par. 285. Where a will is procured to be written by persons largely benefited by it, it is a circumstance to excite a stricter scrutiny, and requires stricter proof of volition and capacity. *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Byard v. Conover*, 39 N. J. Eq. 244. The latter case of *Byard v. Conover* is somewhat similar in its facts to the case at bar. There a bachelor, 72 years old, while in a moribund condition, signed a paper purporting to be a will, giving all his property to his housekeeper, who had lived with him for many years, and who had previously prepared the paper which was signed; none of the testator's brothers

and sisters were present, or informed of the making of the will; and it was held that the paper should be refused probate on the ground of want of capacity and undue influence.

It is only necessary to notice certain objections urged upon our attention by counsel for appellants. It is said that the allegations of the bill are not sufficiently specific in relation to the charges of fraud. This specific objection was not made in the court below, either by demurrer to the bill, or in opposition to the introduction of testimony, and consequently cannot be made here for the first time. If the allegations were not sufficiently specific in this regard, and attention had been called to them in the court below, the complainants there might have been permitted to amend their bill. *Society v. Price*, 115 Ill. 635, 5 N. E. 126.

It is said that the court below improperly admitted the conversation had between Mrs. Smith and Stevens in regard to what the latter was to say to the deceased upon the subject of making his will. Stevens must be regarded as the agent of Mrs. Smith and her daughter to communicate their wishes to the deceased in regard to the will. What she told Stevens to say to the deceased was so told on the evening before the codicil was executed, while she and her daughter were in a room adjoining that in which the deceased lay, and was for the purpose of influencing the deceased's mind to make his will or codicil in a certain way. The main objection made to this testimony is that Mrs. Smith and her daughter were both legatees under the will, and that admissions and statements of one legatee prejudicial to the will cannot be admitted where there are other legatees. As we read the testimony, both of the legatees, to wit, Mrs. Smith and Paulina Smith, her daughter, were present when the conversations were had with Stevens and Humphrey in reference to the communications to be made to the deceased. By the terms of the will and codicil Mrs. Smith and her daughter were joint devisees. The property was devised to them jointly. Where the interest of the devisees is joint, the evidence may be admitted against all of them; and where the parties have a joint interest in the matter in suit an admission made by one is, in general, competent evidence against all. *McMillan v. McDill*, 110 Ill. 47; *Insurance Co. v. Wilkinson*, 53 Ga. 535. Under our statute, parties are permitted to create the common-law estate of joint tenancy, with its common-law incidents, by expressly declaring in the instrument executed that the estate conveyed shall pass in joint tenancy. *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. 81.

The first instruction given for the appellees is criticised because it uses the expressions "alleged execution of the codicil" and "supposed codicil." It is said that the use of the words "alleged" and "supposed" was equivalent to telling the jury that the codicil was not the real codicil of the testator. We do

not think so. The proponents of the will allege that the codicil was valid. The appellees deny that it was valid. To speak of it as an "alleged" codicil was no more casting discredit upon its validity than to speak of it as the "codicil" without the use of the word "alleged" would have been to make an announcement in favor of its validity. The question submitted to the jury in this case was whether "the writing read in evidence, purporting to be the codicil of the will of David Henline, deceased," was really his codicil. This is the form of expression used in all cases of contested wills where the question whether the paper is a will or not is to be submitted for their determination to the jury. It cannot be said that, because the instrument is spoken of as one "purporting" to be a codicil, the jury are thereby instructed that it is not a codicil. An instruction making use of the word "alleged" in the same way in which it is here used was given in *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080, and was approved by this court.

The first instruction given for the appellees is also criticised because of the following language: "The court instructs you that if you believe from the evidence that fraud was practiced on David Henline, deceased, in procuring the alleged execution," etc. It is said that the instruction is defective, in not indicating the nature or character of the fraud, or the persons by whom it was exercised. Undue influence, to avoid a will, must be such as to overcome the free agency of the testator at the time the instrument is made, so as to substitute the will of the beneficiary, or some other person, for his will. What constitutes such undue influence will depend upon the circumstances of each case. But undue influence is a species of constructive fraud, which the court will not undertake to define by any fixed words. Its exercise may be inferred in all cases where the power of the person receiving a devise or other like benefit has been so exercised upon the mind of the donor as, by improper arts or circumvention, to have induced him to make the devise or confer the benefit contrary to his deliberate judgment and reason. *Shipman v. Furniss*, 69 Ala. 555. It is immaterial by whom the undue influence is exercised,—whether by a beneficiary or an outsider. 27 Am. & Eng. Enc. Law, pp. 500, 501. The instruction was not erroneous for the reasons stated.

The second instruction is objected to because it tells the jury that the law in the first instance casts the burden of proving the will and codicil upon the proponents alleging their validity. Such is the rule which has been adopted by this court in a number of decisions. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113. It is said, however, that under this instruction the jury could not know that, after the burden of proof was in the first instance put upon the proponents, it had shifted to the contestants. If this was a defect, it was cured by the first instruction given for the

contestants. The latter instruction told the jury that when the proponents had proven the due execution of the will and codicil in question, and the capacity of the deceased to make the same, by the signing witnesses, a prima facie case was made out in favor of the validity of the will and codicil, and then the burden of proof was shifted to the complainants to prove by a preponderance of the evidence some one or more of the grounds alleged against the validity of the will and codicil.

Objection is also made to the fourth instruction given for the appellees. This instruction is unobjectionable, as it merely told the jury, in substance, that the condition of the testator's mind at the time of the execution of the will was the real subject of inquiry. Such is the law. The sixth instruction given for the appellants announced the same rule, namely, that the deceased must be competent to make a will at the time when he made the codicil in question. The real question is whether the testator, at the time of making the instrument purporting to be his will, had such mind and memory as to enable him to understand the particular business in which he was engaged. *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361.

The objection to the fifth instruction given for the appellees is disposed of by what has already been said in regard to the first. The seventh instruction given for the appellees, which defines what constitutes testamentary capacity, or a sound and disposing mind, agrees with the views on this subject laid down by this court in *Campbell v. Campbell*, supra, and *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698.

It is said that the eleventh instruction assumes that the testator was subjected to "repeated urging," and for this reason is defective. The instruction used the following language: "If you further believe from the evidence that he was too weak to resist repeated urging, and that undue influence was brought to bear upon him," etc. The instruction does not make the assumption charged against it, but leaves it to the jury to find whether, as a fact, there was repeated urging. There was evidence in the record tending to show that the testator was at least twice urged to make a will in behalf of the defendants. Counsel say that repeated urging does not constitute undue influence. Whether it does or not will depend upon circumstances, and certainly repeated urging, in connection with other facts, may be considered by the jury in determining whether undue influence was exercised. The instruction does not state that repeated urging is undue influence. Undue influence, however, has been defined to be "any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely." 27 Am. & Eng. Enc. Law, p. 453.

Some other objections are made to the in-

structions, but we do not deem it necessary to discuss them. Upon a careful review of the whole record, we are of the opinion that the decree of the court below was right. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(151 Ind. 197)

MAIER et al. v. BOARD OF PUBLIC WORKS OF CITY OF EVANSVILLE et al.

(Supreme Court of Indiana. Oct. 5, 1898.)

APPEAL—REVIEW—EVIDENCE—OPINIONS—MUNICIPAL CORPORATIONS—CONTRACTS—FRAUD—NEW TRIAL—SPECIFICATIONS.

1. A finding sustained by the evidence will not be disturbed because a contrary finding would have been warranted.

2. Testimony that the time limited for completing a paving contract was too short is an opinion on a question of fact, and hence inadmissible.

3. A motion for new trial because "the court erred in allowing S. to testify about a paper on American vitrified brick pavements" is insufficient to raise a question of error in permitting S. to testify that he obtained information as to the quality of brick pavements by reading a certain paper.

4. On an issue whether a municipal paving contract was obtained through fraud, testimony of municipal officers charged with its letting, that they obtained information of the quality of different kinds of pavement proposed by different bidders by reading a certain paper, is admissible.

5. A specification in a motion for a new trial that "the court erred in striking out a portion of the testimony of the plaintiff relating to his feelings in the matter" does not sufficiently identify the testimony.

6. On an issue whether a contract for a municipal improvement was obtained through fraud, the opinion of a witness that the contract was not honest is inadmissible.

7. The rejection of evidence cannot be reviewed unless the admissibility of the proposed evidence is shown, although the objection to the evidence was merely that it was irrelevant and incompetent.

Appeal from superior court, Vanderburgh county; John H. Foster, Judge.

Action by Peter Maier and others against the board of public works of the city of Evansville and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

S. R. Hornbrook and W. W. Ireland, for appellants. Gilchrist & De Bruler, for appellees.

McCABE, J. The appellants sued the appellees to set aside a contract by which the board had, through alleged fraud, collusion, and favoritism with appellees Eichel, Arnold & Co., awarded them the contract for paving Sixth street, in the city of Evansville, at a higher price per square yard than was offered in another bid for the same work by the firm of Welkel & Nugent. The issues formed were tried by the court, resulting in a special finding of the facts, on which the court stated conclusions of law leading to judgment that the plaintiffs take nothing by their suit, the court having overruled the

plaintiffs' motion for a new trial. The errors assigned call in question the conclusions of law and the action of the superior court in overruling appellants' motion for a new trial. The only brief filed by the appellants within 60 days next after the submission of the cause in this court is such as we would be justified in holding not a brief, within the meaning of the rule, and in treating the errors as thereby waived. But we waive that defect, and decide the questions discussed in appellants' second brief. The special finding not only wholly fails to find the charges of fraud, collusion, and favoritism true, but specifically finds that each and every one of such charges is untrue. Therefore the conclusions of law authorizing and requiring judgment for the defendants were not only not erroneous, but were correct.

It is contended, however, that a contrary finding was authorized by the evidence. But there was ample and most abundant evidence to justify and warrant the finding made. Though some items of evidence, taken alone, might have warranted a different finding, we cannot reweigh the evidence, and correct any supposed error in the court's estimate of its weight, so long as there was, as was the case, evidence, taken alone, amply sufficient to warrant the finding made.

There was no error in refusing to permit the witness Thompson to state his opinion as to whether the time limited in which the work should be completed was too short, for many reasons. An all-sufficient reason is that it was not a question of science or skill, but was simply a question of fact.

It is complained that the trial court erred in permitting James Saunders to testify as to extensions of time given to the Indiana Contract Company or appellees Elchel, Arnold & Co. to finish other contracts. This evidence was wholly immaterial to the issues, and ought to have been rejected, but its character is such as, when considered along with the other evidence, it could not have harmed the appellants. Nor was there any error in allowing Saunders to testify that he and other members of the board obtained information as to the quality of certain bricks to be used from statements they had read in a certain paper taken by the board. The motion for a new trial is too general, however, to raise any question as to that point. It states that "the court erred in allowing James D. Saunders to testify about a paper on American vitrified brick pavements."

It is complained that the court erred in striking out certain evidence. The specification in the motion for a new trial is: "The court erred in striking out a portion of the testimony of the plaintiff relating to his feelings in the matter." This language does not point out or identify with sufficient certainty the testimony stricken out. But there was no error in striking it out, because it was only an expression of his opinion about the contract, that it was not honest.

It is objected that the court sustained an objection to a question where no other objection was stated to the question than that it was "irrelevant and incompetent." Had such an objection been overruled, it would have been insufficient to raise any question; but, as the objection was sustained, the ruling cannot be successfully assailed, unless the proposed evidence is shown to be admissible. That has not been done. The court did not err in overruling the motion for a new trial. Judgment affirmed.

(151 Ind. 173)

M. A. SWEENEY CO. et al. v. FRY.

(Supreme Court of Indiana. Oct. 4, 1898.)

PAYMENT—APPLICATION—NEW TRIAL—MOTION—APPEAL—ASSIGNMENT OF ERRORS—REVIEW.

1. A creditor placed in charge of the debtor company as treasurer, with authority to pay himself out of the money coming into his hands as treasurer, may apply the money on his unsecured claims instead of those secured.

2. The supreme court will not disturb a verdict merely on the weight of the evidence.

3. A joint motion for new trial is properly overruled if not well taken as to all.

4. A joint assignment of errors is not available unless it is good as to all joining.

Appeal from circuit court, Clark county; Jacob Herter, Special Judge.

Suit by Jacob S. Fry against the M. A. Sweeney Company and Mary Carroll. There was a judgment for plaintiff and an order overruling a motion for new trial, and defendants appeal. Affirmed.

Chas. P. Ferguson and Jonas G. Howard, for appellants. M. Z. Stannard, for appellee.

MONKS, J. Appellee was plaintiff in the court below, and recovered judgment against appellants for \$5,618.57, and for the foreclosure of a mortgage executed by appellant Carroll on certain real estate in Clark county, Ind. Appellants' joint motion for a new trial was overruled, to which they excepted.

It is contended by appellants that the court erred in overruling the motion for a new trial. The ground of this contention is that the evidence was not sufficient to sustain the finding of the court in favor of appellee. The note sued upon was for \$10,000, executed by appellant the M. A. Sweeney Company, as principal, and Mary Carroll, as surety, payable to appellee. The note was secured by a mortgage on real estate executed by said Carroll. The M. A. Sweeney Company was engaged in the foundry and shipyard business. There was evidence that said company was insolvent, and had a contract to build several boats for the government, and appellee was surety on the bond given to secure the performance of said contract. Appellee loaned said company \$10,000 to enable it to purchase material and pay for labor in the construction of said boats, in consideration of which the note and mortgage sued upon were executed. Afterwards said company entered into other con-

tracts to build boats for the government, and appellee advanced for and loaned money to said company, and became its security to others for money borrowed, to carry on its business. The money so advanced and loaned, including the \$10,000 for which the note and mortgage were given, amounted to \$42,486.07. At the time the \$10,000 note was executed, appellee was elected treasurer of the M. A. Sweeney Company, in order that he might become familiar with its affairs, and see to the application of its money and to the payment of bills. The arrangement was that appellee had the right to apply the money that came into his hands as such treasurer to the payment of the money advanced by him to the company, and to the payment of accounts due him from the company, and to the payment of bills for which he was responsible. He was to have full control of the money as such treasurer, in order that he might protect himself. The amount for which said company was liable to appellee, not including the \$10,000 note, was \$32,486.07, and appellee's evidence was that he had been repaid by the company only \$30,483.06 thereon. Items amounting to \$8,913.28, included in the \$42,486.07, were disputed by appellants, and appellants also claimed that appellee should be charged with \$36,455.22, instead of \$30,483.06, as testified by him.

Under the facts as testified to by appellee, he had full power, as treasurer of said company, to pay the indebtedness of said company, so as to protect his own interests. He was authorized to apply the money of said company in his hands to pay the debts for which he was liable as surety or otherwise to others, and to pay the indebtedness to himself which was unsecured before paying that for which he held security. Even if no such agreement had been made, or if he had not been the treasurer of said company, and the company had paid him the money received by him without any directions as to how it should be applied, he had the right to apply the same to the payment of the unsecured indebtedness of said company to him instead of the secured indebtedness. 1 Beach, Cont. § 390; Wood v. Callaghan, 81 Mich. 402, 28 N. W. 162; Bank v. Lewis, 78 Wis. 475, 47 N. W. 834; Haynes v. Nice, 100 Mass. 327; Publishing Co. v. Utley, 155 Mass. 366, 29 N. E. 635; Cohen v. Bank, 29 Fla. 655, 11 South. 44; Henry v. Dietrich (Super. Buff.) 7 N. Y. Supp. 505; Brownlee v. Goldthalt, 73 Ind. 481.

As to the disputed items on either side, there was a sharp conflict in the evidence, and there is nothing in the record showing what disposition the court made of any particular one of them. It is evident, however, that appellee was not allowed all of the items of credit which he claimed, or that the court charged him with money he denied receiving. There was evidence given which, if true, fully sustained the finding of the court that there was due appellee from appellants upon

the \$10,000 note the sum of \$5,618.57. Indeed, if the finding had been for a much larger amount, this court could not have interfered therewith, under the well-settled rule that this court cannot disturb a verdict merely on the weight of the evidence. Schmidt v. Zahrdt, 148 Ind. 447, 457, 47 N. E. 335, and cases cited; Childers v. Bank, 147 Ind. 430, 436, 46 N. E. 825, and cases cited; Smith v. McClure, 146 Ind. 123, 124, 44 N. E. 1004, and cases cited; Giles v. Canary, 99 Ind. 116, and cases cited.

Appellant Mary Carroll claims that under the evidence, even if there could be a recovery against the M. A. Sweeney Company, there should be none against her. It is sufficient to say that the motion for a new trial was made jointly by the M. A. Sweeney Company and Mary Carroll, and, if not well taken as to both, was properly overruled. Appellants also united in a joint assignment of errors. It is well settled that a joint assignment of errors is not available unless it is good as to all, and that a joint motion for a new trial is properly overruled if it is not good as to all. Earhart v. Creamery Co., 148 Ind. 79, 80, 47 N. E. 226, and cases cited; Armstrong v. Dunn, 143 Ind. 433, 437, 41 N. E. 540, and cases cited; Goss v. Wallace, 140 Ind. 541, 543, 39 N. E. 920, and cases cited; Carver v. Carver, 97 Ind. 497, 520; Wolfe v. Kable, 107 Ind. 565, 566, 8 N. E. 559, and cases cited; Elliott, App. Proc. § 839. If said appellant Carroll claimed any right as surety different from the rights of the M. A. Sweeney Company, she should have filed a separate motion for a new trial and a separate assignment of errors. Finding no available error in the record, the judgment is affirmed.

(151 Ind. 182)

COTTERELL v. KOON et al.

(Supreme Court of Indiana. Oct. 4, 1898.)

JUDGMENTS—COLLATERAL ATTACK.—FRAUD—PARENT AND CHILD—FINDINGS.

1. A judgment regular on its face, but fraudulently procured, may be attacked collaterally, an attack on that ground being regarded as direct.

2. In cases not governed by the statute of fraudulent conveyances, which provides that the question of fraudulent intent is one of fact, special findings need not include a finding of fraud as a substantive fact. It is sufficient if the facts found show fraud.

3. A life tenant obtained a judgment quieting title in himself against the remaindermen, who were his children, by securing the appointment of a guardian ad litem for them without their knowledge, and inducing him to consent to the decree under a belief that it was a mere matter of form. The children were in his custody, and the age of the eldest was five years. *Held*, that the judgment was void.

Appeal from circuit court, Montgomery county; J. M. Rabb, Special Judge.

Proceedings by Frank Cotterell, administrator of the estate of George W. Koon, deceased, against Serena A. Koon and others, to sell realty. There was a judgment adjudging decedent's interest in the realty to be a life

estate only, with remainder to his children, and petitioner appeals. Affirmed.

Paul & Van Cleave and W. B. Paul, for appellant. Kennedy & Kennedy and Ristine & Ristine, for appellees.

HACKNEY, C. J. The questions for decision in this case arise upon the finding and decree of the circuit court setting aside and annulling a judgment in favor of George W. Koon, now deceased, and against the appellees, quieting the title to certain real estate. The court found the facts specially, and stated conclusions of law thereon, in substance as follows: John Koon died, testate, in Montgomery county, in October, 1882, leaving a widow and several children, among them his son, the said George W. Koon, then a youth of 16 years of age. By an item of his last will, he gave to his widow, Mary Koon, the land in question, at her death "to go to and become the property of * * * George W. Koon, to have and to hold during his natural life, and at his death to go to his children should he leave any surviving him; if not, then said lands to go to and be equally distributed amongst" the testator's surviving children and the children of such as may be dead. George W. Koon married, and prior to March 1, 1894, had three children. On the 24th of January, 1894, his mother conveyed to him her interest in said lands. On said 1st day of March, 1894, he instituted suit in the court below against his said three children and the heirs at law of said John Koon, deceased, to quiet in him the title to said lands. At that time the said three children were Nellie T., aged five years; James R., aged four years; and Alice M., aged one year. They were living with their father, and were under his control, having no legal guardian of their persons or property. That, while they were served with process, there was no appearance by or for them, excepting as hereinafter stated. That all other defendants therein were merely nominal parties, and filed an answer consenting to a decree in favor of the plaintiff therein. The court further finds that one —, a young lawyer, and a member of the bar of said court, was selected by the plaintiff therein to act as the guardian ad litem for said infant defendants, and his appointment as such was made by the court upon the request of the plaintiff; that said — accepted said appointment with the understanding and belief that his duties were merely formal; that he had no knowledge of the nature of the action, or how the same was to affect the interests of the persons for whom he acted; that he accepted the appointment only "for the purpose of accommodating the plaintiff in the procurement of the order of court and decree he desired in said cause; that the answer of the guardian ad litem was prepared for his signature by the plaintiff's attorney; that said guardian ad litem sign-

ed said answer, and the same was filed by plaintiff's attorney"; and that he gave no further attention to said cause, and took no steps to protect the interests of said infants. On the same day of said appointment, the cause was submitted to the court with a hearing from no one but the plaintiff, and without objection, exceptions, cross-examination of witness, or other participancy by said guardian ad litem or any other for said children, and the court thereupon rendered a decree in favor of said plaintiff. On the 19th day of April, 1895, a fourth child, Walter R., was born to said George W. Koon; and thereafter, on the 5th day of March, 1896, said George W. departed this life, leaving his said wife, as his widow, and said four children, him surviving. Said widow and children are the appellees herein, and the appellant is the administrator of the estate of said George W., deceased, and seeks to subject said lands to the payment of the debts of said estate. Upon the facts found, the court concluded, as matters of law: (1) That the said will vested the fee in said four children, subject to a life estate; (2) that the judgment in favor of George W. Koon was void; and (3) that said life estate was subject to sale by the administrator.

It is urged by the appellant's counsel that the facts found were insufficient to support the conclusions of law, because there was no finding that the judgment sought to be vacated disclosed its invalidity. The rule in collateral attacks would probably require such a finding, but an attack upon a judgment for fraud in its procurement is regarded as a direct attack, which is permitted, notwithstanding the decree or judgment questioned may appear upon its face in all respects regular and valid. *Wilhite v. Wilhite*, 124 Ind. 226, 24 N. E. 1039; *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 809; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140. It would certainly be a rare instance in which the decree would disclose the fraud or imposition upon the parties or upon the court.

It is further urged for the appellant that the findings were insufficient in failing to find as a fact the existence of fraud in the procurement of the judgment. This insistence is made upon the authorities which hold that, in actions for fraud upon creditors, the existence of fraud must be found and stated in the special finding as a substantive fact. Such authorities are numerous, but in this state they have their support from a provision of the statute of frauds that "the question of fraudulent intent, in all cases, arising under the provisions of this act, shall be deemed a question of fact." It is enough to say that the rights of the appellees do not depend upon the statute of frauds. The appellant insists, however, that this rule has been held to apply to cases not falling under the statute, and several decisions are cited. Every one of such decisions involves

a question of fraud upon creditors. In some of the cases are expressions to the effect that in this state there is no such thing as constructive fraud, and in others that fraud, actual or constructive, is a question of fact. These cases involved questions under the statute, and such expressions were doubtless applicable. When such expressions were employed, they were supported by decisions under the statute, and appeared, therefore, to have been intended to apply to like cases. As to the recognition in this state of constructive frauds,—that is, cases where actual fraud was not intended, but, from the conduct of the parties, some rule of public policy has been violated or some advantage has been gained by reason of some special confidential or fiduciary relation,—the cases are numerous. Where, in a pleading or special finding, fraud must be made to appear, except there be some statute or special rule to the contrary, the facts constituting the fraud must be stated, and mere epithets are not required, nor are they available. *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864; *Cicero Tp. v. Picken*, 122 Ind. 260, 23 N. E. 763; *Jackson v. Myers*, 120 Ind. 504, 22 N. E. 90, and 23 N. E. 86; *Brown v. Cody*, 115 Ind. 484, 18 N. E. 9; *Conant v. Bank*, 121 Ind. 323, 22 N. E. 250; *Enc. Pl. & Prac.* 686, and notes. The reason of this rule is in the conclusion that, the facts being stated, the law applies to determine if they are sufficient, and the legal standard is not to be defeated by the statement of an epithet or the pleader's conclusion. It would seem a contradiction of terms to say that constructive fraud must be found as a fact when, in relation to certain well-recognized transactions, it is fraud *ipso jure*. Nor is it less a contradiction as to actual fraud to say that it exists as a fact when it only exists by the application of legal or equitable rules to the facts. Considering, however, the intent of one charged with fraud, under the statute, a question of fact is made. That question is not urged here. This rule need not be confused with that which requires, in the first instance, that fraud shall not be presumed. In the absence of the facts making it manifest, the law will not indulge the presumption that fraud exists. On the contrary, presumptions are in favor of honesty and fair dealing. But, when facts appear, the legal test is applied, and the question is determined.

The remaining question is as to the sufficiency of the facts found to raise the inference of fraud. We have no doubt of their sufficiency. The father of children,—mere babes,—having the custody of their persons, and being their natural guardian, both as to person and property, owed to them the highest concern for their welfare. Above all interests, it was his duty to see that they were not deprived of their rights by his own wrongful conduct. He owed a duty also to the court in which the cause was pending, and that was to create no misapprehen-

sion in the mind of the court as to the bona fides and adversary character of the cause. The facts found disclose a violation of all these duties. As to the merit of his claim of title, little or no defense is made in this court, and it appears that he not only secured active support for his own side of the case, but secured the participancy of a guardian *ad litem* appointed and serving "for the purpose of accommodating the plaintiff in the procurement of the order and decree he desired in said cause." He was thus enabled to control both sides of the case, and give to it the appearance of bona fides as an adversary proceeding, while it was all for his accommodation, to his advantage, and to the detriment of most helpless infants. Such control, with such results, amounts to fraud. *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464, and cases there cited. The case presented more than a mere irregularity or oversight in failing to appoint a guardian *ad litem* or to answer for the infants. As shown in the case last cited, it is as a criminal prosecution instituted by the procurement of the defendant, and is not effective. The judgment is affirmed.

(152 Ind. 127)

GIVAN v. MASTERSON et ux.¹

(Supreme Court of Indiana. Oct. 5, 1896.)

DEEDS—FRAUD—SUBSTITUTION OF INSTRUMENTS—
CONFIDENTIAL RELATIONS—EVIDENCE
—REASONABLE DOUBT.

1. A son, to accommodate his stepfather in obtaining a loan, agreed to mortgage his place for a certain sum. The stepfather produced a mortgage, which the son and his wife read over, and they agreed to sign it. On the same day they went to a notary, and the stepfather handed him an instrument, which the son and his wife signed without reading, supposing it to be the mortgage previously read, but which was, in fact, a quitclaim deed. *Held*, that, as between the parties, where the rights of innocent third persons had not intervened, the deed should be set aside as fraudulent and void on account of the confidential relations between the parties.

2. In an action to set aside a deed alleged to have been signed under the belief, induced by the acts of the grantee (the stepfather of plaintiffs), that the instrument was a mortgage, where plaintiffs claimed that they had no knowledge of the real nature of the instrument until two months after its execution, evidence of an inmate of the stepfather's home that she had afterwards informed plaintiffs that the instrument executed was a quitclaim deed was admissible.

3. A son was induced by his stepfather to agree to mortgage his property to accommodate the latter in obtaining a loan. The son and his wife read a mortgage produced by the stepfather, which they agreed to sign. On the same day they signed an instrument produced by the stepfather before a notary without reading it, supposing it to be the mortgage, when in fact it was a quitclaim deed. *Held*, that, in an action to set aside the deed as fraudulent, the evidence of the wife that she had reposed great trust and confidence in her husband's stepfather was admissible.

4. The rule that evidence, in order to be sufficient to set aside a deed regular in form and duly acknowledged, must satisfy the court, "beyond all reasonable doubt," that the execution of the deed was procured through the fraud of

¹ Rehearing denied.

the grantee, is not applicable when a deed is signed without reading it by persons standing in confidential relations to the grantee, on the supposition, induced by the latter's acts, that the instrument is a mortgage which had been previously shown to, and read by, the former.

Appeal from superior court, Vigo county; David W. Henry, Judge.

Action by Wesley C. Masterson and wife against Benjamin F. Givan. From a judgment for plaintiffs, defendant appeals. Affirmed.

Carson & Thompson and McNutt & McNutt, for appellant. Frank Carmack and Sam'l R. Hamill, for appellees.

HOWARD, J. This was an action brought by appellees to set aside as fraudulent a deed made by them to appellant. Appellees allege in their amended complaint that they are husband and wife; that the appellant is stepfather of the appellee Wesley; that the said Wesley is the only child of Jennie Givan, deceased, who died the wife of appellant, and selsed in fee simple of the real estate in controversy, being certain lands in the city of Terre Haute; that the said Jennie Givan left, as her only heirs at law, the appellant, her husband, and the appellee Wesley, her son; that the said Jennie Givan and appellant intermarried in 1872, when Wesley was seven years of age, and that he lived with his mother and stepfather, and grew to manhood as a member of the family, and the relation of father and son always existed between him and the appellant; that appellees reside in the city of Indianapolis, and on or about October 3, 1894, the appellant called upon them at their home, and expressed his desire to make a loan for \$500 upon the land in controversy, to enable him to engage in some business; that appellee Wesley, desiring to assist appellant because of their relationship, assented to the incumbering of said real estate, as requested, and procured the assent of his wife and co-appellee to join in the mortgage; that on this visit appellant exhibited to appellees an instrument purporting to be a mortgage upon said property for \$500, which instrument appellees then read and agreed to sign; that on the occasion appellant took dinner with appellees, and it was at the dinner hour that the conversation and understanding as to the execution of the mortgage took place; that immediately after dinner appellees met appellant at a notary's office in the city of Indianapolis, where appellant handed to the notary an instrument, to all appearance the mortgage that appellees had just read at their house and agreed to sign; that upon the instrument being handed to the notary he remarked to appellees, "I suppose you understand the nature of this," and upon their assenting he indicated to them the place for their signatures, and thereupon they signed and acknowledged the instrument; that during this proceeding appellant stood by and heard the words of

the notary and witnessed the conduct of appellees, without saying a word; that appellees signed the instrument believing it to be the mortgage which appellant had exhibited to them at their home, and which they had agreed to sign; that they signed the same without any consideration whatever, but simply as a favor and accommodation to appellant; that, after having read the instrument which appellant asked them to sign, the instrument which they did sign was exhibited to them by the appellant as the same instrument which they had just read at their house; that, instead of the instrument thus executed by them being the mortgage which they had just read, it was a quitclaim deed, which appellant had procured to be prepared without their knowledge or consent, and, by the trick and fraudulent conduct of appellant herein set out, he presented it to them and had them execute it in the manner aforesaid, well knowing at the time that appellees, by reason of his conduct, were misled into signing the instrument, believing it to be the mortgage which he had shown them at their house, well knowing that they would not have executed a deed to their interest in the premises, and knowing that appellees were willing to join in a mortgage only, as he requested, because they reposed in him the confidence shown by a child towards a parent; that, for the purpose of misleading, deceiving, and defrauding appellees, appellant procured the quitclaim deed to be prepared without their knowledge, and by his misleading conduct, as aforesaid, procured their execution of the same by having it conform, to all appearance, to the mortgage which they had read at their home, and substituting it in place thereof; that appellees were in the notary's office but a short time,—long enough to affix their signatures aforesaid,—and it was two months thereafter before they learned that the instrument which they had signed was a quitclaim deed to said real estate instead of the said mortgage. A copy of the quitclaim deed is filed as an exhibit to the complaint, and it is alleged that because of the fraud and deceit of the appellant, which he practiced upon appellees by reason of his knowledge of the confidence which they reposed in him as their stepfather, the deed should be set aside as fraudulent and void. A demurrer was overruled to this complaint, and the ruling so made is first complained of as error.

The complaint, as we think, states a good cause of action. It is true that, in general, a person who executes a written instrument without reading it will not be relieved of the consequences of his want of care; but there are exceptions to this rule, and when it appears that one was deceived without fault on his part, by relying upon the representations of another, in whom he had good right to repose trust and confidence, the court, if satisfied of the truth of such allegations, will set aside the instrument as procured through fraud. It has often been decided that a deed

or other contract may be set aside for such fraudulent misrepresentations, even though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the other party's information. *Matlock v. Todd*, 19 Ind. 130; *Peter v. Wright*, 6 Ind. 183; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519. "Ordinarily," says Judge Elliott in *Robinson v. Glass*, 94 Ind. 211, "one contracting party has no right to rely upon the statements of the other as to the character or contents of a written instrument; but, while this is true, it is also true that, if a known trust and confidence is reposed in the person making the representations, and there is a relationship justifying such trust and confidence, then the persons to whom the representations are made may rely upon them,"—citing *Shaeffer v. Sleade*, 7 Blackf. 178; *Peter v. Wright*, supra; *Bischof v. Coffelt*, 6 Ind. 23; *Matlock v. Todd*, supra; *Worley v. Moore*, 77 Ind. 567; 2 Pars. Cont. (7th Ed.) 774. In *Shaeffer v. Sleade*, supra, it was said by the court, citing many authorities, that "when a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement or motive to the act of the other party, and by which an undue advantage is taken of him, is regarded as a fraud, against which equity will relieve."

The allegations of the complaint before us disclose a studied design by appellant to deceive his stepson and wife, under the guise of asking them to aid him in borrowing money on a mortgage, according to which they were induced to execute a deed, believing and trusting in their stepfather that the paper they were signing was the same mortgage which he had shown to them at the dinner in their home a short time before, and which they had there read and understood. As said by Judge Story, cited in *Peter v. Wright*, supra: "Where a party designedly produces a false impression in order to mislead, entrap, or obtain undue advantage over another, in every such case there is fraud,—an evil act with an evil intent." 1 Story, Eq. Jur. 201. In *Byers v. Daugherty*, 40 Ind. 198, it was said: "Where a different instrument from that which the party supposes he is executing is fraudulently substituted by the other party to it, there can be no doubt but that this is fraud. The party does not do what he meant to do. He intended to sign one instrument, and by the fraud is made to sign another and different one,"—citing 1 Chit. Pl. 483, note 1; *Van Valkenburgh v. Rouk*, 12 Johns. 337; *Taylor v. King*, 6 Munf. 358. *Miller v. Powers*, 119 Ind. 79, 21 N. E. 455, and other cases relied upon by appellant, are, as we think, not applicable to such a case as this. It is true, in general, as already intimated, that one who executes a written instrument without reading it, or otherwise assuring himself of its contents, must suffer any

evil consequences of such folly. But the law recognizes that the relations of persons may be such that one may rely implicitly upon the good faith and confidence resulting from such relationship. It may be that, even in such a case of misplaced confidence, innocent third parties will not be allowed to suffer by the want of caution on the part of the confiding and deceived party to the contract; for it is held that, of two innocent parties, that one must suffer whose act, though innocent, has been the means used to perpetrate the wrong, rather than the one who was in no way instrumental in bringing about such a wrong. Here, however, it is the wrongdoer himself who is seeking to charge the party that confided in him, and was thereby deceived. The deceiving party cannot thus take advantage of his own wrong, and charge his victim with neglect in having failed to guard against said deception. The rule is therefore, as stated, that one who, by reason of known trust and confidence reposed in another, relies, and has good cause to rely, upon representations made by such other party, and is thereby overreached and wronged, may be relieved as against such wrong, in case no innocent third parties are thereby injured.

Under the assignment that the court erred in overruling the motion for a new trial, it is first contended that it was error to allow the witness Josie Sargent to testify that she informed the appellees that the instrument executed by them was a quitclaim deed. No good reason is given why this evidence was not proper. The evidence was most competent, as corroborating the evidence of appellees that they did not know that the instrument executed by them was a deed, but supposed it to be a mortgage. Indeed, the detailed evidence of this witness, who had been brought up as a daughter in the family of appellant, and with whom he talked freely after he had procured the quitclaim deed, went very far to show that he had completely deceived the appellees, and procured a deed from them under the guise of persuading them to join in a mortgage to enable him to engage in business.

Neither is any good reason shown why the appellee Carrie B. Masterson should not have been allowed, as she was, to testify to the trust and confidence reposed by her in the appellant, as her husband's stepfather. Such testimony furnished the reason for her readiness to execute the instrument in appellant's favor, as requested by her husband, and showed a sufficient reason for her want of care in not asking to have it read before she signed it.

Complaint is also made that appellant was not allowed to testify as to the reason why he had an old deed with him at the time of taking dinner at appellees' house, and that he was also not allowed to testify as to a mortgage made on the property in question at a time subsequent to the date of the quitclaim deed. We are unable to see what relevancy these proposed items of evidence had to the trans-

action complained of. If the evidence had been admitted, it could not in any way have shown any explanation or justification of the charge made against appellant of having deceived appellees into executing the quitclaim deed instead of the mortgage which they believed they were executing.

It is finally contended that the decision of the court is not sustained by sufficient evidence; that it is contrary to the evidence and contrary to law. The discussion in support of these contentions proceeds on the ground that the evidence, in order to prevail against a deed regular in form and duly acknowledged, ought to satisfy the court beyond all reasonable doubt that the execution of the deed was procured through the fraud of the grantee. We do not think that the rule so contended for applies to such a case as this. It is true that where a person has had full opportunity to know of the contents of a written instrument before executing it, and the parties to the contract afterwards differ as to their understanding of its terms, one asserting and the other denying that the writing correctly expresses the terms of the contract as previously agreed to, then, no doubt, the rule is that only the most convincing proof will be accepted as sufficient to overcome the written, signed, and acknowledged statements of the party denying the authenticity of the instrument. *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, and 47 N. E. 1.

Here, however, the very contention is, not that there was any mistake as to the terms of an instrument which both parties had full opportunity to read and understand, but that, by the fraud of one party, caused by the known trust and confidence properly and legitimately reposed in him by the other, the second party was deceived and lulled into security, so that reliance was placed upon false representations, and a document altogether different from that intended was in good faith acknowledged and executed. Such deception takes the place of force. There is no free meeting of mind with mind, and no valid contract entered into. The fact of such fraud is to be proved and found as any other fact, and that by a consideration of the evidence presented. We are, besides, of opinion that the evidence before the court, and all the surrounding circumstances, were such as to have amply justified the court in reaching the conclusion that the execution of the quitclaim deed was procured by imposing upon the appellees through the parental influence of the appellant. To hold the deed good would be to hold that a young man, without other property, and with a wife and children to support, should, without consideration or compensation of any kind, be willing to relinquish all claim to any part of the only property or estate left him by his mother. That he should be willing to join in a mortgage upon this property to enable one who occupied to him the place of father to procure a loan of money

seems to have gone a long way in filial duty; but that he should go further, and be willing to give away from his wife and children all his patrimony to enable his stepfather to engage in business, seems at least to call for some explanation. The record shows none. Even if the case called for evidence beyond a reasonable doubt to support the conclusion reached, we are not sure that such evidence is not shown. Judgment affirmed.

(151 Ind. 188)

DENTON v. ARNOLD.

(Supreme Court of Indiana. Oct. 4, 1898.)

PROBATE—PROCEEDINGS TO SELL LAND—COLLATERAL ATTACK—DOWER—PRESUMPTIONS.

1. A proceeding in the proper court by an administrator to sell land of his decedent to pay debts cannot be attacked collaterally, where the court was vested with jurisdiction over the subject-matter and the parties.

2. Where land set off to a widow as dower is subject to a purchase-price mortgage, and the remainder of the land of decedent, when sold to pay debts, is insufficient to pay the other preferred debts of the estate, the land set apart as dower can be sold by the administrator, on leave of court, to satisfy such mortgage, since *Burns' Rev. St. 1894, § 2656* (*Horner's Rev. St. 1897, § 2695*), provides that a widow shall not be entitled, as against a mortgage for purchase money, to her one-third interest in the mortgaged premises, and *Burns' Rev. St. 1894, § 2504* (*Horner's Rev. St. 1897, § 2349*), empowers the court to order the sale of the interest of decedent's widow in his real estate when it is liable to sale to satisfy a lien thereon.

3. In an action to recover possession of land, where defendant pleads title under an administrator's deed, and alleges that plaintiff was a party to the proceedings to sell the real estate for debts, and that due notice thereof was given to her, after which the court assumed jurisdiction and ordered the sale of the land, it will be presumed, on demurrer to the answer, that the probate court found that plaintiff, as a party to the petition, was duly notified thereof "as required by law."

4. Where an administrator lawfully, by leave of court, sells the land set apart as the wife's dower to satisfy a purchase-price mortgage thereon, the sale cannot be attacked collaterally on the ground that the petition to sell set up other claims, which were not liens on her dower interest.

5. Where a party defends his title to land through an administrator's deed, the widow of decedent cannot avoid the defense by alleging that she was not notified of the pendency of the proceedings to sell, since, in order to overcome the presumption of the probate court's jurisdiction over her, she should have alleged what was shown by the record in such proceedings in respect to the service of process on her.

Appeal from circuit court, Harrison county; W. T. Zenor, Judge.

Action by Minerva Denton against William J. Arnold. From a judgment for defendant, plaintiff appeals. Affirmed.

Benj. P. Douglass, John V. Denton, and Tracewell & Mitchell, for appellant. William Ridley, for appellee.

JORDAN, J. The appellant instituted this action, whereby she sought, under the first

paragraph of her complaint, to recover possession of 25 acres of land therein described, situated in Harrison county, Ind., and by the second paragraph to quiet title to the same premises. An answer in three paragraphs was filed by the appellee. The facts alleged in the first may be summarized as follows: Appellant is the widow of Joseph Denton, who died some time in the year 1876, the owner of the real estate in suit. In 1878 one William H. Hudson was, by the Harrison circuit court, appointed administrator de bonis non of the estate of the said Joseph Denton. There being debts existing against said estate, it became necessary, in the course of the administration thereof, to sell the real estate of said decedent to pay such debts and liabilities. Two-thirds of the land of which the decedent died seised appear, in the first instance, to have been sold by the administrator, by order of the court, for the purpose of paying and discharging the debts and claims against the estate, and the real estate now in controversy was ordered by the court, in partition proceedings, to be set off to appellant as her interest in the lands of her deceased husband. At the death of the decedent, and at the time the particular tract of land now in dispute was set off to appellant, there existed against it a mortgage lien for \$500, as unpaid purchase money therefor, in favor of one Murr, guardian, etc., and also a lien for unpaid taxes, and an additional lien of an indemnity mortgage for \$200, held by one Samuel Ramsey. It is shown by the averments of the answer that the two-thirds of the real estate originally sold by the administrator proved to be insufficient to pay off and satisfy the claims and liabilities existing against the estate; and that consequently Hudson, as administrator, at the May term, 1883, of the Harrison circuit court, filed his petition therein, praying for an order of said court authorizing him to sell the real estate now in controversy, for the purpose of paying and discharging said purchase-money lien, and also the lien of the indemnifying mortgage, together with taxes alleged to have been due thereon. Appellant was made a party to the said petition and proceedings to sell said real estate, and was duly notified of the pendency of the said petition. At said term of court, on June 13, 1883, the administrator obtained an order of the court, authorizing him to sell said tract of land as prayed for, for the purpose of paying and discharging said purchase-money lien, together with the liens averred to have existed against it by virtue of said indemnity mortgage and delinquent taxes; and in pursuance of said order of court, and in compliance therewith, after giving the notice required by law, the administrator, on July 18, 1883, sold the real estate at public sale to the appellee, William J. Arnold, for \$632, which amount was more than two-thirds of the appraised value thereof. This sale was duly reported to the court by the administrator, and by the

court approved and confirmed, and, appellee having paid in full the purchase price, the administrator, on March 1, 1886, by order of the court, executed to him a deed for said real estate, which conveyance was by the court approved and confirmed; and appellee took possession of the land under his said purchase, and has ever since held possession thereof. The second paragraph of the answer alleges substantially the same facts as were set out in the first, being more particular and specific, perhaps, in the averment of the facts than is the first. Appellee subsequently filed a third additional paragraph of the answer, but to this latter paragraph no demurrer appears to have been filed. The first and second paragraphs of the answer were each, upon demurrer, held sufficient as a defense to the action, and these rulings of the court are assigned as errors.

The debatable or controlling question between the parties to this appeal relates to the sufficiency of the facts as disclosed by the answer to repel the collateral attack which the answer exposes that the appellant is seeking to make against the order of the Harrison circuit court, made in the proceedings under which the land in controversy was sold and conveyed to the appellee by Hudson as administrator of Joseph Denton, the deceased husband of appellant, to satisfy the lien of the purchase-money mortgage. It is settled by the authorities that a proceeding in the proper court, by an administrator, to sell the land of his decedent, for the payment of debts and claims existing against the estate, stands upon the same ground as does an ordinary judicial proceeding in a court of superior jurisdiction, and, when the court is invested with jurisdiction over the subject-matter and the parties to such an action, its order or judgment therein will be protected against a collateral attack, however erroneous such judgment or order may be, and such order or judgment must stand and prevail against the parties thereto, until set aside in a direct proceeding instituted for that purpose. *Gavin v. Graydon*, 41 Ind. 559; *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *Thomas v. Thompson*, 149 Ind. 391, 49 N. E. 268; *Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054, and cases there cited; *Bailey v. Rinker*, 146 Ind. 129, 45 N. E. 38; 1 *Thornt. Adm'n*, p. 325, and cases there cited.

It is insisted by counsel for appellant that the court was not invested with power to order the sale of the land, which appellant had acquired as the widow of the decedent, for the payment of debts existing against the estate. As a general proposition, this is correct, but that proposition is not the one which the facts, as averred in the answer, present for our consideration. It appears that the land in controversy was owned and held by the appellant's husband at the time of his death, incumbered with and subject to a mortgage lien for unpaid purchase money to the amount

of \$500. It is also shown that the land was still subject to said lien after the death of the decedent, when it was set off to appellant as her interest in his real estate. Two-thirds of the decedent's lands seem to have been previously sold by the administrator, upon the order of the court, for the payment of debts and liabilities of the estate, and the proceeds arising out of such sale, as it is averred, were not sufficient to pay and satisfy the debts and liabilities. The reason why the taxes, the purchase-money mortgage, and the indemnity mortgage were not paid and satisfied out of the proceeds of the sale of the two-thirds of the decedent's lands is not disclosed by the answer. It must be conceded as true that it was the duty of the administrator to have applied the money in his hands, belonging to the estate, not required to pay other claims or demands expressly preferred by law, to the payment of liens upon the real estate of the decedent in order to fully secure to the appellant, as widow, her interest in the lands of her husband. *Sparrow v. Kelso*, 92 Ind. 514; *Matthews v. Pate*, 93 Ind. 443; *La Plante v. Convery*, 98 Ind. 499; *Bowen v. Lingle*, 119 Ind. 560, 20 N. E. 534; *Shobe v. Brinson*, 148 Ind. 285, 47 N. E. 625. This question, however, is not one with which we have to deal in the decision of the question involved in this appeal, and as between the parties to this action, under the facts, that question must be deemed to be closed by the order of the court authorizing the sale of the premises in dispute.

Counsel for appellant urge that the answer is not sufficient, for the reason that it does not disclose that the appellant was notified of the pendency of the petition to sell the real estate in the particular manner prescribed by the statute. It is alleged in the answer, however, that she was a party to the proceedings, and that due notice was given to her of the pendency of said proceedings; and it further appears that the court assumed jurisdiction in the action, and ordered the sale of the land. This was an adjudication by the court upon the question of notice, and we must presume that the court did its duty, and found, before it rendered its judgment, that appellant, as a party to the petition, had been duly notified thereof as required by law. *Bank v. Hanna*, supra; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371.

That appellant's interest, as widow, in the real estate of her deceased husband, was subject to a lien for unpaid purchase money in favor of the mortgagee, or persons claiming under him, although she did not unite in such mortgage, is settled beyond controversy. *Nutter v. Fouch*, 86 Ind. 451; *Keith v. Hudson*, 74 Ind. 333; *Fowler v. Maus*, 141 Ind. 47, 40 N. E. 56, and cases cited on page 51 of the opinion, 141 Ind., and page 59, 40 N. E.; *Butler v. Thornburgh*, 141 Ind. 152, 40 N. E. 514. In fact, section 31 of our statutes of

descent (section 2656, Burns' Rev. St. 1894; section 2695, Rev. St. 1881; section 2695, Horner's Rev. St. 1897) provides that a widow shall not be entitled, as against a mortgage for purchase money, to her one-third interest in the mortgaged premises. Section 2504, Burns' Rev. St. 1894 (section 2349, Rev. St. 1891; section 2349, Horner's Rev. St. 1897), empowers the court to order the sale of the interest of the decedent's widow in his real estate when it is liable to sale to satisfy a lien thereon, for the purpose of discharging such lien, and to order the payment to her of the gross proceeds of such sale, after satisfying such lien. *Lewis v. Watkins* (Ind. Sup.) 49 N. E. 944.

We have seen that appellant's interest in the land in question was liable to the payment of the purchase-money mortgage; consequently the court, upon the petition of the administrator, was fully empowered, under the statute, to order the sale of the land in question for the satisfaction of such lien. The fact that the administrator may have set up, in his petition, in addition to the claim of the purchase-money mortgage lien, the alleged claims for delinquent taxes and the indemnity mortgage held by Ramsey, which the facts do not fully disclose to have been liens for the payment of which appellant's interest as widow was liable, and prayed also that the land be sold in satisfaction of these claims, would not enable her, in this action, to question the validity of the court's order as an entirety, and it would, at least, be binding upon her in this case so far as it directed and effected the sale of the land in satisfaction of the purchase-money lien. If the administrator sought to apply, or applied, any part of the proceeds arising out of the sale of the land in payment of claims or demands for which it was not liable, the law afforded to appellant the proper remedy. The real estate in dispute appears to have been the particular tract of the decedent's land that was incumbered by the purchase-money mortgage at the time of his death.

This lien, it is alleged, still existed against the land when it was set off to appellant. The law made it the duty of the administrator, in the course of the administration of the estate, to pay off and satisfy this mortgage; and it becoming necessary, as we must presume, under the facts, to subject this land to a sale to satisfy the lien in question, it was still liable to be sold by the administrator upon the order of the court for that purpose. In contemplation of law, so far as it was rendered necessary to subject this real estate to the payment of this purchase-money lien, it still belonged to the estate of the decedent, although it had been set off to appellant as her interest in his lands, and the petition of Hudson to sell it, as administrator, it would appear, proceeded upon this theory. We must presume, under the averments of the answer, that this issue was tendered to

appellant by the petition of the administrator to sell the real estate, and this issue, by its order and judgment, the court seems to have decided against her. The latter being a party to the petition and to the issues tendered thereby, and the court having plenary jurisdiction over her person and the subject-matter involved, she is not now in a position to collaterally assail the order of the court directing the sale of the land for the payment of the lien in controversy. *Lantz v. Maffett*, 102 Ind. 23, 28 N. E. 195; *Thomas v. Thompson*, supra.

The facts set up in the second paragraph of the answer being sufficient to repel appellant's collateral attack, we do not consider or determine the question relative to the five-years statute of limitations, which such facts incidentally disclose, and which question counsel have discussed in their respective briefs. The paragraphs of the answer in question were substantially sufficient, and the demurrer thereto was properly overruled.

Appellant replied to the answer in two paragraphs, each of which the court held insufficient upon demurrer. In the first paragraph of her reply she gave the history of the administration of her husband's estate. She admitted therein the sale of the two-thirds of his real estate for the payment of claims and debts against the estate, and that the administrator instituted the proceedings to sell the real estate in dispute, and made her defendant to said proceedings, as alleged in the answer, but she avers that she had no notice of the pendency of said petition. It is also alleged that the proceeds of the sale of the two-thirds of the real estate sold by the administrator in the first instance, together with the personal property, were sufficient to have paid and discharged the lien of the purchase-money mortgage. It was not sufficient, to avoid the defense which the answer interposed to this action, for appellant, in her reply, to allege that she was not notified of the fact of the pendency of the proceedings to sell. To overcome the presumption of jurisdiction of the court over the person of appellant, she was required to allege what was shown by the record in such proceedings in respect to the service of process upon her. *Bank v. Hanna*, supra, and cases there cited; *Bailey v. Rinker*, supra.

While there are matters alleged in each of the paragraphs of the reply that might have been interposed by appellant as a defense of the administrator's petition to sell the real estate here involved, still such matters are not now available to her in this action. The facts alleged in the second paragraph of the reply are similar in some respects and of like character as were those averred in the first, and this paragraph is equally as deficient as is the first, and the demurrer to each of the paragraphs of the reply was properly sustained. There is no error, and the judgment is therefore affirmed.

(20 Ind. App. 707)

HILLIGOSS v. NORTH ANDERSON GAS CO.

(Appellate Court of Indiana. Oct. 4, 1898.)

APPEAL—REVIEW.

A verdict will not be set aside as not sustained by the evidence, where there is some evidence to sustain it.

Appeal from circuit court, Madison county; J. F. McClure, Judge.

Action between Edward C. Hilligoss and the North Anderson Gas Company. From a judgment for the latter, the former appeals. Affirmed.

Floyd S. Ellison, for appellant. Chipman, Keltner & Hendee, for appellee.

HENLEY, C. J. In this cause we are asked to set aside the verdict of a jury, and hold that the trial court erred in overruling the motion for a new trial, upon the sole ground that the verdict is not sustained by sufficient evidence. The evidence is properly before us. The verdict of the jury is not without some evidence to sustain it, and, under the rule adopted by both this court and the supreme court of this state, the judgment of the lower court must be affirmed. Judgment affirmed.

(174 Ill. 215)

SLOCUM et al. v. O'DAY et al.¹

(Supreme Court of Illinois. June 18, 1898.)

VENDOR AND PURCHASER—DEEDS—RECORD—NOTICE.

A contract for the sale of lands correctly described them as being in H. addition, in section 17. Subsequently the vendor sold the notes which he had taken for the price, and by instrument in form of a trust deed, but not under seal, covenanted that on failure of the makers to pay the notes he would declare a forfeiture, and deed the lands to the note holders. The document recited the land contracts as providing for the sale of lots in H. addition, in section 11. After the recording of this deed, the owner conveyed the lands covered by the contracts to other bona fide purchasers. *Held*, that the trust deed did not constitute notice to them.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by Jeremiah Slocum and others against Frank C. O'Day and others. There was a decree sustaining defendants' demurrers to the bill, and plaintiffs appeal. Affirmed.

Eugene H. Garnett, for appellants. John H. Bradley and Frank P. Schmitt, Jr., for appellees.

CARTWRIGHT, J. The circuit court of Cook county sustained demurrers to appellants' amended bill in this case, and dismissed it. The facts appearing from the amended bill, and admitted by the demurrers, are as follows: Frank C. O'Day, one of the defendants, entered into separate written contracts with three of the other defendants to

¹ Rehearing denied.

sell each of them a different lot in block 2 in Harnstrom's addition to Oak Park, Cook county, Ill., in section 17, township 39, range 13 E. of the third P. M. One of these contracts was with Tillie Hofwald, for the conveyance of lot 38, and she gave as part of the consideration her notes amounting to \$475. Another was with Helen Rasmussen, for lot 39, and she gave notes amounting to \$500. The third was with Edward Seaver, for lot 25, and he gave notes amounting to \$500 as part consideration. Each contract reserved to O'Day the right to forfeiture, at his option, on nonpayment of the notes. Later, on March 25, 1893, O'Day sold all the notes which still remained unpaid to Jeremiah Slocum, one of the complainants, and signed and acknowledged a paper in the form of a trust deed, which had no seal, and was therefore not effective as a trust deed, conveying to Samuel H. Wright, the other complainant, as trustee, another lot in Chicago, to secure the performance of the agreements contained in said instrument. This document recited that O'Day had made contracts for the sale of lots "in Harnstrom's addition to Oak Park, being a subdivision of the east half of the west half of the northwest quarter of the northwest quarter of section 11, township 39 north, range 13 east of the third principal meridian, in Cook county, Illinois"; misdescribing the premises. It also recited the sale of the notes to Slocum; and O'Day agreed that, if any of the makers failed to pay their notes, he would, at the request of the legal holders of such notes, declare a forfeiture of the contracts, and make a deed or deeds to such legal holders. It was also provided that, in case of default or a breach of any of the covenants or agreements contained in this intended trust deed, it should be lawful for the trustee to file a bill for foreclosure, and obtain a decree for the sale and conveyance of the lot thereby conveyed to satisfy the notes sold to Slocum, and interest and costs, but the taking and giving of this trust deed was to be without prejudice to any rights which the legal holders of the notes might have against the makers. This instrument was filed for record in the recorder's office in Cook county on the day it was made. On December 19, 1894, O'Day conveyed lot 25 to Johanna Nielsen; on October 15, 1895, he conveyed lot 39 to John T. Sutor; and on May 6, 1896, the title of lot 38 passed by conveyance to Ira L. Parker. The bill stated that all the notes had matured, and stated the amounts due on them, respectively, and that Slocum had requested O'Day to declare a forfeiture, and to make a deed or deeds to him. The bill made the present owners, with their wives, and the original parties with whom O'Day contracted, defendants, and prayed for a reformation of the instrument intended as a trust deed, by adding a seal, so as to make it valid, and striking out the erroneous description, and that defendant O'Day should be declared to specifically perform the

agreement as reformed, by declaring forfeitures of the contracts, and conveying the property to Slocum, the holder of the notes, or, if that relief should be denied, then for a foreclosure of the contracts made by O'Day with said other defendants, and for a personal decree against O'Day in case of foreclosure for any deficiency.

It was not alleged in the bill that the grantees of O'Day were not bona fide purchasers of the lots conveyed to them. They are therefore presumed to be such, and it is substantially conceded by counsel that such is the fact. O'Day has disqualified himself from making a conveyance by conveying the premises to others, who are not claimed to be other than bona fide purchasers for value, without actual notice of Slocum's equity, unless they have had constructive notice by virtue of the record of the attempted trust deed. There could, of course, be no specific performance against them, or any relief granted under either prayer of the bill, unless they had such notice. Waiving all other questions as to the effect of recording such an instrument as notice, we are of the opinion that it did not operate as notice in this case, for want of a proper description of the premises. The instrument described the lots as being in Harnstrom's addition to Oak Park, being a subdivision of a certain portion of section 11. The bill alleged that Harnstrom's addition, where these lots were situated, is in section 17, and that there is no other Harnstrom's addition in Cook county. There was no averment that O'Day's grantees knew that there was but one such addition, and there is no reference in the instrument to a recorded plat, or anything which could give notice of the error. In a case where the notice is constructive, and not actual, and rests only upon the record of an instrument, if there is a misdescription of a substantial nature the record will not operate as a constructive notice, and a bona fide purchaser will not be affected by it. The record is notice so far as land is correctly described, and no further, unless it is apparent from the record itself that there is such a misdescription. *Wade, Notice*, §§ 174-176; *Rodgers v. Cavanaugh*, 24 Ill. 583; *Walt v. Smith*, 92 Ill. 385; *Grundies v. Reid*, 107 Ill. 304; *Bullock v. Battenhausen*, 108 Ill. 28.

The cases relied on by appellants do not sustain the claim that, as against subsequent bona fide purchasers of a tract of land, the record of a false description apparently describing other land will operate as notice, where there is no other element of notice. In *Bowen v. Galloway*, 98 Ill. 41, the trust deed conveyed lot 4, and there was an original lot and a subplot of that number in the block; but the trust deed further gave substantially the dimensions of the subplot, and described it as having a two-story frame dwelling house thereon. The record showed that the subplot was the one described. In *Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492, the premises were described as a part of lot 25,

and the mortgagor was in possession of them. The error was in bounding the premises by commencing at the wrong corner of the lot. It was evident from the record that a misdescription of the lot had been made, as the boundaries given would carry the premises off from that lot. The mortgagor continued in possession until long after the bank had obtained its judgment, and the description as a part of lot 25 was deemed sufficient. In *Rich v. Trustees*, 158 Ill. 242, 41 N. E. 924, the premises were misdescribed; but the grantees took possession, and commenced the erection of a brick school house thereon. The fact of possession was held sufficient to give notice to prevent a subsequent deed from becoming effective to pass the title to another. We have been referred to no case where, as against bona fide purchasers, there was no notice except by the record, and the mistake did not appear in the instrument itself, where such purchasers have been held bound to take notice of what was intended by the instrument. There is nothing in this description to lead one to suppose that there was not a subdivision made by Harnstrom of the tract in section 11 described in the instrument intended as a trust deed, and there is nothing but the record which is claimed to have operated as notice. The bill did not show such facts as entitle the defendants to the relief prayed for. The decree of the circuit court is affirmed. Judgment affirmed.

(174 Ill. 259)

CHICAGO GEN. RY. CO. v. MURRAY et al.¹
(Supreme Court of Illinois. June 18, 1898.)

EMINENT DOMAIN—STIPULATIONS BY ATTORNEYS—
PREJUDICIAL ERROR.

1. In condemnation proceedings to assess the damages by the taking of certain other land for a street railway, it was not error to exclude from the jury a stipulation made during the trial, by counsel for the company, as to the manner in which the company would use its roadbed in front of said land, where it did not appear that counsel had any authority to bind the company in that way.

2. If the ruling was error, it was not prejudicial, where the court afterwards gave the company sufficient opportunity to present proper evidence on the subject to which the stipulation referred, but where none was offered.

Appeal from Cook county court; R. H. Lovett, Judge.

Condemnation proceedings by the Chicago General Railway Company against John Murray and others. From the judgment, petitioner appeals. Affirmed.

Lyman M. Paine and Glenn E. Plumb, for appellant. Wm. M. Johnston and John H. Rollins, for appellees.

CARTER, C. J. This was a proceeding by appellant to condemn for a right of way a triangular piece of land lying at the corner of Thirty-First and Farrell streets, in the city of Chicago, to be taken from the front

ends of lots 20 and 21 in Keeley's subdivision, etc. Thirty-First street runs east and west, and Farrell street is a diagonal street running into the former from the northwest. Said lots have a combined frontage of 61 feet on a diagonal line on Thirty-First street. Lot 20 extends back along Farrell street 115 feet to an alley, and lot 21 lies next adjoining it. The triangular piece sought to be condemned and taken from the front of these lots is 47 feet 2 inches on Thirty-First street, and 25 feet 7 inches on Farrell street; leaving the other side of the triangle, drawn at a right angle to Farrell street, of the length of 40 feet. There was a 14-foot sidewalk on the street in front of these lots, and the owner had excavated the lots, and also Thirty-First street for a distance of 10 feet, and built a retaining wall there for the purpose of building. The evidence showed that the outside rail of the proposed street-railroad track would be only three feet from the new lot line, and that the street cars would overhang the rail 22 inches. It would be necessary also to take from the end of these lots additional space for a sidewalk, and it was contended by appellees that such close proximity of the street railroad would make it impracticable to front his building on Thirty-First street, but would compel him to front on Farrell street,—a side street of only 40 feet width, on which property was of little value. Appellant made John Murray and "unknown owners" defendants. Afterwards John Murray, claiming to be owner, Robert Berger, claiming to be trustee, and Ferdinand Miller, claiming to be mortgagee, of the aforesaid property, filed their appearance and answer, alleging that the residue of the lots would be greatly damaged and injured, and asking for a determination of the compensation and damages by a jury. After hearing the evidence and viewing the premises, the jury returned a verdict finding that the just compensation to be paid to the owner or owners of the property to be taken or damaged (describing the same) was \$3,000, and to the owner or owners of the residue of said lots by reason of the taking of the said triangular piece was \$2,000. A motion for a new trial was overruled, and judgment entered on the verdict, from which judgment the petitioner has appealed to this court.

Appellant contends that the court erred in excluding from the jury a certain stipulation, and in giving certain instructions for appellees, and contends also that the evidence does not support the verdict, and that the damages are excessive. The evidence relating to the value of the property taken and to the damage to the property not taken was conflicting, but there was evidence on both points to sustain the verdict of the jury; and, although the evidence of appellees as to the latter point was not as clear as it might have been, still the jury viewed the premises, and it was their province to weigh the evidence, and determine the amount to be awarded

¹ Rehearing denied.

from such evidence and view, and we find no such insufficiency of evidence as to justify us in reversing the judgment on that ground. The jury were authorized to find that the most valuable part of the lots was taken, that the valuable frontage on Thirty-First street was destroyed, and that the owner would be compelled to use a narrow side street for the front of his property for business purposes. He was entitled to just compensation for such losses, and we cannot say that the amount awarded is excessive, or that the evidence does not support the verdict.

While we do not regard the instructions complained of as models of clearness to be copied, we find no sufficient error in them to justify us in reversing the judgment. The one relating to the view of the premises by the jury, and concerning which the chief complaint is made, is, in substance, the same as the instruction reviewed by this court in *Kiernan v. Railroad Co.*, 123 Ill. 188, 14 N. E. 18, and which it was there said was in accord with what this court had theretofore said upon this subject. A careful reading of the instruction very clearly shows that it is not open to the objection urged,—that it authorized the jury to base their verdict alone on their inspection of the premises. On the contrary, the instruction referred the jury to the evidence, or the whole evidence. Criticisms are made upon other instructions, but we cannot believe that the jury were misled by the alleged defects.

Nor was there error in excluding from the jury the stipulation made during the trial by counsel for appellant relative to certain filling and paving, and to the proposed construction of a stone wall which it was supposed would be necessary to build on the line separating the land taken from the rest of the lots. There was no error in this. It did not appear that counsel had any authority to bind the company in that way as to the manner in which the company should use its roadbed. *Railway Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291. Besides, the court gave appellant sufficient opportunity to present such proper evidence on the subject to which the stipulation referred as it should think proper to submit, but it offered none, and it was not therefore prejudiced by the change in the rulings of the court. Finding no substantial error, the judgment is affirmed. Judgment affirmed.

(174 Ill. 810)

PEOPLE *ex rel.* KASSON *v.* ROSE, Secretary of State.¹

(Supreme Court of Illinois. June 18, 1898.)

FIDELITY INSURANCE — VALIDITY OF INCORPORATION.

Guarantying the fidelity of persons holding places of trust, and the performance of contracts and undertakings, and becoming surety

on bonds, constitute a kind of insurance, and fall within the exception in Laws 1872 of "An act concerning corporations," providing "that corporations may be formed in the manner provided by this act, for any lawful purpose, except * * * insurance, * * *" although at the time when the act was passed companies doing business of that nature were not organized within the state.

Carter, C. J., and Magruder, J., dissenting.

Petition by the people, on the relation of C. Vallete Kasson, for a writ of mandamus against James A. Rose, secretary of state. Writ denied.

Church & McMurdy, for petitioners. E. C. Akin, Atty. Gen. (O. A. Hill and B. D. Monroe, of counsel), for respondent.

WILKIN, J. This is an original petition for mandamus against James A. Rose, as secretary of state. The petition sets forth that on January 27, 1898, petitioners made application to the respondent for a license authorizing them to open subscription books to the capital stock of a proposed corporation. The application was made in due form, and accompanied by the requisite fee. The object of the corporation, as contained in the statement, is as follows: "To transact in the state of Illinois and elsewhere the business of guarantying the fidelity of persons holding public or private places of trust, and the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind, and of becoming surety on bonds required by law, and on every kind of contract, obligation, and undertaking of persons, firms, and corporations." The secretary refused to issue the license, upon the ground that the statute under which the application is made does not authorize the organization of corporations for the objects stated in the application. Section 1 of the statute entitled "An act concerning corporations," approved April 18, 1872, provides "that corporations may be formed in the manner provided by this act, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, provided," etc. The only question here raised is whether or not the objects, or any of them, of the proposed corporation, fall within the exception "insurance."

The following definitions of the term "insurance" are cited from standard authorities by the attorney general on behalf of the respondent: "Guaranty insurance is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employes and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against breach of contract. It includes other forms of insurance, which are specifically classified as 'fidelity guaranty,' 'credit guaranty,' etc."

¹ Joyce, *Ins.* § 12. "Insurance is a contract

¹ Rehearing denied.

by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified, to certain things which may be exposed to them." *Lucena v. Craufurd*, 2 Bos. & P. 300. "Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril." 11 Am. & Eng. Enc. Law, 280. "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve. * * * It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity." 1 May, Ins. §§ 1, 2. "A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phil. Ins. § 1. "A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith, Com. Law, 299. "In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes." Cent. Dict. "Insurance." "An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms." Stand. Dict. "Insurance." "The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guaranty the other against loss by certain specified risks." Webster, Dict. "Insurance." It is said in 9 Am. & Eng. Enc. Law, 65 (cited in *People v. Fidelity & Casualty Co.*, 153 Ill. 32, 38 N. E. 752): "Guaranty insurance is, in its practical sense, a guaranty or insurance against loss in case a person named shall make a designated default, or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employé or officer, though sometimes against the breach of a contract. This

branch of insurance is so much more modern in origin and development than fire, marine, life and accident insurance that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of guaranty insurance. It was held in a Canadian case that a company was liable on a policy guarantying the faithful and diligent performance of the duty of a clerk, where such clerk went to lunch, leaving a large sum of money in open bags in his room, which money disappeared while he was gone. Overdrafts allowed without security, by collusion with the party making the overdrafts, is within a policy which insures against loss 'by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities, of the manager.'" In *Shakman v. Credit-System Co.*, 92 Wis. 366, 68 N. W. 528, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance, and it was said: "We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (sub silentio) construed as a policy of insurance by the supreme court of New Jersey. *Robertson v. Credit-System Co.*, 57 N. J. Law, 12, 29 Atl. 421. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meanings of sections 1977 and 1978, Rev. St." In *Tebbets v. Guaranty Co.*, 19 C. C. A. 281, 73 Fed. 95, the action was upon a policy of insurance against business losses or "uncollectible debts" issued by the defendant to the plaintiff, and it was said: "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by

insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation."

We do not understand counsel for petitioners to deny that under these authorities and definitions one or more of the objects stated in its application fall within the term "insurance." But it is insisted that inasmuch as at the time of the passage of the general incorporation law of 1872, under which they seek to organize, there were already in existence statutory provisions for the incorporation of companies known as "insurance companies,"—that is to say, fire, inland navigation, and marine insurance companies, also life insurance companies,—and that provisions like those of the charter here sought by petitioners were practically unknown at that time, therefore the legislature did not intend, by the use of the word "insurance," other kinds of insurance than existed at that time, and named in the prior enactments. The proposition is untenable. While corporations of this character have not until recently been organized, they must, under the foregoing authorities, be treated as a form of insurance companies, and as such they fall within the express limitation named in the statute. The language of the exception, in common acceptance, includes all insurance companies, and it is not for the court to say that only certain classes were intended. "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as plainly written." *Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20, and authorities cited. "It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity." Referring to authorities cited, it is further said: "A careful examination of all these cases will show that where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature as manifestly disclosed by a consideration of the whole context." *Wunderle v. Wunderle*, 144 Ill. 62, 33 N. E. 195. The manifest purpose of the legislature in excepting banking, insurance, real-estate brokerage, and other corporations from the provisions of the act authorizing the incorporation of companies for other lawful purposes, was that these excepted corporations should be restrained by more strict requirements, securing the safe conduct and correct administration of their affairs. The object stated in the petitioner's application—especially that of guarantying the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind—is not only

to enter into contracts of insurance, within the meaning of the authorities cited, but within the spirit and reason of the exception. We think the application of the petitioner was properly refused, and the petition for a writ of mandamus will be denied. Writ denied.

MAGRUDER, J., dissenting.

CARTER, C. J. I do not agree to the conclusions reached in this case.

(174 Ill. 242)

GRAY et al. v. ROBERTSON et al.¹

(Supreme Court of Illinois. June 18, 1898.)

MORTGAGES—FORECLOSURE—GRANTEES—WAIVER—ATTORNEY'S FEE—ASSUMPSIT—DEMAND.

1. Under a trust deed containing a covenant by grantors to pay all taxes levied against the property when same should become due, and protect it from tax sales, and authorizing grantees to pay unpaid taxes, and making all sums so paid by grantees payable by grantors on demand, and an additional charge against the premises, under the deed, and providing that in case of a breach of any covenant the whole sum secured may, at the option of grantees, become due, without notice to grantors, the grantees may foreclose for the whole sum secured, on failure of the grantors to pay the taxes and protect the property from tax sales.

2. Where the right to foreclose a trust deed accrues on the failure of the grantor to pay taxes, an agreement by which the grantee is to pay the taxes for a certain year, and is to have them repaid him at a stated time, is, in effect, an agreement not to exercise his right of foreclosure if the money is repaid him at that time.

3. Where, by contract, a sum of money becomes due at a fixed date, notice or demand is not necessary before suit.

4. A trustee, who is an attorney, and acts in that capacity for himself and the cestui que trust in foreclosing a trust deed, is not entitled to have fees for himself included in the judgment, notwithstanding a provision in the deed that in the event of foreclosure there shall be included in the judgment "a reasonable sum for the complainant's solicitor's fee."

Appeal from appellate court, Second district.

Suit by John B. Robertson and Lyman M. Paine, trustee, against Della M. Gray and others. A decree in favor of complainants was affirmed by the appellate court (74 Ill. App. 201), and defendants appeal. Modified.

Millard & Abbey, for appellants. Lyman M. Paine, for appellees.

BOGGS, J. This is an appeal from a decree rendered on a bill in chancery exhibited by appellee Robertson in his individual capacity, and appellee Paine in his capacity as trustee, to foreclose a certain trust deed executed on the 18th day of June, 1894, by the appellants, who are husband and wife, to appellee Paine, whereby they mortgaged certain premises in Highland Park, in Lake county, Ill., to secure a certain note executed by the mortgagors, and payable to their order, in the sum of \$10,000, dated June 18, 1894, and due three years thereafter, bearing interest at the rate of 7 per cent. per annum.

¹ Rehearing denied.

payable semiannually on the 18th of June and December of each year. The consideration of the note was a loan of money to the amount thereof made by the appellee Robertson, and the note was indorsed to and held by him. The makers of the note were not in default of the payment of the principal or interest of said note at the time the bill was filed, but the trust deed contained a covenant to the effect that the mortgagors would pay all taxes and assessments levied on the mortgaged premises when the same should become due and payable, and would not suffer the premises to be sold for taxes or assessments, or to be forfeited for unpaid taxes or assessments. The trust deed also contained further covenants as follows: "The grantors further covenant and agree that if the party of the second part, or the legal holder of the said principal note, shall, as they are hereby authorized in their discretion to do, advance or expend any money, either for premiums for insurance, as aforesaid, or to save said premises from sale or forfeiture for taxes or assessments, or to redeem the same from such sale, or to purchase any tax titles thereon, or to remove any mechanic's lien or other liens or incumbrances thereon, or in defending any suits in relation thereto, or in any manner protecting the title or estate by this deed conveyed and warranted, or intended so to be, all moneys so advanced or expended shall be deemed a charge upon said premises, and shall be, and are hereby declared to be, secured by this deed in the same manner as the principal sum of money above mentioned is secured, and shall be repaid by said grantors to the persons so advancing the same, on demand, and may be collected at any time after the same shall have been advanced or expended, with interest thereon at the rate of seven per cent. per annum from the time the same shall be advanced or expended. It is further agreed that in case of failure to pay said note, or interest thereon, or any part thereof, as and when the same shall become due, or in case of a breach of any of the agreements or covenants herein by the first party, then in that case the whole of said principal sum hereby secured, with the interest thereon to the time of the sale, may at once, at the option of the legal holder thereof, without notice to the first party, become due and payable." It was also agreed that in case of a breach of any of the agreements or covenants therein, or in case default should be made in the payment either in the principal or interest on the said indebtedness thereby secured, or any part thereof, when due, by election or otherwise, then in either of said cases the grantee might take possession of the premises, collect rents and profits, and apply them, etc., and the legal holder of said indebtedness should also, in either of said cases, have the right to immediately foreclose. The bill alleged that the mortgagors failed and neglected to pay the taxes and assessments on the premises levied for the

year 1894, and allowed and permitted the premises to be sold on the 21st and 22d days of June, 1895, at the tax sale for such unpaid taxes, and further that the said mortgagors failed and neglected to pay the taxes levied and assessed for the year 1895; that said appellee Robertson, in order to redeem the premises from the said tax sale, on the 17th day of June, 1896, was forced to and did pay the sum of \$821.02, and, in order to protect the property from sale for the unpaid taxes for 1895, paid the said taxes, in the amount of \$538.89. The bill further alleged that, because of the failure of the mortgagors to keep and observe their covenant to pay the taxes and assessments upon the said premises, the said Robertson elected to declare the whole of the principal sum and interest of the debt secured by the mortgage to be due and payable.

It is first insisted the provisions of the trust deed did not authorize the appellee Robertson to declare the whole sum due because of the nonpayment of the taxes and assessments by the mortgagors. The argument in support of the insistence is that under the provisions of the trust deed the moneys advanced or expended in making payment of taxes or assessments, and redeeming from sales for taxes, are deemed a charge upon the premises in the nature of an additional loan, and as such secured by the trust deed, and should be repaid on demand, and might be collected by foreclosure at any time after demand had been made, together with interest at the rate of 7 per cent. per annum from the date of payment, but that while such payments had been made, and the right to foreclose to recover the sums paid had accrued, yet that no right or power existed to declare the unmatured principal debt to be due, and to recover the same by foreclosure. The position is not tenable. The proper construction of the covenants of the trust is that the failure of the mortgagors to keep and observe their covenant to pay and discharge all taxes or assessments levied against the premises, and to protect the premises from sales for delinquent taxes and assessments, conferred upon the holder of the note secured by the trust deed the right to decline to permit the money loaned upon the security of the land to remain longer unpaid, notwithstanding the terms and conditions of the note given to evidence the loan. The provision that such holder or owner of the note might pay any unpaid taxes and assessments, or redeem the land from sales, if any had been made, was incorporated in the trust deed for the purpose of enabling the mortgagee to relieve the lands upon which he relied as security from incumbrances and sales which might destroy or impair their value as security to him. His right to declare due the principal debt secured by the trust deed arose out of the failure of the owners of the land to protect the same against unpaid taxes. It was not essential to the existence or exercise of that right that he should pay unpaid taxes or assessments, or

redeem the land from sales for delinquent taxes or assessments. He could foreclose without making such payment or redemption. The mortgage, however, gave him the right to pay delinquent taxes or assessments, or make redemption from sales, and created a lien in his favor on the mortgaged premises for any amount he might so pay, together with interest thereon at the rate of 7 per cent. per annum.

Nor is there any force in the other contention of appellants, that it appeared in the proof the appellee Robertson did not make the redemption of the land from the tax sale, or make payment of the delinquent taxes, by virtue of the authority of any of the provisions of the trust deed, but that he made such payment and redemption by virtue of an arrangement or agreement entirely apart from and independent of the trust deed entered into with the appellants, by the terms whereof said appellee Robertson agreed to make such payment and redemption in consideration of the agreement and undertaking of the appellants that they would repay any sums of money so expended by the appellee Robertson by the 1st day of September, 1896, and would also pay 7 per cent. interest thereon from the date of such payment until such sum should be repaid. The evidence does not support this contention. It appeared from the proofs that appellant Elisha Gray on the 28th day of May, 1896, addressed a letter to appellee Robertson asking him to make payment of the taxes for the year 1895, and proffering to repay the same, with interest, in 90 days. It appears, however, from the proofs, that appellee Robertson had paid the taxes for the said year 1895 on the 15th day of May, 1896, and in a letter written in reply to the letter of Gray so stated, and stated further that he intended to redeem the lands from the sale for the year 1894 within a few days, and that if the appellants would pay a semiannual interest coupon, which fell due on the 18th day of June, promptly when due, he would wait for payment of the money advanced for the taxes and to make the redemption until the 1st day of September; the appellants to pay interest at the rate of 7 per cent. Gray replied that the proposition was satisfactory. The appellants did not pay the said interest coupon when due, and some 20 days after its maturity the same was paid by appellees Boynton and Quigg, who held a second mortgage given by the appellants upon the same premises. The appellants also failed to make payment of the amount paid by appellee Robertson to redeem the mortgaged premises from the tax sale, or to repay the amount of the delinquent taxes paid by him. As we have said before, the right of the appellee Robertson to declare the entire debt due and foreclose the trust deed accrued upon the failure of the appellants to keep and observe their covenant with relation to the payment of the taxes and the protection of the property from sale for delinquent taxes

and assessments. In effect, the arrangement that the appellee Robertson would wait until the 1st day of September for repayment was that he would not exercise the right of foreclosure if the money should be paid by that time. Payment not being made, proceedings to foreclose the trust deed were begun. It is the provision of the covenant that any moneys paid by the mortgagee to save the premises from sale or forfeiture shall be repaid on demand. It was not proven that demand was made after the 1st day of September that the moneys so paid by the appellee Robertson should be repaid, and appellants contend that a demand was necessary to the existence of a cause of action. Payment was demanded as required by the conditions of the trust deed, but at the request of the appellants the time of payment was extended to a definite date, to wit, to the 1st day of September. Neither notice nor demand is necessary where by the terms of a contract a definite time is fixed for the performance. 5 Am. & Eng. Enc. Law, p. 528a.

We think the chancellor correctly ruled adversely to the appellants upon all these points, but we conceive the court erred in decreeing that the appellants should pay the sum of \$500 as solicitor's fees for the prosecution of the cause. A clause was inserted in the trust deed which provided that, if the trust deed should be foreclosed by a judicial proceeding, there should be "included in the judgment on such foreclosure a reasonable sum for the complainant's solicitor's fee." Much testimony was produced pro et con upon the question of the amount of a reasonable fee, and counsel devote some time and space in the briefs to that question. It is not, however, necessary we should advert to that question, for the reason we do not think a fee should have been allowed in any sum. It appeared the appellee Paine, who is a lawyer, acted as solicitor and attorney for himself and his co-complainant, and that he performed all the services in that capacity that were rendered in the case. He is the party named as trustee in the trust deed. He voluntarily accepted that duty, and in that capacity, of his own volition, became a party complainant to the proceeding. He was equally the trustee and representative of both debtor and creditor. He was appointed by the debtor, and derived all his power from the debtor, and was, of course, the trustee of the debtor. We have frequently held a trustee in a trust deed is the representative and trustee of both the parties to the instrument; that his relations must be absolutely impartial as between them; that he must act fairly towards both parties, and not exclusively in the interest of either. *Cassidy v. Cook*, 99 Ill. 385; *Ventres v. Cobb*, 105 Ill. 33; *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005. At the common law the trustee could not demand or be awarded compensation for his services in connection with the trust, in the absence of an express contract entitling him thereto.

This rule of the common law has been adopted by repeated decisions of this court. Willard v. Bassett, 27 Ill. 37; Cheeney v. Railway Co., 68 Ill. 570; Hough v. Harvey, 71 Ill. 72; Huggins v. Rider, 77 Ill. 360; Cook v. Gilmore, 133 Ill. 139, 24 N. E. 524; Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65. In Willard v. Bassett, supra, we held that an administrator who was also an attorney at law was not entitled to an allowance of a fee for professional services in cases which he prosecuted or defended as such administrator; and the rule was announced that a lawyer would not be permitted to become his own client, and charge for professional services rendered in his own cause, although he appeared in the cause only in a trust capacity. In Hough v. Harvey, supra, we held that an executor, being a trustee for an estate, could not be allowed compensation for his time and trouble in organizing and working up a defense to a suit against the estate, nor could he receive compensation for professional services as attorney at law for defending the suit. The trust deed in question, among other powers vested in the trustee, empowered him to take possession of the mortgaged premises, under certain circumstances, and collect rents, and to execute proper instruments releasing or reconveying the mortgaged premises, or separate tracts thereof, in a certain event, and provided he should be compensated for his services, in case he should take possession of the mortgaged premises, by way of a commission on the amount of rents collected, and by the payment of the sum of three dollars for each release or instrument of reconveyance executed by him. The clause in the trust deed authorizing the inclusion of a fee for the complainant's solicitor in any decree of foreclosure which might be rendered thereon cannot be construed to warrant the taxation of a fee to compensate the trustee for services rendered as an attorney or solicitor in his own behalf in the cause. The duties and obligations of a trustee in a trust deed are so far incompatible with the duties and obligations of the solicitor of the creditor, that a trustee cannot be permitted to charge and receive compensation as a solicitor in a cause in which he appears as a party, though in his capacity as trustee. In Chaney v. Ricks, 168 Ill. 533, 48 N. E. 75, we held that one of the parties to a partition proceeding, who was an attorney at law, and who prepared the bill in the cause, could not become his own client, and be allowed compensation, under the statute, for professional services rendered in the cause; and in the same case we cited with approval the ruling in *Sciater v. Cottam*, 3 Jur. (N. S.) 630, and *Patterson v. Donner*, 48 Cal. 369, that an attorney who is a mortgagee cannot recover professional fees for services which he himself renders in a proceeding to foreclose the mortgage, though a stipulation in the mortgage provided for the allowance of solicitor's fees. It was error to award the sum of \$500 as a fee for the

services rendered by the complainant trustee. That excluded, the decree should have been in favor of the appellees in the sum of \$12,962.70. The judgment of the appellate court must be reversed, and the decree of the circuit court, modified by the denial of allowance for attorney fee, must be, and is, affirmed. It is ordered that each party pay one-half the costs in this court. Judgment affirmed.

(174 Ill. 221)

 ANDERSON TRANSFER CO. v. FULLER.¹

(Supreme Court of Illinois. June 23, 1898.)

APPEAL—BILL OF EXCEPTIONS—PRESUMPTIONS—HARMLESS ERROR—DISCRETION OF TRIAL COURT—PLEADING—JUDGMENTS—CORPORATIONS—AUTHORITY OF PRESIDENT—CONDUCT OF TRIAL.

1. Affidavits introduced in support of a motion to vacate a judgment, which are copied into the transcript of the record, but are not incorporated in the bill of exceptions, cannot be considered on appeal.

2. In the absence of a bill of exceptions showing the proofs introduced, it will be presumed that the action of the court thereon was justified.

3. Leave to file a special plea after the time for filing pleas has expired rests largely in the discretion of the trial court, and its action will not be disturbed, except in case of an abuse of discretion.

4. A refusal to permit a special plea to be filed after the time for filing pleas has expired is not an abuse of discretion, where evidence of the only facts well pleaded which were proper to be considered could be introduced under pleas already filed.

5. Where the president and treasurer of a corporation signed the corporate name of the company, by himself, as president and treasurer, to a note containing a warrant of attorney, and placed the seal of the corporation thereon, the act was prima facie that of the corporation.

6. Where a judgment against a corporation on a note by confession under authority therein is opened to allow defendant to plead, judgment may be rendered against defendant on proof that the indebtedness was that of the company, and that the president had authority to make and deliver the note, even in the absence of proof that the president was authorized to execute the warrant of attorney therein to confess judgment.

7. It is within the discretion of the court to grant or refuse leave to recall a witness examined and dismissed, and its action will be reviewed only in case of abuse of that discretion.

8. A refusal to permit the recall of a witness to testify concerning entries in a ledger, where he has already testified that he could tell nothing about the book, is not an abuse of discretion.

9. In an action against a corporation on a note executed by its president, an instruction that if plaintiff loaned the president the money for which the note was given, and the money was spent by the president for the benefit of defendant, that of itself would not authorize a verdict for plaintiff, was properly modified by adding that, if the corporation used the money thus borrowed, it would be bound.

10. A refusal to give an instruction based on a fact which the jury specially find is untrue cannot prejudice the party requesting it.

Appeal from appellate court, First district.

Action by George A. Fuller against the Anderson Transfer Company upon a note of the company executed by Frank S. Rolfe as presi-

¹ Rehearing denied.

dent and treasurer. Defendant filed a special plea alleging that the note was given for the individual indebtedness of the president, and requested an instruction that: "If the jury find from the evidence that George A. Fuller loaned to Frank S. Rolfe \$5,000, and this money was spent by said Rolfe for the benefit of the Anderson Transfer Company, still this fact, of itself, would not authorize you to find the verdict for plaintiff." The court gave the instruction, modified by adding thereto: "But if the corporation defendant, however, having used the money borrowed personally by its president giving its note to the plaintiff for that amount, then there is good consideration for the note, and the company would be bound." From a judgment for plaintiff, defendant appealed to the appellate court, where the judgment was affirmed (73 Ill. App. 48), and defendant appeals. Affirmed.

Otto Gresham (John S. Cooper, of counsel), for appellant. Tenney, McConnell, Coffeen & Harding, for appellee.

BOGGS, J. On February 12, 1897, a judgment by confession was entered in the superior court of Cook county for the sum of \$5,847 in favor of the appellee and against the appellant company. The judgment was entered on a note, which comprised also a warrant of attorney to confess a judgment, purporting to have been executed by the appellant company, by Frank S. Rolfe as president and treasurer of the company, and to which was attached the corporate seal of the company, payable to the appellee, in the sum of \$5,600, with interest at the rate of 6 per cent. per annum. On the 15th day of February a motion to vacate the judgment was entered by the appellant company, and also one by Hadley W. Smith; the latter purporting to act as receiver for the appellant company. It appears from the briefs of counsel that the affidavits of a number of persons and some documentary evidence were produced in support of the motion, and the affidavits of a number of persons in opposition thereto, and that the motion was submitted to the court upon such proofs. On the 26th day of February, 1897, the court entered an order overruling and denying the motion to vacate the judgment, and a further order that the judgment should be opened to permit the defendant to plead to the declaration, and ordered that the defendant should plead within three days. It does not appear that objection was made or exception taken to the order and judgment of the court denying and overruling the motion to vacate the judgment, nor are the affidavits and documents which the parties produced in the court pro et con upon the hearing of the motion preserved in the bill of exceptions. Such affidavits and documents are copied into the transcript of the record, but, not being incorporated in the bill of exceptions and certified to by the judge, they are not a part of the record for our considera-

tion. *Wright v. Hatchett*, 12 Ill. App. 261; *Vandruft v. Craig*, 14 Ill. 395; *Mallors v. Machine Co.*, 170 Ill. 434, 48 N. E. 992. In the absence of a bill of exceptions, signed and sealed by the trial judge, showing the proofs introduced, the presumption is that the action of the trial court was justified by the state of the proof. *Mallors v. Machine Co.*, supra. It is therefore to be considered that the court properly overruled and denied the motion to vacate the judgment.

On the 1st day of March, 1897, the appellant company filed a plea of the general issue, and a special plea (No. 1), verified by the affidavit of the secretary of the appellant company, in which it was alleged "that it [the appellant company] did not make and deliver the note or writing in the declaration mentioned, in manner and form," etc. The cause came on for trial on the 25th day of March, 1897, and before proceeding to trial the appellant company asked leave to file two additional pleas. One of the pleas alleged that there was no good or valuable consideration for said note, and that the note was given for the individual indebtedness of Frank S. Rolfe to the appellee, and not the indebtedness of the appellant company; and this plea the court permitted to be filed. It may be designated as "Special Plea No. 2." The other plea was as follows: "For a further plea in this behalf, the defendant, the Anderson Transfer Company, says that the plaintiff ought not to have his aforesaid action against it, because it says that the plaintiff, Geo. A. Fuller, and Frank S. Rolfe, president of the defendant company, conspired and colluded, with knowledge of the want of power of said Rolfe to execute and deliver the supposed note mentioned in the plaintiff's declaration, for the purpose of defrauding this defendant and its stockholders, and, for the purpose of hindering and delaying the creditors of said defendant, fraudulently executed and delivered said note, and the plaintiff fraudulently caused judgment to be taken herein; that said note does not represent the indebtedness of this defendant, but the indebtedness of the said Frank S. Rolfe. And this the defendant prays may be inquired of by the country." The court refused to allow it to be filed. The time allowed by the court for appellant to file pleas had long since expired. The appellant company had filed the general issue and two special pleas, and leave to file this additional plea was not asked until the day on which the cause stood for trial. Whether the leave should be granted, permitting the plea to be filed, was largely a matter resting within the discretion of the court. It is only in case of an abuse of discretion that error can be assigned upon a refusal to exercise the discretion. *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635. The plea does not aver that Rolfe had not power to execute the note, but it merely assumes argumentatively that he had not such power. Nor does the plea set forth any fact or facts from

which it would appear to the court that any fraudulent act had been committed, but it states, merely as the conclusion of the pleader, that the making of the note and the entry of judgment thereon were fraudulent. That the note was given for the individual indebtedness of the president and treasurer of the company, Frank S. Rolfe, was fully and properly set up as a defense in the second special plea which the court allowed to be filed. If the said president and treasurer was not empowered to execute the note, as assumed in the excluded plea, that defense could be introduced under the first special plea. The remaining allegations relate to matters which were proper for consideration only in determining whether the judgment should be vacated, upon which the parties had been fully heard, and the question determined by the court. The discretion resting in the court was properly exercised.

Issues were joined upon the pleas filed, and the cause was submitted to a jury, who returned a general verdict for the plaintiff in the sum of \$——. The following special interrogatories were propounded to and answered by the jury as follows: "Q. Did George A. Fuller on or about June 13, 1894, loan to Frank S. Rolfe, personally, the sum of \$5,000? A. No. Q. Are not the \$5,000 represented by the check for that amount given by Geo. A. Fuller to Frank S. Rolfe the debt of said Rolfe, and not the debt of the Anderson Transfer Company? A. No." Appellant's motion for a new trial was overruled, and judgment entered on the verdict. The appellant company prosecuted an appeal to the appellate court for the First district, and from a judgment of affirmance prosecuted this appeal to this court. It was proven that Frank S. Rolfe was the president and treasurer of the appellant company at the time of the execution of the note, and that he signed the corporate name of the company, by himself, as president and treasurer, to the note, and that the note bore an impression of the seal of the appellant company at the time it was delivered to the appellee. In *Bank v. Griffin*, 168 Ill. 314, 48 N. E. 154, we said: "The general rule is, a corporation acts through its president; and an act pertaining to the business of the corporation, not clearly foreign to the general powers of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body. *Moser v. Kreigh*, 49 Ill. 84; *Mitchell v. Deeds*, Id. 416; *Smith v. Smith*, 62 Ill. 493; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680." Where a note and warrant of attorney are executed in the name and under the seal of the corporation, by its president, the authority to execute it will be presumed. *Atwater v. Bank*, 152 Ill. 605, 38 N. E. 1017; *Snyder Bros. v. Bailey*, 165 Ill. 447, 46 N. E. 452. The testimony therefore afforded prima facie proof that the instrument sued upon was the act and deed of the appellant company, and justi-

fied the submission of the note in evidence to the jury. *McDonald v. Chisholm*, 131 Ill. 273, 281, 23 N. E. 596, and cases there cited.

Appellant contends that, even if proven that the said company was indebted to the appellee in the amount of the said note, and if Rolfe, as its president, had, by virtue of his general powers as president, authority to execute and deliver a note of the company therefor, still the verdict of the jury should have been for the appellant company, unless the appellee should further prove said Rolfe was authorized to incorporate in the note the warrant of attorney authorizing the confession of a judgment thereon. As we have before seen, the execution of the note and warrant of attorney by the president of the company, in the name of the company, and authenticated by the seal of the company, established prima facie that the execution of the note and warrant was fully authorized by the company. The refusal of the court to vacate the judgment involved consideration and determination of the question of the power of the said president to execute a warrant authorizing the confession of a judgment. The appellant company, upon the hearing of the motion, should, and presumably did, introduce all testimony of the character necessary to enlighten the court upon that issue. The court denied the motion, and the appellant company acquiesced in the decision of the court,—at least, if it had any objections thereto, it has not preserved same for review. The court, however, opened up the judgment, and allowed the appellant company to plead to the action, and impaneled a jury to decide the issue raised upon such pleas. It was sufficient to authorize the jury to render a verdict for the appellee, if it was proven that the indebtedness was that of the company, and that the president of the company had authority to make and deliver the note, even in the absence of proof or presumption of authority in the president to add the warrant of attorney to the note.

The appellee produced in evidence page 198 of the ledger of the appellant company, on which page appeared the account of the appellee. It is assigned as error that the court refused to permit Frank S. Rolfe, president of the appellant company, who was introduced in its behalf as a witness, to explain certain entries in the said account on the said page of the ledger. It appears from the record that after the close of the testimony for the appellee the appellant company introduced its said president, Rolfe, and examined him at length as a witness in its behalf. Upon cross-examination the ledger and cash book of the company were produced, and the attention of the witness called to the entries on page 188 of the ledger; and in answer to questions relating thereto the witness testified he could not tell anything about the book; that he employed a competent bookkeeper, and had nothing to do with the books. The witness was subjected to a redirect examination by counsel for appellant company, and they had

ample opportunity to interrogate him as to any entries upon the books, but did not do so, and he was dismissed as a witness. The bookkeeper referred to, and other witnesses, were examined; and the appellant company subsequently desired to recall its said president, for the purpose, as counsel stated to the court, of asking him to explain certain of the entries on page 188 of the ledger. It is within the discretion of the trial court to grant or refuse an application for leave to recall a witness who has been examined and dismissed from the stand. 1 Thomp. Trials, 349. The mere refusal to do that which is within the discretion of the court to do or not to do cannot be assigned as error, as courts of review only interfere when it is apparent that the refusal was an abuse of the discretionary power lodged in the court. Such is not here apparent. Nor did the court err in refusing to permit counsel for the appellant company to propound certain questions to the appellee in his cross-examination. These questions were designed to elicit information as to transactions between the appellee and said Rolfe, president of the appellant company, in no wise connected with any issue the jury were called upon to decide, and not in any manner pertinent to the cause.

The court correctly refused to give the first instruction as asked by the appellant. It was as follows: "If the jury find from the evidence that George A. Fuller loaned to Frank S. Rolfe \$5,000, and this money was spent by said Rolfe for the benefit of the Anderson Transfer Company, still this fact, of itself, would not authorize you to find the verdict for the plaintiff." The court modified the instruction, and gave it as modified. We think the instruction was properly modified. However that may be, as the jury specially found that the appellee did not loan the money to said Rolfe, it is manifest the refusal to give the instruction did not prejudice the cause of the appellant company, and that the instruction could not have been of benefit to the company had it been given. We find no error in the record, and the judgment must be, and is, affirmed. Affirmed.

(174 Ill. 208)

CENTRAL ELEVATOR CO. et al. v. PEOPLE ex rel. MOLONEY, Atty. Gen. SEAVERN v. SAME. SOUTH CHICAGO ELEVATOR CO. et al. v. SAME. ARMOUR ELEVATOR CO. et al. v. SAME. COUNSELLMAN v. SAME. CHICAGO RAILWAY TERMINAL ELEVATOR CO. v. SAME. NEBRASKA CITY PACKING CO. v. SAME. CHICAGO ELEVATOR CO. v. SAME. DAVIS et al. v. SAME.¹

(Supreme Court of Illinois. June 18, 1898.)

APPEAL — REVIEW — EQUITY — JURISDICTION — GRAIN ELEVATORS — RIGHT OF OWNERS TO STORE THEIR GRAIN — MONOPOLIES — LACHES — CORPORATIONS.

1. The objection that a court of equity is without jurisdiction because of an adequate remedy

at law cannot be first urged on appeal, where the cause is one in which equity might under any circumstances obtain jurisdiction.

2. In the absence of objection that the law furnishes an adequate remedy, equity has jurisdiction of an information by the people to enjoin the owners of grain elevators which are public warehouses under the warehouse act of 1871 from storing their own grain in the elevators, on the ground that such practice is injurious to shippers and producers, since it has produced a monopoly in the ownership of grain, resulting in harm to them and to the public.

3. Informations were filed by the state to enjoin the owners of certain grain elevators from storing their own grain in their elevators, which were created public warehouses by the warehouse act of 1871. Defendants, by storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By reason of their advantages as warehousemen, they have crushed out competition in buying and selling, to the extent that they own three-fourths of the grain in the public warehouses in Chicago. By virtue of the same grade of grain, as inspected, being of different qualities, varying in value from 2 to 15 cents per bushel, and of its being the warehousemen's duty to mix grain of the same grade as delivered, so as to give an average quality to the holder of the warehouse receipts, great chances for fraud in manipulating the grain are open to the warehousemen where they own part of the grain. A warehouseman often overbids other dealers, and immediately resells at a loss, but exacts storage more than enough to balance the loss. The warehousemen are large dealers in futures on the board of trade. When the warehouse act was passed, there was no custom of elevator owners buying or selling grain. *Held*, that the relief should be granted on the ground that their duty as warehousemen is in opposition to their interests as buyers and dealers in grain storing the same in their warehouses.

4. The relief sought is not barred by the fact that the warehouse commissioners, charged with the administration and enforcement of the law, had permitted the practice complained of for several years without questioning its legality by prosecuting the offenders, since such failure is not a practical construction of the act, and since the public are not bound by their dereliction or indifference.

5. Nor are the public barred by laches.

6. The stockholders in the corporations owning the elevators are themselves also properly enjoined from using the property to carry on their private business.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Informations in equity by the people, on relation of Maurice T. Moloney, attorney general, against the Central Elevator Company and eight others. From a decree for complainant in each case, defendants appeal. Affirmed.

John P. Wilson and John J. Herrick (Custer, Goddard & Griffin and James E. Munroe, of counsel), for appellants. Edward C. Akin, Atty. Gen., and Henry S. Robbins, for appellee.

CARTWRIGHT, J. Appellants in these nine cases were defendants in the circuit court of Cook county to informations in equity filed by the attorney general against them as licensed proprietors of warehouses of class A in Chicago, or stockholders of cor-

¹ Rehearing denied.

porations so licensed. The informations made the same general allegations in each case,—that defendants had stored grain owned by themselves in the particular warehouse of which they were proprietors; that not less than three-fourths of all the grain received in the public warehouses in Chicago was owned by the warehousemen; that the grades for inspection of grain were such that the grain of each grade was not of the same quality, but that separate car loads of different quality and value were graded in the same grade; that by reason of advantages of the defendants, as owners of warehouses, in mixing and manipulating grain, and rebating storage charges, and otherwise, they had been enabled to drive out competition, and to hold and enjoy the privilege of buying grain free from competition; and that such storing of grain was unlawful and injurious to the public. All the informations prayed for the same relief,—a perpetual injunction to restrain defendants, as warehousemen, from storing grain in their own warehouses. The answers admitted in each case that defendants were operating public warehouses of class A, in which grain was stored in Chicago, and that they had stored grain owned by them in their own warehouses, and claimed the right to do so. The answers also set up a general custom of 30 years' standing, under which the proprietors of public warehouses were accustomed to store their own grain and mix it with the grain of their customers, and also that the warehouse commissioners had construed the act of 1871 as permitting that custom, and that such purchases of grain and such custom had a beneficial effect upon producers, shippers of grain, and dealers in grain throughout Illinois and the Northwest. A great amount of evidence was taken, and a decree was entered in each case granting the relief prayed for. Where the defendant was a corporation, the stockholders were enjoined from storing their own grain in the elevators of their own corporations. These appeals were prosecuted from the decrees so entered. The cases were argued together, and were all submitted upon the same briefs and arguments.

It is contended that a court of equity has no jurisdiction in a case of this character, and especially because by the provisions of the warehouse act the license is made revocable for any violation of law, so that the statute affords a sufficient remedy for any illegal act by the licensee. This objection was not made by the answers, and the fact that the statute provides an efficient remedy for a violation of duty by a warehouseman and licensee cannot be raised for the first time in this court, if the case is one in which a court of equity might under any circumstances obtain jurisdiction. There are subjects which cannot be brought before a court of chancery, even by consent of the parties; but if a defendant makes no objection to a hearing of the cause, and participates in it,

he must be regarded as consenting to the jurisdiction, and, if the subject-matter is such that jurisdiction can be conferred in that way, he will not be heard to complain of the want of it. In such a case, if a defendant goes to a hearing without objection he cannot, in case of defeat, make the objection here. *Stout v. Cook*, 41 Ill. 447; *Dodge v. Wright*, 48 Ill. 382; *Hickey v. Forristal*, 49 Ill. 255; *Magee v. Magee*, 51 Ill. 500; *Gridley v. Watson*, 53 Ill. 186; *Board v. Davis*, 63 Ill. 405; *Ryan v. Duncan*, 88 Ill. 144; *Richards v. Railway Co.*, 124 Ill. 516, 16 N. E. 909; *Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40; *Clemmer v. Bank*, 157 Ill. 206, 41 N. E. 728. Clearly, this is such a case. The relief sought by the informations, and the subject-matter, are neither of them foreign to equity jurisdiction. The constitution declares that warehouses such as defendants are licensed to carry on are public warehouses, and that it shall be the duty of the general assembly to pass all necessary laws to give full effect to that article of the constitution, which shall be liberally construed to protect producers and shippers. In compliance with the requirements of the constitution the warehouse act of 1871 was enacted, by which defendants were permitted to exercise the business of public warehousemen, and to conduct such public warehouses. They procured their licenses, and thereby voluntarily submitted their property to the law. The right of the state to control them in that business is conceded, and the right of the state, through its attorney general, to restrain them in the use of their public warehouses, within the limitations of the law, and to prevent resulting public injury, is not foreign to the powers or jurisdiction of a court of equity. Defendants could not operate their warehouses and devote them to such uses without a license, and the giving of a bond to faithfully comply with the law. The attorney general alleged injury to the public from violations of the laws governing them and their warehouses, and this authorizes the court of equity to protect the public right,—at least, where there is no objection that the law furnished an adequate remedy.

It is a firmly established rule that, where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to temptation of acting contrary to that duty, or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which alone it will be applied. They have applied it to agents, partners, guardians, executors, administrators, directors, and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that

duty, and he will not be permitted to expose himself to temptation, or be brought into a situation where his personal interests conflict with his duty. Courts of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor to see that he does not violate his duty, but forbid such a course of dealing, irrespective of his good faith or bad faith. If the duty of the defendants as public warehousemen stands in opposition to personal interest as buyers and dealers in grain storing the same in their own warehouses, then the law interposes a preventative check against any temptation to act from personal interest, by prohibiting them from occupying any such position.

The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators, the position of equality between them and the public whom they are bound to serve is destroyed; and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. The grades established for different qualities of grain are such that the grain is not exactly of the same quality in each grade, and the difference in market price in different qualities of the same grade varies from 2 cents per bushel in the better grades to 15 cents in the lower grades. The great bulk of grain is brought by rail and in car loads, and is inspected on the tracks, and the duty of the warehousemen is to mix the car loads of grain as they come. Such indiscriminate mixing gives an average quality of grain to all holders of warehouse receipts. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage, which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder

of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition, and to combine in establishing a monopoly by which a great accumulation of grain is in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade, and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear. The defendants answer that the practice had a beneficial effect upon producers and shippers, and naturally were able to prove that when, by reason of their advantages, they were overbidding other dealers, there was benefit to sellers, but there was an entire failure to show that in the general average there was any public good to producers or shippers.

The answers also set up, and it is claimed here, that there was at the time of the passage of the warehouse act a general custom of warehousemen to deal in grain, and to store it in their warehouses, and that the law was passed with reference to that existing custom. The evidence fails to establish any such custom. The amount so bought and stored or dealt in up to the year 1885 was trifling, and the first time when there was any material increase was in 1890. Many witnesses who would have known if such a practice or usage existed united in denying all knowledge of it, and many of them testified that they never knew or heard of any elevator owner buying or selling grain prior to 1885. There was no such custom.

Finally it is claimed that there has been a practical construction of the law by the warehouse commissioners, permitting the practice complained of. There was a little buying and storing of grain by warehousemen from time to time, but it was so insignificant as to call no attention to it until in recent years. It is said, however, that since the practice became common the warehouse commissioners, charged with the administration and enforcement of the law, did not question the legality of the practice. There was nothing in the nature of affirmative construction, and the most that can be said is that the warehouse commissioners failed to appeal to the attorney general to institute a suit, and failed to prosecute the offenders. That fact does not amount to practical construction. If the

commissioners were derelict, it would not bind the public, and indifference on their part could not have that effect.

Neither are the public barred by laches. The stockholders who were made defendants occupy such a relation to their corporations that they cannot be permitted to use the property which they have devoted to public use to carry on their individual business with substantially the same effect and the same deleterious result to the public interest as if done by the corporation. These persons were made respondents as stockholders, and the only relief sought against them was in that relation. The charges and findings against them were on account of the existence of that relation, and, as we interpret the decree, the permanent injunctions are against them as stockholders. They are permanent only so long as the relation and interest on which they are based exist.

The decree of the circuit court is affirmed. Decree affirmed.

(157 N. Y. 1)

PEOPLE v. HAWKINS.

(Court of Appeals of New York. Oct. 11, 1898.)

INTERFERENCE WITH INTERSTATE COMMERCE—
CONVICTS.

Laws 1896, c. 931, making it a misdemeanor to sell or expose for sale goods made in any prison, without labeling them "Convict-Made," with the year and name of the prison, as applied to articles made without the state, violates Const. U. S. art. 1, § 8, subd. 3, empowering congress to regulate commerce among the states.

Parker, C. J., and Bartlett and Haight, JJ., dissenting.

Appeal from supreme court, appellate division, Third department.

Samuel K. Hawkins was indicted for having and offering for sale a scrub brush of convict make, not so labeled. There was a judgment of the appellate division (47 N. Y. Supp. 56) affirming a judgment entered on a decision sustaining a demurrer to the indictment, and the people appeal. Affirmed.

Harry C. Perkins, for the People. Frederick Collin, for respondent.

O'BRIEN, J. The defendant was indicted for a misdemeanor, the charge being that he violated chapter 931 of the Laws of 1896, relating to the labeling and marking of convict-made goods or articles. The indictment alleges that the defendant on the 5th day of November, 1896, had in his possession and offering for sale, unlawfully and with criminal intent, a certain scrub brush of the form, style, and material commonly used in scrub brushes, but made and manufactured, as the defendant well knew, by the labor of convicts lawfully sentenced to and confined in a prison at Cleveland, Ohio. It then charges that this article was brought from that institution into this state, and was in

the defendant's possession, for the purpose of sale, without having upon it in any manner the words "Convict-Made," or any words indicating in any manner that it was manufactured by convict labor. The defendant demurred to the indictment upon the ground that the facts stated did not constitute a crime, and the courts below have sustained the demurrer for the reason that the statute was in conflict with the constitution, and therefore void. The statute went into effect by its terms on November 1, 1896, and the several sections material to the questions in this case are as follows:

"Section 1. All goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed shall, before being sold, or exposed for sale, be branded, labeled or marked as hereinafter provided, and shall not be exposed for sale in any place within this state without such brand, label or mark.

"Sec. 2. The brand, label or mark hereby required shall contain at the head or top thereof the words 'Convict Made,' followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer Roman condensed capitals. The brand or mark shall in all cases, where the nature of an article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering."

"Sec. 5. Section three hundred and eighty-four b of the Penal Code is hereby amended so as to read as follows: Section 384b. Penalty for dealing in convict-made goods without labeling.—A person having in his possession for the purpose of sale, or offering for sale, any convict-made goods, wares or merchandise hereafter manufactured and sold, or exposed for sale, in this state without the brand, mark or label required by law, or removes or defaces such brand, mark or label, is guilty of a misdemeanor, punishable by a fine not exceeding ten hundred dollars nor less than one hundred dollars, or imprisonment for a term not exceeding one year nor less than ten days, or both."

The act charged against the defendant, and which is admitted by the demurrer, is declared to be a crime by this statute, and the only question that we need consider is whether the legislature had any power, under the constitution, to enact such a law. The

law is similar in all respects to the law of 1894 (chapter 698, Laws 1894), except that the latter statute was aimed at prison-made goods of other states, while the present statute applies to all prison-made goods, whether of this or other states. The act of 1894 was held to be unconstitutional and void. *People v. Hawkins*, 85 Hun, 43, 32 N. Y. Supp. 524. The present act makes it a criminal offense to expose for sale prison-made goods of this state as well as of other states. It seems to have been assumed that the feature of the former act, which discriminated against the prison-made goods of other states, was the only objection to this class of legislation. But the broader scope of the present law removes no objection that existed to the former. On the contrary, it multiplies and intensifies them.

It is important at the outset to ascertain, if we can, the legislative purpose and intent that led to the enactment of this law. The learned district attorney, in his brief in the court below, has, I think, stated it quite fairly and accurately in these words: "The statute in question is an attempt to solve a great public and economic problem. It has a bearing, directly or indirectly, upon wages paid to workmen in certain lines of industry. * * * It involves the welfare and prosperity of the laboring classes, who comprise a great portion of our population. * * * It is against sound public policy to compel workmen who have to support their families by their daily earnings to compete with the unpaid labor of convicts in penal institutions. The framers of the state and federal constitutions never intended to create and foster such competition. The people have a right to demand protection from the legislature in this respect, and it is within the police power of the state to require the mark, brand, or label of goods made in penal institutions." We may assume, therefore, that the purpose of the law was to promote the welfare of the laboring classes by suppressing, in some measure, the sale of prison-made goods. Waiving for the present the question whether the means employed can ever, in the nature of things, accomplish the end in view, it is quite clear that unless this statute in some degree affects the value of certain articles of merchandise by restricting the demand or imposing conditions upon the right to deal in them as property, in order to exclude them from the market, it is a mere brutum fulmen. The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority, which diminishes the value and impairs its selling qualities. It is not claimed that there is any difference in the quality of this scrubbing brush when compared with one of the same

grade or character made outside the prisons. There is no pretense that the act was passed to suppress any fraudulent practice, or that any such practice existed with respect to such goods. The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing, through the instrumentality of the criminal law, the sale of the products of prison labor.

The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment, and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the constitution is a protection. The fact that legislation hostile to the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the courts cannot permit that to be done by indirection which cannot be done directly. The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession, or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business, are infringements upon his fundamental rights of liberty, which are under constitutional protection. These rights may, doubtless, be affected to some extent by the exercise of the police power, which is inherent in every sovereign state. But that power, however broad and extensive, is not above the constitution. The conduct of the individual and the use of property may be affected by its lawful and proper exercise in cases of overruling necessity, and for the public good. The preservation of public order, the protection of the public health and the prevention of disease, the sale of articles of unwholesome or adulterated food, the calamities caused by fire, and perhaps other subjects relating to the safety and welfare of society, are within its scope. But no law which is otherwise objectionable as in conflict with the fundamental guaranties of the constitution can be upheld under the police power, unless the courts can see that it has some plain or reasonable relation to those subjects, or some of them. These principles have been so fully discussed and sanctioned

by judicial authority, and so often asserted, that they may now be regarded as elementary. It is therefore unnecessary to enter the vast field of litigation involving discussions of the police power, and the validity of statutes enacted really or ostensibly in its exercise. *Wynehamer v. People*, 13 N. Y. 378; *In re Jacobs*, 98 N. Y. 98; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

It is entirely safe to assert that no court has yet invoked the police power to justify a statute, the purpose of which was to enhance the wages of labor in certain factories, by suppressing, through the agencies of the criminal law, the sale of competing products made in prisons. If the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power, there is no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion. That all legislation of this character, with this end in view, which subjects the individual to criminal prosecution unless he will comply with regulations in the sale of such goods that are intended to depress their value or demand in the market, is in violation of the constitution, cannot be doubted. It would be trifling with the constitution to attempt to uphold this law on the ground that all producers or vendors of goods may be required to tell the truth concerning them, both as to their quality and the means by which or the place where they were manufactured. A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade, or commerce cannot be essential to the public welfare; and, even if it was, the law could be effective only when applied to all property alike, and not limited to articles made in certain places, and by a certain class of workmen. Any attempt to carry the police power to such an extent as to require the owner of an article of property kept for sale, such as a scrubbing brush, to label it with the history of its origin, and to indicate the place where it was made, and the class of workmen that produced it, and to enforce such regulations by the aid of the criminal law, must be regarded as an inexcusable and intolerable invasion of the rights and liberty of the citizen. There is nothing in the character or effect of prison labor to justify such legislation. The health and welfare of convicts is a subject peculiarly within the functions of government. The state, in order to carry out the purposes of punishment, must employ them at some useful labor. Whatever it may be, their work must in some degree come into competition with the labor of others. It is not at all likely that this result ever had, or can have, any material or perceptible influence on wages. But, even if it had, the welfare of the convicts and the interests of the taxpayers are proper subjects for consideration.

The question is reduced to the simple inquiry whether the legislature, under the guise of the police power, can regulate the price of labor by depressing, through the penalties of the criminal law, the price of goods in the market, made by one class of workmen, and correspondingly enhancing the price of goods made by another class. If the statute does not tend to produce that result, there is no reason or excuse for its existence, and it would be a useless and arbitrary interference with the liberty of the individual without any possible reason or motive behind it. The law is now defended upon the ground that it was intended to accomplish, and in fact does tend to promote, that very result. If the police power extends to the protection of certain workmen in their wages against the competition of other workmen in penal institutions, why not extend it to other forms of competition? Why not give the workman who has a large family to support some advantage over the one who has no family at all? Why not give to the old and feeble a helping hand by legislation against the competition of the young and the strong? Why not give to the women, the weaker sex, who are often the victims of improvidence and want, a preference by statute over the men? Why confine such legislation to scrubbing brushes and like articles made in prisons, when multitudes of men engaged in farming, mercantile pursuits, and almost every vocation in life are struggling against competition? If the statute now under consideration is a valid exercise of the police power, I am unable to give any reason why the legislature may not interfere in all the cases I have mentioned to help those who need help at the expense of those who do not.

It would be difficult to give any satisfactory reason, legal, moral, or economic, why a person who happens to be confined in a prison should not be permitted or compelled to earn his living and pay his way instead of becoming a burden upon the public, to the detriment of his health and morals. The mere fact that he is in prison may be due to misfortune, or to his natural surroundings, and in some cases he may be at least morally innocent. The state may certainly, for his own benefit, and for the relief of the tax-paying community, employ him at some useful labor; and, whether that labor be in building roads or making shoes, he takes the place of another. If it be lawful and right to so employ him, it is difficult to see why the state may, by legislation, depress the value of the products of his labor when such property is purchased in the ordinary course of commerce by a dealer therein. The state, while permitting such property to come within its jurisdiction in the regular course of trade, cannot then impair its value by hostile legislation, without a violation of the constitutional guaranties for the protection of property. Aside from the peculiar restrictions of revenue laws, the merchant or dealer may

buy his goods where he can obtain them to the best advantage, and any restriction upon his freedom of action in this respect by state laws is, in a broad sense, an invasion of his right of liberty, since that term comprehends the right of the individual to pursue any lawful calling. I think that the statute in question is in conflict with the constitution of this state, since it interferes with the right to acquire, possess, and dispose of property, and with the liberty of the individual to earn a living by dealing in the articles embraced within the scope of the law. It is an unauthorized limitation upon the freedom of the individual to buy and sell all such articles, subject only to the law of supply and demand, and the legislation is not within the scope of the police power.

It has been suggested by some members of the court that the statute in question can be upheld under the recent amendment to the state constitution with respect to prison labor. It should be observed that no such point was argued or submitted, either in this court or the court below; but, since some of my brethren are of that opinion, the question may be properly discussed. The language of the amendment is as follows: "The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the state; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof." Const. 1894, art. 3, § 29. It is said that this provision of the constitution indicates and expresses a public policy on the part of the state to suppress the competition of prison labor with free labor by forbidding the sale to the general public of prison-made goods. The term "public policy" is frequently used in a very vague, loose, or inaccurate sense. The courts have often found it necessary to define its juridical meaning, and have held that a state can have no public policy except what is to be found in its constitution and laws. *Girard Will Case*, 2 How. 127; *Hollis v. Theological Seminary*, 95 N. Y. 166; *Cross v. Trust Co.*, 131 N. Y. 343, 30 N. E. 125; *Dammert v. Osborn*, 140 N. Y. 40, 35 N. E. 407. Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the constitution,

the statutes, or judicial records; so that the inquiry is whether the provision of the constitution above cited forbids the sale of prison-made goods to the general public. Either it does or does not. If it does not, there is an end of the argument on that point. If it does, we will see hereafter how it affects the validity of this statute. If the framers of the constitution intended to forbid the sale of prison-made goods to the general public, or to prohibit dealing in them, it was an easy matter to say so in terms that could not be misunderstood. Surely, the poverty of our language is not such as to preclude the framers of the fundamental law from giving plain and direct expression to such a simple thought. But the section above quoted does not forbid the sale of any article of property. It deals only with modes of employing convicts, and with practices that had formerly existed, under which the labor of convicts had become a subject of bargain and sale. It simply abolished what was known as the "contract system" of labor in prisons, whereby the profits of the labor of convicts were secured by contractors or private parties. This is apparent from the language of the section, which begins by providing for the employment of convicts. It then forbids the employment of the inmates of penal institutions at any trade or industry whereby "his work or the product and profits of his work shall be farmed out, contracted, given, or sold to any person." What is it that this language forbids? Not dealing in tangible things or articles of property wherever made, but the farming out, contracting, giving away, or selling of convict labor. The words "product and profit of his work" do not refer to articles of property, but to the net value of labor. If the framers of the constitution intended to prohibit dealing in any article of merchandise, surely they would not have described the article by such vague terms as the "products of work." A manufactured article is not known in common parlance, in law or political economy, as the "product of labor." Of course, labor enters into its production, but in many cases it is an insignificant element. The article is the product of raw material and labor combined, or, as it is commonly expressed, labor and capital. The prohibition against dealing in any article of property cannot be found in this section without giving to the words a strained and unnatural meaning. If any of the penal institutions of the state happen to have a farm attached to it, worked by the convicts,—as some of them probably have,—it would be a very narrow construction of this section to hold that the products or profits of the farm, whether consisting of cattle or other farm produce, could not be sold to the general public, because it would be the products and profits of prison labor.

But if it be assumed, for the purpose of the argument, that the constitution does forbid the sale of prison-made goods to the public,

It would not help the statute in question, but, on the contrary, would furnish an additional reason for its condemnation. If the constitution forbids the sale of such goods, or prohibits dealing in them as merchandise, then clearly the legislature has no power to enact laws regulating and permitting such sales. That this was the purpose and was the obvious effect of the statute in question in its entire scope and meaning must, of course, be admitted. Therefore, if the section means what is claimed for it, the legislature has attempted to regulate and permit what the constitution forbids. It has attempted to regulate and permit the sale of prison-made goods by fixing upon them a badge of their origin, when the constitution provides that they shall not be sold at all. It is difficult, therefore, to understand how any one, who believes that the constitution interdicts the sale of convict-made goods, can at the same time reach the conclusion that the statute is in harmony with the constitution. It would be manifestly unjust and inconsistent for the state, while it encourages and commands the employment of convicts, and becomes itself the patron and customer of prison-made goods, to prohibit its citizens from dealing in the same property. What policy could the framers of the constitution have had in view when providing for the employment of convicts, and for drawing all supplies needed by the state from goods produced in the prisons, if at the same time they forbid the general public from dealing in the same class of goods? When it is asserted that the law-makers intended to employ convict labor in the production of property, and at the same time enacted that the property so produced should not become a part of the general mass of merchandise in the state, or the subject of bargain and sale, like other property, we look for language in the constitution so clear and explicit that no other construction is possible to be put upon it; but such language is not there. This construction would really impeach the honor and justice of the state, make it the sole beneficiary of convict labor, and the sole competitor with free labor. I think the constitution is open to quite another construction, and one much more honorable to the state.

But such a construction of the constitution must, if adopted, encounter another and still more serious obstacle. Assuming that it forbids the sale in this state of the convict-made goods of Ohio, it is in conflict with the commerce clause of the federal constitution. The article described in the indictment in this case came into this state from a penal institution in Ohio through the operation of interstate commerce. The argument in favor of the validity of the statute assumes and asserts that it was not only the purpose of the statute, but of the constitution of the state, to discriminate against such articles and in favor of the same articles produced by free labor, in the markets of this state.

It was a regulation of commerce by means of which the value of merchandise produced in another state was to be depressed, or its sale entirely prohibited. No state can, in its sovereign capacity or in its fundamental law, enact anything in violation of the federal constitution, any more than can the legislature, acting in a representative capacity. That constitution is the supreme law of the land, anything contained in the constitution or statutes of any state to the contrary notwithstanding. A state constitution which is in violation of the supreme law is of no more force than a state statute open to the same objection, so that, even if this statute was not in conflict with our own constitution, it would come under the condemnation of the constitution of the United States. A state law which interferes with the freedom of commerce is not saved by the fact that it applies to all states alike, including the state enacting it. Interstate commerce cannot be taxed, burdened, or restricted at all by state laws, even though operating wholly within its own jurisdiction. If it is a regulation of commerce, the law relates to a subject within the exclusive jurisdiction of congress, upon which the state has no power to legislate. It matters not whether the regulation be under the guise of a law requiring a municipal license to sell certain goods, or a health law requiring inspection of the article, or a label law, as in this case, requiring the article to be branded or labeled. When they operate as burdens or restrictions upon the freedom of trade or commercial intercourse, they are invalid. *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213; *Minnesota v. Barber*, 136 U. S. 813, 10 Sup. Ct. 862; *Welton v. Missouri*, 91 U. S. 275; *Webber v. Virginia*, 103 U. S. 344; *Ward v. Maryland*, 12 Wall. 418; *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. 855; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *Guy v. Baltimore*, 100 U. S. 134; *Gloucester Ferry Co. v. Com.*, 114 U. S. 196, 5 Sup. Ct. 826; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427; *People v. Hawkins*, 85 Hun, 43, 32 N. Y. Supp. 524. This statute manifestly discriminates against the sale of goods made in a prison in the state of Ohio by a certain class of workmen, and in favor of the same articles when made outside a penal institution, and by free labor. In some of the states labor is much cheaper than in others. But the state where labor commands the highest price cannot make discriminating regulations for the sale of the goods made in the state where it is cheapest, in order to favor the interests of its own workmen. One state may have natural advantages for the production of certain goods

by reason of location, climate, or the rate of wages over another state where it costs more to produce them, but the latter cannot by hostile legislation drive the cheaper-made goods of the former out of its markets, even though such legislation would increase the wages of its own workmen. Trade and commerce between the states must be left free. The constitution intended that it should be affected only by natural laws and the ordinary burdens of government imposed through the exercise of the taxing power equally on all property. The police power of a state cannot be used to depress the price or restrict the sale of articles of commerce merely because they happen to be made in a prison, or by a certain class of workmen, while the same articles made in some other place, and by free labor, are left untouched by the regulation. A citizen of this state who happens to buy goods made in a prison in Ohio has the right to put them upon the market here on their own merits, and if this right is restricted by a penal law, while the same goods made in factories are untouched, such a law is a restriction upon the freedom of commerce, and the objection to it is not removed by the fact that it may have been enacted in the guise of a police regulation. The validity of such a law is to be tested by its purpose and practical operation, without regard to the name or classification that may have been given to it.

This state has declared its policy to utilize convict labor in the production of such articles as the government itself, or that of any political division, or the management of any public institution may need. The convict labor necessary to supply such a large consumption must necessarily, in some degree at least, affect the wages of free labor, if the argument in support of this law be correct; but the general public good overbalances any evil, real or imaginary, that may proceed from that policy. Some other state may not see fit to take all the profits of convict labor itself, but to sell the products in the market; and when the articles thus produced have been absorbed into the general mass of merchandise, they cannot be made the object of hostile legislation to depress their value, any more than if they had been made in private manufacturing establishments. The statute in question is aimed at property produced by a certain kind of labor, and the plain purpose is to depress its value or restrict its sale in order to enhance the price or enlarge the demand for the same kind of property produced by some other kind of labor. It belongs to a class of laws which have become quite common in recent years, all resting largely upon the notion that the important problems involved in the social or industrial life of the people may be solved by legislation. This theory has, no doubt, a certain fascination over some minds, but, so long as legislative power is circumscribed by the restrictions of a writ-

ten constitution, a statute like this cannot be sustained by the courts. Whether tested by the federal or state constitution, it is, I think, an invalid law. The judgment of the courts below sustaining the demurrer to the indictment should be affirmed.

BARTLETT, J. (dissenting). The courts below have held the law (chapter 931, Laws 1896) regulating the sale of convict-made goods in this state to be in violation of the provisions of the federal constitution vesting in congress the power to regulate commerce among the several states (Const. U. S. art. 1, § 8, subd. 3), and consequently void. It is urged that the act also violates the United States constitution, providing as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (Id. art. 4, § 2, subd. 1); also giving congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. * * *" Id. art. 1, § 8, subd. 18. It is further argued that the constitution of this state is violated wherein it provides: "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." Const. N. Y. art. 1, § 6. I am of opinion that this legislation is a legitimate exercise of the police power of the state, and not repugnant to the federal or state constitution. In entering upon the discussion of this appeal, it is well to state the precise question presented, as the able briefs of counsel have taken rather a wide range. The act under consideration (chapter 931, Laws 1896) provides that all goods made by convict labor in penal institutions shall, before being sold, or exposed for sale, be branded, labeled, or marked as therein provided. It further prescribes that a person having in his possession for sale, or offering for sale, any such goods, without the brand, mark, or label required by law, or removes or defaces such brand, mark, or label, is guilty of a misdemeanor, and punishable by fine, imprisonment, or both. The defendant is charged in the indictment with having in his possession for the purpose of sale certain goods manufactured by convict labor in a prison in the state of Ohio, and known by him at the time to have been so manufactured, without any brand, mark, or label thereon, as required by law; that he did feloniously, willfully, unlawfully, and with criminal intent offer for sale and sell a scrub brush brought from a prison in the state of Ohio into this state for the purpose of sale. As the facts alleged in the indictment stand admitted by the demurrer, we have to deal with a defendant whose guilty knowledge and criminal intent are fully established. This being so, the question is, can the defendant be punished by the state of New York without violating its own or the fed-

eral constitution? If the act of 1896 is a proper exercise of the police power, it is valid legislation, enforceable by the courts. This act is declaratory of the deliberate policy of this state that free labor shall be protected from disastrous competition with the convict system, which pays to the workman no wages, and therefore finds little difficulty in supplanting the wage earner in the public markets. That this is the policy of the state is witnessed by the action of the constitutional convention of 1894, which was ratified by the people. The amendment then adopted reads in part: "The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the state; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation, * * *." Const. N. Y. art. 3, § 29. This policy is evidently designed to conserve the prosperity and welfare of the wage earners in this state, and we are thus brought to the vital question whether the fundamental law and the statutes framed to this end are sustainable as a proper exercise of the police power. It is as difficult as it is undesirable to define the limits of the police power. It has been said to be "the general power of a government to preserve and promote the public welfare, even at the expense of private rights." 18 Am. & Eng. Enc. Law, p. 740. Judge Earl remarked in *Re Jacobs*, 98 N. Y. 108: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it." Judge Cooley, in his *Constitutional Limitations* (4th Ed. 719), says: "The limit of the police power in these cases must be this: the regulations must have reference to the comfort, safety, and welfare of society." The supreme court of Illinois in *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 194, referring to the police power, said: "It may be assumed it is a power co-extensive with self-protection, and is not inaptly termed the 'law of paramount necessity.' * * * It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." This much of definition shows that it must be determined under the facts of each case whether the attempted exercise of the police power is proper.

A few additional facts will now be pointed out as still further narrowing the field of inquiry. Under the constitution of this state, as already quoted, and the legislation in aid

thereof (chapter 429, Laws 1896), no prison-made goods manufactured here can be sold to the general public, as they are only to be disposed of to the state, its political divisions and public institutions. The law we are considering (chapter 931, Laws 1896) does not discriminate against the citizens of other states in favor of our own, as did the law of 1894 (chapter 698, Laws 1894), and which was held by the supreme court of this state violative of the interstate commerce provision of the federal constitution. *People v. Hawkins*, 85 Hun, 43, 32 N. Y. Supp. 524. On the contrary, the law of 1896 throws open the markets of this state to the convict-made goods of all the other states, subject only to one restriction, while our own penal institutions are cut off from this privilege by constitutional provision. The one restriction mentioned, to which the citizens of other states are subject, is that their prison-made goods must be branded, labeled, or marked "Convict-Made," followed by the year and penal institution in which they were manufactured. So it is inaccurate to say, as has been said, that the law of 1896 prohibits the sale of convict-made goods from foreign states, within our jurisdiction, as it only requires that buyers in this state shall be advised as to the origin of the goods, and decide for themselves whether they will purchase or not. The fact remains that penal institutions of other states are more highly favored than our own under the policy which has been adopted to protect free labor. It does not, by any means, follow, as suggested by the learned counsel for the respondent, that the marking of the goods will render it impossible to sell them. A low price for an article will doubtless attract buyers in the future as it has in the past. The precise question, then, is whether it is competent for this state, in the exercise of the police power, in order to promote the public welfare and prosperity, to impose the restriction, already pointed out, upon the sale of convict-made goods. I am of opinion that it is, for two reasons: (1) It is self-evident that the protection of free labor from competition with convict-made goods in our domestic markets will promote the public welfare and prosperity; and (2) it is competent for the state to protect its citizen from fraud or deception, when any such goods are offered for sale, by advising him of the fact that they are convict-made, so that he may act with full knowledge in the premises. In case of *In re Rahrer*, 140 U. S. 554, 11 Sup. Ct. 865, Chief Justice Fuller said: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive." In *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, it was held that the right of a state to enact a stat-

ute prohibiting the manufacture of intoxicating liquors within its limits is not affected by the fact that the manufacturer of said spirits intends to export them when manufactured. The police power of a state is as broad and plenary as the taxing power (as defined in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475), and property within the state is subject to the operation of the former so long as it is within the regulating restrictions of the latter. Mr. Justice Lamar, in delivering the opinion of the court, at page 23, 128 U. S., and at page 11, 9 Sup. Ct., said: "As has been often said, 'legislation [by a state] may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the constitution,' unless, under the guise of police regulations, 'it imposes a direct burden upon interstate commerce,' or interferes directly with its freedom." Vide cases there cited. In *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459, the state of Louisiana passed an act providing for the appointment of coal and coke boat gaugers, and making it compulsory upon all persons selling coke or coal in a barge to have it inspected and gauged. The law applied to coal and coke brought in from other states, but it was sustained as a proper exercise of the police power. This was a regulation calculated to promote the public welfare and prosperity and protect the citizens of Louisiana from fraud and deceit. It affected commerce, but in no legal sense regulated it. See *Smith v. Alabama*, 124 U. S. 464, 473, 8 Sup. Ct. 564; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; s. c. 117 N. Y. 1, 22 N. E. 670, 682. There are many cases holding that the state may regulate and prohibit the manufacture and sale of articles of commerce. In *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, the statute of Massachusetts of March 10, 1891 (chapter 58), "to prevent deception in the manufacture and sale of imitation butter," in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, was held not in conflict with the power vested in congress to regulate commerce among the several states. The court held in *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, that such an act was constitutional, although it appeared that the coloring matter was not injurious to health. An act "to prevent deceptions in the sale of vinegar" was held constitutional by this court, although it was proved to be entirely healthy and safe as a food product, notwithstanding the artificial coloring matter therein contained. *People v. Girard*, 145 N. Y. 105, 39 N. E. 823. The oleomargarine cases do not rest upon the well-recognized incident of the police power to protect the public health, but stand on a much broader ground, to wit, the right of the state to protect its citizens against fraud, deception, and unjust dealing in trade.

Judging the act of 1896 by the general prin-

ciples already commented upon, it does not, as matter of law, interfere with the power of congress to regulate commerce among the states; nor is it repugnant to any of the constitutional provisions referred to, either federal or state. The facts in the case before us are peculiar, and we are called upon to apply well-settled principles to new conditions. If the oleomargarine, vinegar, and kindred cases are within the police power, can it be properly said that a law which not only seeks to shield the citizen from fraud, deception, and unjust dealing in trade, but has for its object the further purpose, in pursuance of an enlightened public policy, to promote and protect the interests of free labor as against convict labor, is beyond the power of a sovereign state to enact? I am of opinion that both upon principle and authority the act of 1896 was a legitimate exercise of the police power. I am unable to agree with respondent's counsel as to the grave consequences likely to follow the reversal of this judgment. The possible cases he has cited by way of illustration do not, I think, involve the principle here decided. In fact, many cases are cited by him in the United States supreme court that are not in point. It is only necessary to refer to those where discriminations were made between different classes in the ranks of free labor; also the salesman license cases, and the inspection of living animals before slaughter, in the state enacting the law. It is clear that the principles involved in all these cases have no application here. The criticism is made on behalf of respondent that it is against the honor and dignity of the state to purchase products forbidden to the private citizen under the exercise of the police power. This criticism involves a misapprehension of the situation. It is most fitting that the state should protect its citizens, and the interests of free labor, as already pointed out; and it is equally proper that it should provide employment for the inmates of our penal institutions. In this connection it is necessary to examine more critically the amendment of the state constitution made in 1894 (article 3, § 29), as it is seriously argued that it does not indicate a public policy on the part of the state to suppress the competition of prison labor with free labor. The opening sentence reads as follows: "The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the state; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation." As I read this

provision, it not only prohibits the work of prisoners from being farmed out or contracted to others, but it also prohibits the products from being given or sold to any person, firm, association, or corporation. If the products of the work of prisoners cannot be given away or sold, then it, of necessity, follows that the product of prison labor in this state cannot be dealt in by the inhabitants thereof. I do not see how there can be any question with reference to the meaning of the words used; but, should there be, it would seem as if all doubt must, of necessity, vanish upon reading the concluding sentence of this section: "This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state, or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof." If the product of prison labor was intended to be sold, and thus enter the general commerce and traffic of the state, what is the purpose of this clause? The mind can suggest none. The provision would be meaningless under such a construction. But when it is read in connection with the former provision quoted, and in view of my understanding of the meaning of that provision, it has a well-defined purpose. Under the former provision, as we have seen, the products of prison labor cannot be sold to individuals, etc. This would leave the prisons with the power to manufacture, but not to dispose of their product. The latter provision relieves this situation. While the goods cannot be sold to any person, firm, association, or corporation, they may be disposed of to the state, or any political division thereof, or to any public institution owned or managed and controlled by the state or any political division thereof. In other words, the state may supply its own wants from its own prison labor, but the product of such labor shall not be given or sold so as to enter the general traffic in manufactured goods. This construction is the one contemplated by the constitutional convention, as is evident from the report of the committee and the discussion which followed between the members of the convention. Record 3, N. Y. Const. Conv. p. 1370. The report was made by Mr. McDonough, who said in explanation thereof that: "The first sentence provides that the prisoners shall work; that they shall be occupied and employed as they ought to be. The second clause provides that after January 1, 1897, the products of their labor, and their labor itself, shall not be farmed out or sold to outside parties. The object is to prevent the selling of the goods manufactured by these prisoners, or to sell their labor. The next provision is that they shall work for the benefit of the state, or any political division of the state; in other words, it provides that they may do any kind of work that is neces-

sary for the state, or for any of the institutions in the state that are owned and controlled by the state, or any political division of the state." He then proceeds with an elaborate argument calling attention to the evil resulting from the competition of free with prison labor, refers to an interview with Mr. Pillsbury, who stated, in substance, that the requirements of the state, the civil divisions thereof, and of its institutions were sufficient to furnish employment for all of the prisoners in the state. Then he states that in England and in France articles made by the convicts are the property of the government, and are never sold, and quotes the following from the report of the general superintendent of prisons of Massachusetts: "It is well known that the state, through its penal, corrective, and eleemosynary institutions, is a very large consumer of manufactured products. Most of these products are such as could be quite easily manufactured by prison labor, the state being the purchaser and consumer of its own products. The irritation of free labor by competition with prison labor would be absolutely avoided, and the manufacturer would cease his complaints as to the injustice of meeting prison-made goods in the open market. There would be a constantly growing demand for these prison-made products, thus insuring steady employment and a stability in the establishment of industries that would be a vast benefit to the discipline and welfare of the prisons." A sharp discussion followed, extending through 40 pages of the record, in which opposition was made to the provision prohibiting the selling of prison-made goods, but in the entire discussion not a single objection was expressed against the prohibition of the farming out, or the contracting of the work of prisoners. That question the convention evidently deemed settled by the vote of the people in 1883, when the question as to whether the contract system then in force should be abolished was submitted to them. Further extended quotations might be made from the numerous speeches made upon the subject during its consideration by the convention, but I do not regard it necessary. They all refer to one controversy. The members of the convention all understood the meaning of the provision as prohibiting the sale of prison-made goods to any person, corporation, or association other than the state, the civil divisions thereof, and the institutions controlled by it, so that such goods could not enter the markets of the state in competition with other manufactured goods. They differed as to the advisability of incorporating such a provision in the organic law, but not as to its meaning. Here we have a well-settled public policy of the state incorporated in the constitution prohibiting dealing in the product of prison-made goods by our citizens so as to bring them in competition with free labor. If dealing in prison-made goods is against public policy,

and is prohibited by the constitution, the legislature may also regulate the dealing in such goods, and provide for the criminal punishment of those who violate the act. Such statute would be in harmony, and not in conflict, with the constitution. If against public policy, then it would be within the police powers of the state, and not in conflict with the provisions of the constitution of the United States investing congress with power to regulate commerce among the several states, to legislate as to the sale of foreign convict-made goods. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, and cases before cited. The judgment appealed from should be reversed, the demurrer to the indictment disallowed, and the defendant permitted to plead.

PARKER, C. J. (dissenting). If the prevailing opinion correctly construes section 29 of article 3 of the state constitution the conclusion reached by it is well founded, for it has now been declared by the people of this state by an amendment to the organic law that the public welfare demands that free labor shall not be put in competition with prison labor. As construed, the provision was not intended to prevent dealing in any article of merchandise, even if made by convicts in our own state prisons, but it "simply abolished what was known as the 'contract system' of labor in prisons, whereby the profits of the labor of convicts were secured by contractors or private parties." I deem it safe to say that such a construction will surprise the members of the convention that recommended the constitution to the people for adoption, as well as it will surprise the public at large; for the propriety and wisdom of the provision in question were the subject of much discussion in the public prints and elsewhere at the time of its submission to the people. On the one hand, it was urged as most unjust that labor employed in manufacturing should be subjected to the competition of unpaid, compulsorily enforced labor, while, on the other, it was strenuously insisted that the burdens of the taxpayers should not be added to by restraining the convict from contributing in whole or in part to his own support. That the provision has been heretofore read by those charged with the administration of the affairs of prisons, and those engaged in a consideration of the question from the standpoint of public interest, according to the natural and ordinary meaning of the language employed, seems to me demonstrated by the opinion of Judge **BARTLETT**. I shall therefore assume that the people of the state have forbidden the selling of articles manufactured in our prisons, for the reason that they deemed it to be against a sound public policy to permit some of the citizens of the state skilled in certain kinds of labor to be subject-

ed to competition with the unpaid labor of convicts.

It is now too late to consider the subject generally from the point of view of the political economist, for the people, in whom reside all power, have set at rest that question, so far as this state is concerned. This statute neither prohibits nor attempts to prohibit other states, or the citizens of other states, from putting prison-made goods upon our markets; nor does it prohibit our own citizens from buying or selling them. If it did, then, concededly, the statute would be in violation of the commerce clause of the federal constitution, and void. It simply requires that prison-made merchandise shall be so branded that our citizens shall know where the goods they are buying were made. This they have a right to know, for they voted to burden themselves with additional taxation rather than longer to permit a competition which they regarded as a public wrong, and they are, therefore, entitled to such legislation as will permit them to know the truth in regard to articles offered them for sale, in order that they may not, through lack of information, have forced upon them that which they would not buy advisedly. The commerce clause of the federal constitution does not stand in the way of their having such information, inasmuch as the constitution of this state establishes a public policy in the working out of which the legislature may go to this extent, at least, under the police power of the state.

The decisions of the United States supreme court in the oleomargarine and other cases, some of which are referred to in Judge **BARTLETT'S** opinion, furnish adequate support for that assertion. They establish, generally, that commerce between the states may be regulated to some extent under the police power of the state, which includes, among other things, efforts to prevent fraud and deception on purchasers. In view of the public policy declared by the people of this state through their constitution, I am of the opinion that this statute is well within the police power of the state, and therefore, under the decision in the *Slaughterhouse Cases*, 10 Wall. 273, not repugnant to the federal constitution. I concur with Judge **BARTLETT** for a reversal of the judgment.

O'BRIEN, J., reads for affirmance of judgment. **GRAY, MARTIN, and VANN, JJ.**, concur for affirmance, upon the ground that the statute conflicts with and is repugnant to the commerce clause of the federal constitution. **BARTLETT, J.**, reads for reversal. **PARKER, C. J.**, reads memorandum concurring with **BARTLETT, J.** **HAIGHT, J.**, concurs for reversal.

Judgment affirmed.

(157 N. Y. 30)

SIDWELL v. GREIG et al.

(Court of Appeals of New York. Oct. 11, 1898.)

COURT OF APPEALS—APPELLATE JURISDICTION.

Code Civ. Proc. § 191, subd. 1, prohibiting an appeal to the court of appeals in any civil action commenced in any court other than the supreme court, unless allowed and a certificate given by the supreme court that there is a question of law involved which ought to be reviewed, prevents an appeal from an action originally commenced in a justice's court, and transferred to the supreme court on a plea that the title to realty is involved, unless the proviso is complied with.

Appeal from supreme court, appellate division, Third department.

Action by Katie Sidwell against Robert A. Greig and others. From a judgment of the appellate division (53 N. Y. Supp. 1115) affirming a judgment (40 N. Y. Supp. 968) for plaintiff, defendants appeal. On motion to dismiss the appeal. Granted.

Chas. H. Stage, for the motion. Daniel B. Thompson, opposed.

GRAY, J. The respondent moves to dismiss the appeal taken to this court in this action, upon the ground that it was commenced in a justice's court, and that no allowance of an appeal was made by the appellate division of the supreme court, or a certificate that, in its opinion, a question of law is involved which ought to be reviewed by the court of appeals. It appears that, upon the action being commenced in a court of a justice of the peace, the defendants filed with the justice an answer, in which they set forth that the title to real property would come in question, and an undertaking to admit service of summons and complaint in a new action for the same cause. Thereupon the action in the justice's court was discontinued, and the plaintiff filed with the justice of the peace a summons and complaint in an action in the supreme court for the same cause of action; the answer which the defendants had filed in the justice's court being considered to be their answer in the new action. These proceedings were had under Code Civ. Proc. tit. 3, c. 19. Then the action proceeded to trial, and a judgment was recovered by the plaintiff, which, upon appeal to the appellate division of the supreme court in the Third department, was there affirmed. Thereafter the defendants took an appeal to this court from the judgment of affirmance.

Subdivision 1 of section 191 of the Code of Civil Procedure, upon which the plaintiff bases her motion for a dismissal of this appeal, prohibits an appeal to the court of appeals "in any civil action or proceeding commenced in any court other than the supreme court" (Laws 1896, c. 559), unless it was allowed and a certificate given that there was a question of law which ought to be reviewed. It

constitutes an exception to the general right of appeal to that court, which is given by section 190. Prior to the enactment of section 191 of the Code of Civil Procedure, section 11 of the Code of Procedure, from which it was derived, prohibited an appeal in an action originally commenced in a court of a justice of the peace; and it received the construction that it applied to an action brought in the justice's court, though afterwards discontinued there, and then brought and tried in the supreme court. The action which was brought in the higher court was regarded as a continuation of the action commenced in the justice's court. *Pugsley v. Kesselburgh*, 7 How. Prac. 402; *Brown v. Brown*, 6 N. Y. 106; *Cook v. Nellis*, 18 N. Y. 126. In *Brown v. Brown*, supra, the decision was to the effect that no appeal lies to this court from the judgment of the supreme court, in an action originally commenced in a justice's court, and transferred thereon on a plea of title. In *Cook v. Nellis*, supra, the decision was to the effect that an action commenced in the supreme court, upon the discontinuance of an action in a justice's court, involving the title to land, is "an action originally commenced in a court of a justice of the peace." I think we are bound by such authority, and are not at liberty to say that under the present Code such an action as this was not commenced in another than the supreme court. The prohibition of section 11 of the former Code, and of section 191 of the present Code, is practically the same in expression; and the description, in title 3 of chapter 19, of the action, when transferred, as the "new action," does not prevent it being regarded as a continuance of the justice's court action. The action was commenced in another court than the supreme court, and it was transferred thereto by force of the statute and under the joint action of the parties. It is of considerable significance that section 191, as it originally read, in prohibiting an appeal to the court of appeals in an action commenced in a court of a justice of the peace, expressly provided that an action discontinued because the answer set forth matter showing that the title to real property came in question, and afterwards prosecuted in another court, should not be deemed to have been commenced in the court wherein the answer was interposed; but that, when the section came to be subsequently amended by chapter 946 of the Laws of 1895, that provision was omitted, and has remained omitted in all subsequent amendments. This omission must be accorded the importance it deserves, as a clear indication of the legislative design to restrict the jurisdiction of this court as it previously was restricted, and is in conformity with the general plan to limit appeals to this court. The motion to dismiss the appeal should be granted, with costs. All concur. Motion granted.

(156 N. Y. 514)

DODGE et al. v. McKECHNIE et al.

(Court of Appeals of New York. Oct. 4, 1898.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES—VALIDITY.

1. A transfer made by a debtor of stock to secure a bona fide creditor who took immediate possession, the surplus to go to his wife, who was indorser on the creditor's paper to a large amount, is not in effect a general assignment for the benefit of all creditors, within the meaning of Laws 1887, c. 503, limiting assignments containing preferences, where the surplus which went to the wife was insufficient to satisfy the claims upon which she was liable as indorser.

2. The wife's liability as indorser on the creditor's paper was a sufficient consideration for the transfer to her.

Appeal from supreme court, general term, Fifth department.

Action by Arthur M. Dodge and others against Everett O. Wader, Jessie McKechnie, and others. From a judgment of the general term (35 N. Y. Supp. 1106) affirming a judgment of the special term dismissing the complaint, plaintiffs appeal. Affirmed.

Eldridge L. Adams, for appellants. Henry M. Field, for respondent.

BARTLETT, J. The plaintiffs are judgment creditors of Everett O. Wader, holding claims aggregating about \$5,000, and seek in this action to set aside a transfer by Wader of certain of his property to the banking firm of McKechnie & Co. and his wife, Annie S. Wader, on the ground that it was fraudulent, and made with the intent to hinder, delay, and defraud creditors. The defendant Everett O. Wader, prior to the 29th of May, 1889, was a lumber dealer at Canandaigua, N. Y., and McKechnie & Co. were bankers at the same place. On that day, Wader owed McKechnie & Co. \$18,904, part of which was customers' paper discounted by the latter in the usual course of business, and indorsed by Wader; and the remainder was represented by promissory notes made by Wader, indorsed by his wife, and discounted by the bank.

The trial court found that prior to the 29th of May, 1889, McKechnie & Co. had been demanding further security of Wader, and the latter was being pressed by other creditors. On the 29th of May, 1889, Wader executed and delivered to McKechnie & Co. an instrument in writing, reading as follows:

"Know all men by these presents, that I, Everett O. Wader, of Canandaigua, N. Y., for and in good and lawful considerations to me in hand paid, the receipt whereof is hereby acknowledged, by James McKechnie, Jessie McKechnie, and Alfred Denbow, of Canandaigua, N. Y. (composing the firm of McKechnie & Co.), and by Annie Sherwood Wader, also of Canandaigua, N. Y., have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and

set over, unto said McKechnie & Co., and to their survivors or assigns, and to said Annie S. Wader, and to her heirs and assigns, in the manner hereinafter stated, my personal property, as follows, to wit: All my stock of lumber, of all kinds and descriptions, timber, lath, shingles, sewer pipe, ladders, posts, and chimney pipe, the same being all I have as kept and stored in and upon and about what is known as the 'Sherwood Lumber Yard,' in Canandaigua, on the west side of Bemis street, and to have and to hold unto said parties of the second part, in manner as follows: The said McKechnie & Co., out of the first proceeds of the sales of said lumber yard and personal property herein described and sold, sufficient to repay and reimburse them for any and all moneys due or to grow due from me to them as it now exists, being \$18,964, with interest added,—that is, any balance not otherwise paid,—and then said Annie S. Wader to have and receive all the remainder and surplus; it being understood by and between the parties of the second part thereto that McKechnie & Co. shall have the paramount right and power in every way to manage, control, sell, and dispose of and give to the purchaser or purchasers good title thereto. * * * In witness whereof, I have hereunto set my hand and seal, this 29th day of May, 1889. Everett O. Wader. [Seal.]

"In the presence of H. M. Field."

This is the transfer attacked by the plaintiffs. It is found that, during the summer and autumn of 1889, McKechnie & Co. realized from the sales of this property about \$7,000; that the business paper, amounting to about \$6,000, was paid by the makers thereof; and that the balance of the indebtedness, about \$5,000, being Wader's notes indorsed by his wife, was paid by Mrs. Wader on or about December 23, 1889, and McKechnie & Co. turned over to her the balance of the property unsold by a written instrument, and surrendered to her the paid notes. There is no evidence that any surplus remained in Mrs. Wader's hands after she was reimbursed as indorser, while there is some evidence tending to show the contrary. The existence of a surplus will not be presumed. It was further found, upon ample evidence, that the transfer of property was honestly and fairly made, for the sole purpose of securing and paying to the firm of McKechnie & Co. the honest debts due from Wader, and for the further purpose of protecting and securing Wader's wife from any liability then existing as indorser of her husband's paper held by McKechnie & Co.; also, that McKechnie & Co. did not know at the time of the transfer that Wader was indebted to the plaintiffs, and that the instrument was not executed to hinder, delay, or defraud them; also, that Wader was insolvent when the instrument was executed, and that McKechnie & Co. took immediate possession of the property on the 29th of

May, 1889. After finding these facts, and others not necessary to be considered, the trial court held that the instrument of transfer was a bill of sale to secure and pay the bank and Mrs. Wader, and dismissed the complaint. Wader and wife did not answer, as they were protected by stipulation from costs, and the survivor of the banking firm defended this action, which was not begun until May, 1894.

The plaintiffs make two principal points: (1) That the transaction of May 29, 1889, was in effect a general assignment for the benefit of creditors, with a preference forbidden by the statute; (2) that the instrument is fraudulent and void, because it contains a trust for the use of the debtor's wife, to whom he was not indebted.

The claim that the transfer was designed as a general assignment for the benefit of creditors cannot be sustained, as it is wholly unsupported by evidence, and the remaining question is whether there was a trust for the debtor's wife, to whom he was not indebted.

The facts in this case are undisputed, and it is difficult to understand how it can be maintained, in the face of them, that Mrs. Wader was the beneficiary under a fraudulent trust, by which she was to receive the surplus after McKeehnle & Co. were paid, her husband being in no way indebted to her, and the creditors thereby wronged and defrauded. It is not denied that Mrs. Wader was the indorser of her husband's paper to the amount of \$5,000, upon which she was contingently liable at the time of the transfer, nor is it disputed that she subsequently, and before receiving the surplus, paid the paper as such indorser. It is true that there is no evidence that Wader was indebted to his wife in addition to her contingent liability as indorser; but the existence of that obligation was a good and valuable consideration for the instrument of transfer, so far as Mrs. Wader was concerned. We have here a transfer that was honestly and fairly made, to secure and pay lawful debts to the bank and Mrs. Wader. Furthermore, we have property transferred that sold for enough to pay the bank, and the balance transferred to Mrs. Wader was insufficient to satisfy her claim as indorser. It is true there is no finding as to the value of the property transferred to Mrs. Wader by the bank, but Wader swore as a witness for plaintiffs that the property so set over to Mrs. Wader was worth about \$700. It is also the fact, as already pointed out, that plaintiffs failed to prove that there was any surplus after Mrs. Wader was paid. The plaintiffs' claim is that the instrument of transfer vesting the surplus in Mrs. Wader rendered it void ab initio, and that the question of surplus or no surplus is immaterial. In support of this proposition is cited *Barney v. Griffin*, 2 N. Y. 365, and similar cases. These cases hold that an assignment by an insolvent of his property in trust, to pay

certain specified creditors, and to reconvey the residue to the debtor, without provision for the other creditors, is void. No such result was contemplated or accomplished in the case at bar. The transfer now attacked was to secure and pay honest debts, and no proof was offered that the property conveyed, which was properly disposed of, exceeded in value the amount of the indebtedness.

We have already pointed out that there is no evidence to show that Wader contemplated a general assignment; so that the transfer sought to be set aside is not affected by the statute limiting preferences which amended the general assignment act of 1877. *Laws 1887, c. 503*. This court has very recently, in *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532, considered this precise question, and restated the doctrine of the common law (which has never been departed from in this state) that in the absence of statutory restrictions an insolvent debtor has the right to sell and transfer the whole or any portion of his property to one or more of his creditors in payment of or to secure his debts, when that is his honest purpose, although the effect of the sale or transfer is to place his property beyond the reach of his other creditors, and render their debts uncollectible. *Murphy v. Briggs*, 89 N. Y. 446, 452; *Knapp v. McGowan*, 96 N. Y. 75, 86; *Paper Co. v. O'Dougherty*, 36 Hun, 79, affirmed 99 N. Y. 673; *Williams v. Whedon*, 109 N. Y. 333, 337, 16 N. E. 365; *Bank v. Williams*, 128 N. Y. 77, 78 N. E. 33. The learned counsel for the appellants, confronted by this principle, has endeavored, with much ability, to distinguish the case before us from such a transfer as is permitted, but has failed to do so. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(156 N. Y. 417)

PEOPLE ex rel. EDISON ELECTRIC ILLUMINATING CO. OF CITY OF BROOKLYN v. BOARD OF ASSESSORS OF CITY OF BROOKLYN.

(Court of Appeals of New York. Oct. 4, 1898.)

TAXATION—PATENT RIGHTS.

Patent rights are not taxable by a state, since they are created by the federal government for the promotion of federal purposes.

Appeal from supreme court, appellate division, Second department.

Certiorari by the people, on the relation of the Edison Electric Illuminating Company of the City of Brooklyn, against the board of assessors of the city of Brooklyn, to vacate an assessment of relator's capital stock. From an order of the appellate division (46 N. Y. Supp. 388) affirming an order of the special term vacating the assessment, defendant appeals. Affirmed.

Almet F. Jenks, for appellant. Frank Harvey Field and Edward M. Shepard, for respondent.

PARKER, C. J. Whether, under the taxing power of the state, patent rights may be assessed, has not been passed upon by this court. The question was referred to as an important one in *People v. Barker*, 139 N. Y. 55, 34 N. E. 722, but the court found that it was not necessary to decide it in order to dispose of the case, and so declined to consider it. The result of our present examination leads to the conclusion that, while the question has not been heretofore considered by this court, it cannot, after all, be said to be an open one, for it was long ago asserted by the supreme court of the United States that patent rights were not taxable by the states; and the doctrine has been recognized so often since that it must be fairly regarded as settled in that court. And if we are right in that assumption, then it is the duty of this court to follow it. The argument in support of the doctrine may be briefly stated as follows: The constitution of the United States (article 1, § 8, subd. 8) conferred upon congress the power to "promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In pursuance of this power, congress enacted that patents should be issued to inventors, which should secure to them for a limited term the "exclusive right to make, use and vend the invention or discovery through the United States and the territories thereof." Rev. St. U. S. § 4884. Patent rights are, therefore, granted under the federal constitution, and necessarily for the promotion of federal purposes. *Grant v. Raymond*, 6 Pet. 218, 241; *Ames v. Howard*, 1 Sumn. 482, Fed. Cas. No. 326; *Blanchard v. Sprague*, 3 Sumn. 535, Fed. Cas. No. 1,518. The federal purpose is primarily to stimulate genius, talent, and enterprise by holding out that encouragement which patents give, but ultimately to secure to the whole community the great advantages that flow from the free communication of secrets, processes, and machinery. The next step is that, patent rights being created under the federal constitution and laws for a federal purpose, the states are without the right to interfere with them. The right to tax a federal agency constitutes a right to interfere with, to obstruct, and even to destroy the agency itself, for, conceding the right of the state to tax at all, then it may tax to the point of destruction. This doctrine is elaborately discussed by Chief Justice Marshall in the U. S. Bank Case (*McCulloch v. Maryland*, 4 Wheat. 316), wherein the court decides that congress has power to incorporate the bank as a federal agency, and that, having done so, the state cannot tax the bank upon its circulation. The latter proposition is regarded as a necessary conclusion from the former. The federal government having the right to create the agency, it necessarily has the right to protect it not only from destruction, but from interference from any other gov-

ernment, whether such interference be in the guise of taxation, or otherwise, as the power to tax involves the power to destroy, and the power to destroy may render useless the power to create. In the course of his opinion, Chief Justice Marshall said: "If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government,—to an excess which would defeat all the ends of government." The criticism upon this argument, as now made, is that patent rights were not properly classified with taxing the mail and taxing the mint, for while the latter constitute a means of government, patent rights do not; that the granting of patents by the government is not necessary to the execution of its powers, but constitutes merely a privilege to a person to exclusively practice or exploit his inventions for his own benefit, a privilege which, if it prove of value, should bear its proportion of the public burdens in the political division having jurisdiction of the person and property of the inventor. But whether or not patent rights were properly included with the mails and the mint and judicial process as a means of government, and thus exempted from interference by the taxing power of the states, it is clear that from the time of the decision in the U. S. Bank Case until now, wherever the courts, whether state or United States, have had occasion either to consider the subject or to refer to it, they have conceded it to be settled that patent rights are not assessable under the taxing power of the states. In *Webber v. Virginia*, 108 U. S. 344, *Webber* was convicted in the state court of unlawfully selling certain sewing machines without first having obtained a license and paid the tax imposed by law for the privilege. His defense, in part, was that the machines sold were constructed according to the specifications of the patent held by the company. This point was held to be not well taken, the court saying: "And the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property in which the invention or discovery may be exhibited or carried into effect from the operation of the tax and license laws of the state. * * * It is only the right to the invention or discovery—the incorporeal right—which the states cannot interfere with." In *re Sheffield*, 64 Fed. 833, asserts that the state cannot tax the right to exclude all others than the inventor from the use or sale of an invention or discovery. *Ex parte Robinson*, 2 Biss. 309, Fed. Cas. No. 11,932; *May v. Buchanan Co.*, 29 Fed. 469. The same doctrine has been laid down by the courts of last resort in Pennsylvania, Ken-

tucky, and Tennessee. *Com. v. Manufacturing Co.*, 151 Pa. St. 285, 24 Atl. 1107, 1111; *Com. v. Philadelphia Co.*, 157 Pa. St. 527, 27 Atl. 378; *Com. v. Light Co.*, 157 Pa. St. 529, 27 Atl. 379; *Com. v. Petty*, 96 Ky. 452, 29 S. W. 291; *State v. Butler*, 3 Lea, 222. It has also been asserted by the following text writers: *Cooley, Const. Lim.* (6th Ed.) 590; *Cooley, Tax'n* (2d Ed.) 890; *Walk. Pat.* § 155. The doctrine is also recognized in cases that point out the distinction between the right to property in the physical substance that is the fruit of discovery and the right of discovery itself. The latter, it is asserted in *Patterson v. Kentucky*, 97 U. S. 501, 506, "may be secured and protected by national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond control of state legislation, simply because the patentee acquires a monopoly in his discovery." This distinction was observed in *Com. v. Central Dist. & Print. Tel. Co.*, 145 Pa. St. 121, 22 Atl. 841, and in *Same v. Brush Electric Light Co.*, 145 Pa. St. 147, 22 Atl. 844. In the first of these cases the court upheld the assessment upon the ground that the investment of the relator was not made in the patents of the American Bell Telephone Company, but instead in the lease of the instruments of that company employed in transmitting or reproducing sound. This decision was followed in the *Brush Case*, supra, in which the issue of stock by the relator to pay for the use of appliances from a parent company was held not to be an investment in patent rights, so as to relieve it from the operation of the tax laws of the state.

While it appears from the record that the case at bar is not analogous to either of the last two cases cited, the appellant insists that another question is presented, which, if answered in the negative, will fully justify the assessment made. The question is this: Assuming that patent rights are not taxable by the states, and that the capital stock of an electric company is used to pay for the use of methods and appliances of a parent company, protected by patents, can it be said that this stock is invested in patent rights within the general principles that patents are not taxable? The facts assumed to exist as the basis for the argument in support of a negative answer to the question are: The relator has not acquired any portion of the patent rights of the Edison Electric Company, by assignment or otherwise, nor has it invested any part of the \$945,000 in such patents, but, instead, such investment was made by the relator for the privilege of doing its business by the methods, and with the machinery of the parent company; and the argument briefly is that the patent is not taxed by the assessment complained of, and, consequently, the means of government are not taxed, for the relator is not the patentee, and does not stand in its shoes. Relator cannot

sell the patents, any privileges under them, the machinery covered by them, nor the methods; but, as the record comes to us, we are not at liberty to treat this case as if the facts were established upon the hearing, as the appellant's argument assumes them to be.

The learned counsel calls our attention to testimony that tends to create a suspicion that if the agreement between the companies had been offered in evidence, it might have supported his view of the nature of the relator's relations to the patent rights of the Edison Company. But the agreement was not introduced, and whatever conflict there may be in the testimony on the subject is put at rest by the special term's finding, and its subsequent affirmance. That court found that the final assessment "includes \$945,000, the value of certain patent rights owned by the relator, which had been granted by the United States for certain inventions." This court can neither add to nor subtract from this finding, but it may be said that the record does not indicate that either the assessors or their then counsel entertained a different view. It follows that the question propounded by counsel cannot properly be answered, for it is not before us. The order should be affirmed. All concur. Order affirmed.

(156 N. Y. 636)

WELLS v. TOLMAN.

(Court of Appeals of New York. Oct. 4, 1898.)

EASEMENTS—PRIVATE WAY—CONSTRUCTION OF RESERVATION IN DEED.

1. The owner of certain land conveyed to defendant's grantor a portion thereof, reserving the right of way to his wood lot, across the lot conveyed, "when said lot is not sown with grain, and at all times when there is sleighing," and conveyed to plaintiff such wood lot. The original owner had used the whole property, and had access to the wood lot by a road, which had become so defined that, at the time of such sale and division, it could be identified. *Held*, that defendant had the right to cultivate all of his land, including such roadway to the wood lot, and that when, acting reasonably, and according to the course of good husbandry, he should sow that part of the lot embraced in such way to grain, plaintiff's right to use such easement would be suspended, where such crop was capable of being damaged by driving over it.

2. Where plaintiff was entitled to a right of way over defendant's land at all times during sleighing, and at other times when such land was not sown to grain, by virtue of a reservation thereof in the conveyance to defendant's grantor, his right to use such easement at such times implied the right to make such repairs as might, under all the circumstances, be reasonable and consistent with the right of defendant to cultivate the land, who must reasonably exercise such right, in the ordinary way of good husbandry, but not for the purpose of defeating plaintiff's use of such easement.

Appeal from supreme court, general term, Fourth department.

Action by John Wells against Rial Tolman. From a judgment of the general term (34 N.

Y. Supp. 840) affirming a judgment for plaintiff, defendant appeals. Reversed.

Raymond Cobb, for appellant. Edward H. Burdick, for respondent.

O'BRIEN, J. In this action the plaintiff sought to establish, through the decree of a court of equity, the existence of an easement or right of way over the defendant's land, and to procure an adjudication as to the nature, character, and extent of that right. The lands of both parties were originally, and up to the month of April, 1869, one farm of about 100 acres, including a wood lot of about 20 acres. On that date, the then owner of the whole property conveyed the premises now owned by the defendant, consisting of about 35 acres, including the north half of the wood lot. This portion of the farm thus became separated from the rest, and the wood lot was divided into what is known in the case as the "north half" and the "south half." Aside from the wood lot, this conveyance embraced about 25 acres of the original farm, and this part of the land conveyed is known in the case as the "east lot." On the same day the then owner conveyed to the plaintiff the remainder of the property, including the south half of the wood lot. In this division of the farm, the south half of the wood lot conveyed to the plaintiff, consisting of about 10 acres, was entirely detached from the rest of the plaintiff's land, and could be reached only by passing over the 35 acres which the defendant now owns. Before the sale and division of the farm, the then owner used the whole property, and had access to the wood lot by passing over the 35 acres, or some part of it. The road over which he drove in going to and returning from the wood lot thus became more or less defined, so that at the time of the sale and division it could be traced and identified. Since the sale of the 25 acres now owned by the defendant isolated the south half of the wood lot from the rest of the farm, the owner, in making the conveyance under which the defendant has acquired his title, inserted therein the following reservation: "Reserving the right of way over the east lot to and from the wood lot at all times when said lot is not sown with grain, and at all times when there is sleighing." The original owner thus retained the right to have access to the south half of the wood lot by means of this reservation, and this right passed to the plaintiff when the rest of the farm and wood lot was conveyed to him.

The construction and true meaning of the reservation are the only questions involved in this appeal. The "right of way" referred to was the track then existing over which the original owner passed, and so the courts below have held. The "east lot" was the 25 acres conveyed to the defendant's grantors with the 10 acres comprising the north half of the wood lot. The time when the right of passage was to be exercised was at "all times

when there was sleighing"; that is, when there was snow or ice upon the road or way theretofore fixed and identified by practical location, and at all other times when the same way or track was not "sown with grain." The defendant's farm of 25 acres was subjected by the grant to an easement in favor of the owner of the remaining lands, but the right of way was qualified and limited by restrictions as to the time and manner of enjoyment. It could be used at all times during sleighing, and at other times when the land was not sown to grain. The purpose was to secure access to a wood lot, and that was sufficiently attained by limiting the time of use and enjoyment to the winter months, or, at all events, to that part of the year when the land was not under cultivation for grain crops. It is perfectly evident that the parties to the deed containing the reservation of the easement intended that the grantee of the 25 acres should have the right to plow and sow the land embraced within the limits of the way as theretofore used, in the regular and ordinary way of husbandry, and that during the time it was sown to grain the right of passage was suspended. The language of the restriction is not open to any construction that would deprive the defendant of the use of his land for the ordinary purposes of husbandry, and there is no reason apparent in the case why the courts, by construction, should convert an easement, carefully qualified and limited by clear language, into a general and unrestricted right of way. *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442; *Mansfield v. Shepard*, 134 Mass. 520.

Upon a careful examination of the record, it will be seen that there is no allegation in the complaint, or finding of fact, that the defendant ever refused to allow the plaintiff to pass over the land at the times mentioned in the grant. The plaintiff does not allege, and it has not been found, that the defendant in any way interfered with the use of the right of way as reserved; that is to say, during sleighing, or when the land was not sown to grain. What the plaintiff really claimed and sought to establish in this action was something more extensive than can be deduced from the reservation in the grant upon which the easement depends. In other words, he claimed the general and unrestricted right of way by prescription, or, in the language of the complaint, the right of passage "over and upon said right of way and easement with his teams and otherwise as he saw fit and proper, at all times and in all seasons, irrespective of crops, snow, or otherwise." He also claimed a right of way by necessity, but he failed to allege and the record is silent with respect to any act on the part of the defendant in violation of the reservation in the deed. The trial court held that the plaintiff was not entitled to a right of way by prescription or necessity, but confined the plaintiff to such rights or easements in the defendant's lands as were supposed to be re-

served in the grant already referred to. But the courts below have apparently given to this reservation a construction which secures to the plaintiff all that he asked by prescription or necessity. This is not so apparent from the opinion as from the findings and judgment. It will be seen that at least two points are decided by the judgment which virtually confer upon the plaintiff the right to use the easement at all times, and thus converts what was a qualified and limited right of way into a general one, and practically nullifies the restrictions as to user contained in the deed creating the easement.

1. It has been held that the restriction against the use of the easement when the east lot is sown to grain applies only when the "whole lot" is devoted to that purpose. This means that, if the defendant uses any part of the 25 acres for pasture, meadow, or root crops, the easement becomes general for all purposes, and the exception in regard to the use when the land is sown to grain has no application. In other words, unless the defendant devotes every foot of his small farm to grain crops, he must lose the benefit of the exception. This is an extreme, and, as I think, unwarranted, construction of the language of the deed, and does violence to the intention of the parties. The original owner divided his farm, and sold 25 acres of it to the defendant's grantors, making the reservation in favor of what remained of his estate of the right of way to the wood lot in the restrictive language of the grant. The part thus conveyed was a small farm, near the limits of a large city. It cannot be supposed that the parties had in mind when reserving the right of way, or contemplated such an event, as the sowing of every foot of this whole farm of 25 acres to grain. It might as well be urged that the language of the reservation with respect to the use of the easement during the winter months referred to a time when the whole 25 acres were covered with snow or ice, whereas these words obviously refer to times when there was sleighing on the beaten track, whatever conditions existed on the rest of the lot. So, also, the restriction implied in the reservation against the use of the easement when the lot was sown with grain refers to the land embraced within the limits of the road, as fixed and defined by previous use. Any other construction renders the language meaningless, and the whole provision, so far as it attempted to restrict the use of the easement to certain limits or seasons, absurd. The true meaning and construction of the deed is that the defendant has the right to cultivate all of his land, including the beaten track to the wood lot, and when, acting reasonably, according to the regular course of good husbandry, he shall sow that part of the lot embraced in the way, or any substantial part of it, to grain, the plaintiff's right to use the easement is suspended during the time that the grain crop is upon the ground,

or capable of being damaged by driving over it. When the parties to the deed created the easement, it was clearly intended that the owner of the 25 acres should have the right to use all the land for agricultural purposes; and hence the right of way was so limited and restricted as to secure that end. The right of way to a wood lot is generally important only in the winter season, and it is capable of use in such a way that the owners of the soil and the easement may enjoy the property which each has in the soil; and a reasonable and limited use of a way, such as the deed in this case grants, is not inconsistent with the right to cultivate the land.

2. The judgment also confers upon the plaintiff the right to enter upon the defendant's land, and repair the way at such times and with such materials as he may desire. He may use stone, gravel, or timber, and make just as good a road as his interests or his fancy may dictate. Of course, if he may do that, it necessarily excludes the right of the defendant to cultivate his land, or, at least, that part of it embraced within the limits of the way for sowing grain, or anything else. It converts what was originally a beaten track over defendant's land into a general highway for the benefit of the plaintiff, without compensation of any kind, and works a radical change in the agreement of the parties, as evidenced by the deed under which the easement exists in any form. I do not think that this is a fair construction of the conveyance. The right of the plaintiff to use the easement during sleighing, and when the land is not sown to grain, implies the right to make such repairs as may, under all the circumstances, be reasonable. But such repairs must be consistent with the right of the defendant to cultivate the land, and any change in the surface of the soil that interferes materially with that right is a violation of the spirit and terms of the conveyance. The repairs which an easement of such a special and limited character ordinarily needs are furnished by the use of the soil itself, without importing into it any foreign substance or material.

The real origin of this controversy is not very difficult to perceive. It seems that, when the reservation of the easement was made in the deed, the purpose which the parties had in view was the use of the wood lot as such. Although there was then a stone quarry upon it, no particular use had yet been made of it; and it evidently was not, as subsequently developed, considered in shaping the nature or extent of the easement. But, since that time, what was then a mere wood lot has become a valuable stone quarry, and the right of way that answered all the plaintiff's purposes 30 years ago does not answer them now. Hence the cause of action stated in the complaint is based, not upon any violation of the terms of the deed, but upon a claim of a general right of way by prescription or necessity. Inasmuch as the courts

below have denied the plaintiff's claim to a right of way based upon prescription or necessity, it is somewhat difficult to see why that result did not end the controversy. When the plaintiff was allowed, after failing to establish the substantial allegations of his complaint, to fall back upon a claim under the deed that had never been the subject of controversy, and to recover a judgment, with costs, against the defendant, it was certainly taking a very liberal and favorable view of his rights. As already observed, the plaintiff made no claim that the defendant ever made any objection to his use of the easement during sleighing, or when the land was not sown to grain; and there is no finding in the record that he did. The plaintiff alleges, and it is found, that up to the 30th of May, 1892, he used said right of way for all purposes as he might wish, without hindrance or interruption; and the only act charged against the defendant in violation of the plaintiff's rights is that on said 30th day of May, 1892, the defendant forbade him from further using the way, and erected a fence across the same. But it appears that at this date the defendant had plowed the land, and had sown the same to buckwheat; and, if the language of the deed means anything, he had the right to do that. The defendant also built a temporary fence across the roadway, for the purpose of keeping his own cattle, in an adjoining pasture, out of the grain, and at the same time offered to permit the plaintiff to cross and recross his lands to the wood lot by another route, shorter, but with slightly steeper grades; but he refused to recognize the right of the plaintiff to cross his land when it was sown with grain, and the plaintiff refused to accept anything else but a general and unrestricted use of the way at all times.

This is the real and only controversy between the parties, and, if I am right in the construction of the language of the deed creating the easement, it is obvious that the plaintiff had no standing in a court of equity. In brief, the case is this: The defendant refused to allow the plaintiff to cross his land when it was sown with grain, offering him a passage at another place not sown with grain. The plaintiff refused this offer, and insisted upon his right to pass over defendant's land, whether it was sown with grain or not. He then brought this action in equity, basing his claim upon prescription and the doctrine of necessity, both of which claims the court rejected, but, at the same time, awarded to him all he asked, with costs, under the construction of the deed which has been already referred to. The defendant is still the general owner of every foot of the 25 acres, and is vested with every right and incident of ownership not expressly reserved in the deed from which his title is derived. The only reservation in that deed, as we have seen, is the privilege of passing over the land to the wood lot at certain times,

namely, during the season of sleighing, and when the land covered by the easement was not sown to grain. The judgment in this case awards to the plaintiff much more extensive rights, and correspondingly curtails the rights of the defendant as general owner. It is quite as important that the rights of the latter should be defined and respected as those of the plaintiff in the easement. The right of the defendant to cultivate all the land was not curtailed by the reservation in the deed, but, on the contrary, was expressly recognized; and he may exercise that right in a reasonable and proper way, in the regular and ordinary way of good husbandry, but not for any captious end, or for the purpose of defeating the plaintiff's use of the easement, as described in the deed. The plaintiff may repair the way in a manner suitable to the limited character of the easement, but not so as to interfere materially with the right of the defendant to use and cultivate the land as part of his farm. In these particulars the judgment should be modified, without costs to either party in this court or the courts below, and, as so modified, affirmed. In case this result should not receive the assent of the court, then the judgment should be reversed, and a new trial granted; costs to abide the final award of costs in the case. All concur except BARTLETT, J., not voting, and MARTIN and VANN, JJ., not sitting. Judgment reversed, and new trial ordered; costs to abide final award of costs in the case.

(156 N. Y. 561)

PEOPLE v. VAN TASSEL.

(Court of Appeals of New York. Oct. 4, 1898.)

CRIMINAL LAW—EVIDENCE—ACTS AND DECLARATIONS OF CONFEDERATES—ANOTHER CRIME—IMPEACHMENT.

1. Where there is sufficient evidence to justify the conclusion that several persons charged with a crime were acting with a common purpose and design, the acts and declarations of each, from the commencement to the consummation of the offense, are admissible against the others, though it does not appear that there had been a previous combination or confederacy to commit the offense.

2. The fact that a transaction tends to prove another crime does not render it inadmissible where it is otherwise material or relevant.

3. Evidence in relation to collateral matters, adduced on cross-examination as a basis of impeachment, is properly excluded, unless it is material or relates to a fact brought out by adverse counsel.

Appeal from supreme court, appellate division, Second department.

James Van Tassel appeals from a judgment of the appellate division, Second department (50 N. Y. Supp. 53), affirming a judgment convicting defendant of subornation of perjury. Affirmed.

Wm. H. Wood, for the People. George Wood, for respondent.

BARTLETT, J. In 1895 the defendant brought an action to recover damages for personal injuries which he claimed to have sustained by falling into an excavation in Main street, in the city of Poughkeepsie. The trial resulted in a verdict for the city. The defendant was unable to produce any witnesses in that action who saw the alleged accident. He afterwards brought an action against Adriaance & Son, the contractors who had charge of the work in Main street, and upon that trial he produced two witnesses, Roehle and Hannigan, who swore that they helped lift him out of the excavation into which he had fallen. The jury found for the defendants.

As the circumstances attending this trial were suspicious, investigation was had, and this defendant and Jacob Rieck were arrested on a charge of subornation of perjury in procuring one Roehle to swear falsely. The latter was arrested on a charge of perjury, but he turned state's evidence, and was not prosecuted. The defendant and Rieck elected to be tried separately, were convicted, and are now serving sentences in state's prison. The appellate division of the Second department, in affirming this conviction, held the evidence abundantly sufficient to warrant the verdict which was rendered, and confined its investigations to legal errors alleged to have been committed upon the trial. A perusal of the record discloses a sharp conflict in the evidence. The questions of fact were for the jury, and the verdict is final unless reversible error is found.

The first point made by the appellant is that, as Roehle stood confessed as a wilful, deliberate perjurer, his testimony was to be wholly disregarded. While it is doubtful whether this point is properly raised, yet it appears the trial judge, of his own motion, said to the jury that this witness was a self-confessed perjurer, and that they might give his testimony such credit as they found it deserved, and they could be aided by the surrounding circumstances of corroboration. There was no exception to this portion of the charge, and the defendant has no reason to complain of these instructions to the jury.

It is next insisted that it was error to permit the people to show that during the period when defendant is alleged to have been searching for witnesses, he and his agent made the effort to induce others to swear falsely than those who subsequently took the stand; also that it was error to admit evidence of various transactions and declarations within the same period of time, when defendant was not present. It is well settled that where there is sufficient evidence to justify the conclusion that different persons charged with a crime were acting with a common purpose and design, although it does not appear there has been a previous combination or confederacy to commit the particular offense, yet the acts and declarations of each, from the commencement to the

consummation of the offense, are evidence against the others. A conspiracy may be proved by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be confederators in the commission of the offense. *Kelley v. People*, 55 N. Y. 565; *People v. Bassford*, 3 N. Y. Cr. R. 219; *People v. Murphy*, *Id.* 338; *Adams v. People*, 9 Hun, 89; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883. Evidence of other transactions, otherwise material or relevant, is not inadmissible merely because it tends to prove another crime. *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Mayer v. People*, 80 N. Y. 376; *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404; *People v. Shea*, 147 N. Y. 79, 41 N. E. 505; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138; *Hope v. People*, 83 N. Y. 418.

On cross-examination of some of the people's witnesses, defendant's counsel sought to examine them in relation to collateral matters, evidently as a basis for impeachment, but the evidence was objected to and excluded. Such evidence must be material or relate to a fact brought out by adverse counsel. *Carpenter v. Ward*, 30 N. Y. 243; *Plato v. Reynolds*, 27 N. Y. 586; *Stokes v. People*, 53 N. Y. 164.

There are several other points, involving the order of proof and the admission and rejection of evidence, which we will not refer to at length; they have been carefully considered, and present no error. The judgment appealed from should be affirmed. All concur. Judgment affirmed.

(156 N. Y. 551)

CHAPMAN v. LYNCH.

(Court of Appeals of New York. Oct. 4, 1898.)

CORPORATIONS—CONTRACTS ULTRA VIRES—WHEN RIGHT OF ACTION ACCRUES—LIABILITY OF DIRECTOR—LIMITATIONS.

1. Under Rev. St. (1st Ed.) pt. 1, p. 600, c. 18, tit. 3, § 3, prohibiting corporations other than banking corporations from receiving deposits, the act of a corporation, not organized for banking purposes, in receiving funds on deposit, is ultra vires.

2. The right of action to recover the amount thereof accrues, and the statute of limitations begins to run, from the date of the deposit.

3. In an action against a director to recover the amount of such deposit, under Laws 1875, c. 611, making directors liable for the debts of the corporation upon its failure to file its annual report, failures to file the annual report subsequent to the deposit do not stop the statute from running or remove the bar thereof.

4. Nor is the running of the statute stopped by either credits of payments or charges of interest on the deposit account.

Appeal from supreme court, general term, Fourth department.

Action by Frank B. Chapman against Patrick Lynch. From an order of the general term affirming a judgment entered upon a nonsuit, plaintiff appeals. Affirmed.

Edwin Nottingham, for appellant. Frank Hiscock, for respondent.

HAIGHT, J. This action was brought to recover the sum of \$8,973.37, the amount due and owing the plaintiff by the American Dairy-Salt Company, Limited, a business corporation organized under chapter 611 of the Laws of 1875. The action is sought to be maintained against the defendant upon the ground that he was a director of the corporation, and as such, in company with his associates, had failed to file the annual report required by the statute during the years 1881 to 1888, inclusive. This is a twin action to that of Chapman v. Comstock, reported in 58 Hun, 325, 11 N. Y. Supp. 920, and in this court in 134 N. Y. 509, 31 N. E. 876. The evidence reported upon this trial is, in substance, the same as that in the former case. The facts as stated in the former case in this court are as follows: "On and prior to February 11, 1882, the plaintiff held a promissory note for \$10,890.90 of the Onondaga Coarse-Salt Association, of which Thomas Molloy was treasurer. That company was winding up its business, and desired to pay the note. The plaintiff asked Molloy if he had any place he could use the money for him, saying that he had no place for it, and did not want to use it at that time. Molloy said he could take it for the American Dairy-Salt Company, Limited, of which he was also treasurer. Further conversation took place with reference to the responsibility of the company and its directors, resulting in the plaintiff's leaving the money with that company, and it issued to him a pass book, in which was entered, 'Frank B. Chapman, in special account with the American Dairy-Salt Company, Limited.' Under the credit column was entered, 'February 11, 1882, cash, \$10,890.90,' and semiannually thereafter interest was credited upon that amount at the rate of 6 per cent. The plaintiff was subsequently paid \$4,300, April 30, 1885; \$1,000, June 1, 1888; and \$1,000, July 11, 1888,—for which receipts were given. Shortly after the last payment was made the company failed, and refused to pay the balance, and in October following a receiver was appointed."

It is alleged in the complaint that the money was deposited with the company by the plaintiff, and was payable only upon demand. This allegation was controverted by the answer, in which it was alleged that the money was loaned to the company without time, and was recoverable by the plaintiff at any and all times without demand. It was further alleged in the answer that the corporation was not organized or authorized to do a banking business, or to receive deposits of

money, but was forbidden by law from so doing, and that more than three years had elapsed after the cause of action accrued before the commencement of this action. Upon the trial of the former action the case was submitted to the jury, which found a verdict in favor of the plaintiff. A motion for a new trial was then made upon the minutes of the court, upon the grounds specified in the Code, which motion was denied, and an appeal was then taken by the general term from the judgment and from the order denying the new trial. The general term reversed both the judgment and the order, and awarded a new trial. In the order of reversal the general term certified that it was held and decided "(1) that the verdict ought to have been directed in favor of the defendant or a nonsuit granted; (2) that the verdict is against the evidence; (3) that the several exceptions taken to the refusal to charge present error."

In the appeal which was brought from the order of the general term to this court it was here held that the appeal from the order denying the motion for a new trial, made upon the minutes, brought up for review in the general term the question as to whether the verdict was against the weight of the evidence; and, that question being properly before the court, its order reversing the judgment was not reviewable in this court, unless it appeared from the record that the order was affirmed as to the facts, or the appeal therefrom dismissed,—following a long line of authorities, which are cited in the report of that case.

In this case another question is now presented, which was not then considered, and that is, assuming the money to have been delivered by the plaintiff to the corporation as a deposit and not payable until demanded, was such a contract valid and authorized, and did it prevent the running of the statute of limitations? The alleged deposit was made on the 11th day of February, 1882. The directors of the corporation did not make the report required by the statute during the years 1881 to 1888, inclusive. This action was commenced on the 27th day of September, 1889. The action is for a penalty, depends wholly upon the statute, and falls within the third subdivision of section 383 of the Code of Civil Procedure. *Losee v. Bulard*, 79 N. Y. 404; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49. The statute of limitations commenced to run from the time that the cause of action accrued to the plaintiff. When did it accrue? As we have seen, default in filing the report had already occurred when the deposit was made; but, under the alleged contract for deposit, it is claimed that no action could be maintained thereon until after demand had been made and payment refused. The plaintiff thus had it in his power to prevent the running of the statute by neglecting to make a demand for the money, and thus indefinite-

ly perpetuate the liability of the defendant for the penalty. The claim of the defendant is that the position of the plaintiff is untenable; that, if there was a contract that the money should be received by the corporation on deposit, it was *ultra vires*, unauthorized, and void; and that an action as for money had and received was available to the plaintiff from the date of the deposit.

Section 13 of the act under which the corporation was organized provides that it shall be lawful for the corporation to borrow money for its legitimate purposes. It does not, however, authorize it to receive money upon deposit. It is contended on behalf of the appellant that the statute against unauthorized banking, which originally prohibited corporations from receiving deposits unless authorized so to do, was repealed by chapter 402 of the Laws of 1882. However that may be, the Revised Statutes, with reference to the general powers, privileges, and liabilities of corporations, were left in force, and so remained until they were incorporated into the general corporation law of 1892. Rev. St. (1st Ed.) pt. 1, p. 600, c. 18, tit. 3, § 3, provides: "In addition to the powers enumerated in the first section of this title and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." Id. § 4: "No corporation created, or to be created, and not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold and silver, bullion, or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes, or other evidences of debt, upon loan, or for circulation as money." Here we have, in the first place, an express statutory provision prohibiting the corporation from exercising powers not given to it, which are not necessary for the exercise of the powers for which it was created; and, in the second place, an express prohibition against receiving deposits unless incorporated for banking purposes. Words could hardly be found that would make the meaning more clear.

The American Dairy-Salt Company, Limited, was a business corporation organized for the manufacture of salt. It was incorporated under a statute which authorized the formation of business companies, was adapted for the purposes of such organizations, and contained none of the safeguards which have always been exacted and required of corporations authorized to do a banking business, or the receiving of the money of others on deposit for safekeeping or investment. We thus find a reason, founded on public policy, for the prohibition contained in the statute referred to, applying to corporations not expressly incorporated under the statute pro-

viding for the incorporation of banks, which contains the safeguards exacted from such corporations which are to engage in the business of dealing with the money of others. It appears to us that the corporation, in accepting the funds of the plaintiff, in special account upon deposit, exceeded its corporate power, and engaged in a business in which it was not authorized, and that, consequently, its contract with the plaintiff, if such was its nature, was *ultra vires*. If so, the plaintiff's right of action for the moneys delivered to the corporation at once accrued.

It is not our purpose here to enter upon any discussion as to whether the contract in question was *malum in se* or was simply a contract unauthorized. The corporation is not here seeking to enforce any of the provisions of the contract. In either case the contract was *ultra vires*, and formed no obstacle to an immediate action for the money. Neither do we deem it necessary to enter upon any extended reference to the authorities. The subject of *ultra vires* of contracts has recently been considered in this court in the case of *Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, in which Chief Judge Andrews and Judge Vann have engaged in an elaborate discussion of the authorities. The cases of *Trust Co. v. Helmer*, 77 N. Y. 64, and *Pratt v. Short*, 79 N. Y. 437, while distinguishable in many features, tend strongly to sustain the conclusion which we have reached.

It must be remembered that this action is prosecuted to recover a penalty. The action having once accrued and the statute run against it, the bar becomes complete, notwithstanding the subsequent defaults of the defendant and his associates in filing the annual reports called for by the statute. Neither do we understand that subsequent partial payments by the corporation upon account affect the running of the statute; they may, as to the corporation under its contract to pay, but cannot operate to extend the liability of the defendant for the penalty incurred by him. *Rector, etc., v. Vanderbilt*, 98 N. Y. 170-175; *Losee v. Bullard*, 79 N. Y. 404.

Nor do we think that the crediting of the interest upon the account semiannually affects the liability of the defendant. The cause of action having once accrued, and the defendant having become liable for the penalty, the statute commenced to run, and was not stopped by either credits of payment or the charges of interest accrued thereafter made by the company. The judgment should be affirmed with costs. All concur, except MARTIN, J., not sitting, and VANN, J., not voting. Judgment affirmed.

(156 N. Y. 566)

PEOPLE v. WILMARTH.

(Court of Appeals of New York. Oct. 4, 1898.)

JURORS—QUALIFICATION—ACTUAL BIAS.

1. The existence on the part of a proposed juror of an opinion as to the guilt or inno-

cence of accused constitutes a prima facie disqualification.

2. A juror who had an opinion as to the guilt or innocence of accused declared that in spite of it he would decide the case on the evidence, under the law as laid down by the court. Code Cr. Proc. § 376, qualifies a person as a juror if he declares that he believes that his opinion as to the guilt or innocence of accused will not influence his verdict, and that he can render an impartial verdict, according to the evidence. *Held*, that the juror did not state his belief as to whether his opinion would influence his verdict, or whether he could render an impartial verdict, and it was hence error to overrule a challenge.

Appeal from supreme court, appellate division, Third department.

Frank H. Wilmarth was convicted of grand larceny in the second degree, and of forgery in the third degree. From an order and judgment of the appellate division (51 N. Y. Supp. 688) reversing the judgment of conviction, and awarding a new trial, the people appeal. *Affirmed*.

Henry V. Borst, for the People. Robert P. Anibal, for respondent.

PARKER, C. J. During the impaneling of the jury, one Hollenbeck was called as a juror, and examined as to his qualifications. He testified, among other things, that he had read what purported to be the testimony in regard to this matter taken before the committing magistrate; that in reading it he had formed an opinion in regard to the guilt or innocence of the defendant Wilmarth; that such opinion was decided and fixed, and evidence would be required to remove it. "Q. And considerable too? A. Considerable. Q. You think that you are as unbiased and unprejudiced to sit in this case as you would have been if you hadn't read that in the paper? A. I do not. Q. Do you feel that you are yourself as competent to go in there and try this case as if you had not read and formed an opinion? A. No; I do not think I would be; not quite. I don't think I would be a fair and unprejudiced man to try the case against Mr. Wilmarth the way I feel now." Further answers were made by the juror to questions put by counsel bearing upon the existence of a present opinion by him touching the guilt or innocence of the defendant, which, while tending to show that Hollenbeck was a fair-minded man, nevertheless confirmed the accuracy of the statements bearing upon his qualifications as a juror, which we have quoted.

The existence on the part of a person called as a juror of an opinion as to the guilt or innocence of a person charged with a crime constitutes prima facie a disqualification. *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156. But it does not conclusively establish disqualification, for the statute steps in and provides that the existence of such an opinion or impression "is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath

that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict." Code Cr. Proc. § 376. After a juror makes the declaration provided for by the statute, then it is for the trial court to determine whether the juror does entertain such a present opinion or impression as will influence his verdict; and the decision made in such a case is necessarily one of fact, not reviewable in this court. But, if he fails to make such a declaration, then the disqualification prima facie established by his answers is not overborne, and a decision by the trial court that the juror does not entertain such a present opinion or impression as will influence his verdict is without evidence to support it.

We will now turn to the record for the purpose of ascertaining whether Hollenbeck made such a declaration as the statute calls for; for, if he did, the determination of the trial court that he was a properly qualified juror has evidence to support it, and it may not be reviewed in this court; but, if he did not, then the court erred, as a matter of law, in overruling the challenge interposed by the defendant. A question was asked by the district attorney which presents the appearance of having been intended as a compliance with the statute. It reads: "Q. In spite of any prejudice or any opinion you might have, you would go into the box and decide the case upon the evidence that was given here, under the law as laid down by the court, would you not? A. I would." It will be observed that the question did not call for the belief of the juror, nor did it direct his mind to the inquiry which the statute demands, whether, in his opinion, he believed that such an opinion or impression would not influence his verdict. The statute calls for the belief of the witness upon two subjects: First, whether the opinion or impression which the juror has will influence his verdict; and, second, whether he can render an impartial verdict according to the evidence. The question put omitted entirely to inquire of him whether he believed that the opinion or impression he had would not influence his verdict. The statute not only requires such inquiry, but it is a most important feature of its provisions. It directs the attention of the witness to the fact that he is expected to make a careful analysis of his opinions or impressions, and then to declare on oath his belief as to whether they will influence his verdict. This was entirely omitted, as we have seen. The question did not even attempt to cover anything except the succeeding provision of the section, which is that the juror believes he can render an impartial verdict according to the evidence. And as to that provision the belief of the witness was not asked, nor was an equivalent expression employed, as in *People v. Martell*, 133 N. Y. 595, 33 N.

E. 838. Instead, the witness was asked whether he "would decide the case upon the evidence." The question suggested to him his duty, and, as an upright man, he readily promised to do it. But such a promise is not in compliance with either the letter or the spirit of the statute, which seeks—First, to direct the mind of the juror to a careful introspection, to the end that he may be able advisedly to declare on oath his belief whether the opinions or impressions which he has will influence his verdict; and, second, whether he can render an impartial verdict according to the evidence. This statute is the outcome of many years of experience of lawyers and judges in the trial of criminal causes, and it should not be frittered away by a recognition on the part of the courts of loose or ill-considered substitutes as equivalents. In overruling the challenge, therefore, the court erred to the prejudice of defendant, who, having exhausted his peremptory challenges, was compelled to allow Hollenbeck to sit as a juror. It is claimed that other errors were made upon the trial, but, as the error we have considered calls for an affirmance of the decision of the appellate division reversing the judgment, we have deemed it best not to take up the other questions. The judgment should be affirmed. All concur. Judgment affirmed.

(156 N. Y. 618)

TOWNSEND v. FELTHOUSEN.

(Court of Appeals of New York. Oct. 4, 1898.)

SALES—FRAUDULENT REPRESENTATIONS—DAMAGES—EVIDENCE—RELEVANCY—CORRESPONDENCE—WITNESSES—IMPEACHMENT—DISCRETION OF COURT.

1. In an action for deceit, the extent of the investigation into facts bearing on defendant's candor and integrity, of plaintiff's reliance on the representations made, and of the materiality of the injury, rests largely in the discretion of the trial court.

2. A buyer may rely on the seller's statements in relation to the subject-matter of their negotiations which are actually or presumably within the latter's knowledge.

3. In an action for deceit in inducing a purchase of corporation stock, damages are shown by proof that part of the representations consisted in a false statement of the company's assets, liabilities, and business, since the value of the stock for purchase is directly affected thereby.

4. In an action for deceit in a sale of corporation stock, a letter written by the purchaser to the seller after the sale, stating that a record of the corporation was missing, and asking the seller to find it, and that the corporation was at a loss to look up its business intelligently, occasioned by a prior letter from the seller, though not in response thereto, is not inadmissible as a statement by plaintiff in his own favor, but is admissible as part of the correspondence between the parties.

5. Where defendant in an action for deceit in the sale of corporation stock to plaintiff testified that he had informed original stock subscribers at what figure a patent account which was one of the assets had been taken by the corporation, testimony of subscribers as to what statements defendant did make in reference thereto does not raise a new issue, but is admissible in impeachment.

6. Where part of the deceit practiced in inducing a purchase of stock was representations of the value of property turned over to the corporation at its formation, evidence of the actual value of the property so turned over is admissible.

Appeal from supreme court, general term, Fifth department.

Action by Richard E. Townsend against Edward G. Felthousen. From a judgment of the general term (35 N. Y. Supp. 538) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Adelbert Moot, for appellant. Norris Morrey, for respondent.

GRAY, J. This action was brought to recover damages for the fraud alleged to have been practiced upon the plaintiff by the defendant in the sale of shares of the capital stock of a corporation known as the Buffalo Steam Pump Company. The plaintiff's attention had been attracted to an advertisement, in November, 1890, inserted by the defendant, and offering his interest in the company for sale. He communicated with the defendant, and thereupon negotiations were set on foot and conducted, in interviews and in correspondence, which resulted in the purchase of the defendant's 625 shares of the stock, at the price of \$60 per share, in the latter part of January, 1891. The complaint charges that this purchase was induced by fraudulent representations on the part of the defendant, as to the amount of the actual property and assets of the corporation, exclusive of the value of the good will, and inclusive of the profits made in the previous two years of its existence, and of \$25,000 paid in cash by the subscribers to an issue of capital stock at the time of its organization. It was charged, in substance, that the defendant undertook to, and did, make representations and statements to the plaintiff to show what was the condition of the company's affairs, what its assets and liabilities were, and what the actual profits of the business in the two past years, and that these representations and statements made a false showing of these matters, and were knowingly made and furnished by the defendant for the purpose of deceiving the plaintiff as to the company's true condition, past and present, and of thereby inducing him to purchase the defendant's shares of stock. It was also charged that the cash paid in, at the time of the organization of the corporation, upon the sale of shares of its capital stock, and which was represented by the defendant as forming part of the corporate assets, had been, in fact, at once withdrawn by him from the business; as had been other moneys through the medium of the company's notes, made by him as its president. The defendant's answer was a denial of the various allegations of the complaint, charging the defendant with the representations and statements complained of as being false, and as having been made

to deceive the plaintiff into the purchase of the stock; and it was alleged in defense that the plaintiff made the purchase upon his own investigations and judgment, and not because of any statements or representations of the defendant. Upon the issue thus made, the parties went to trial before a special jury, and a great mass of evidence was submitted, containing the testimony and exhibits adduced on either side. The jury awarded the plaintiff a verdict for a substantial sum, though less than he had demanded, and the judgment upon the verdict has been affirmed by the general term. A review of the case contained in the appeal book shows that there was sufficient support in the evidence for the verdict.

The corporation was formed in July, 1888, with a capital of \$150,000, to take over the properties and business of the defendant's firm of Volker & Felthousen, and defendant became its president. Shares amounting to \$125,000 of the capital stock were issued to the members of the firm, in purchase of its properties, business, and good will, and the balance was issued to subscribers for cash. At the time of the negotiations for the sale to the plaintiff of defendant's shares, the business had been going on for a little over two years, and it was the plaintiff's contention that oral and written statements were made and exhibited to him, which exaggerated the existing assets of the company, diminished its actual liabilities, and falsely represented that substantial profits had been made in the conduct of the business since its inception; and, in support of this contention, he submitted much evidence, in the testimony of himself and of other witnesses. On the other hand, the defendant contended that there was no fraud intended or practiced in the transaction; that it was a case where the plaintiff did not rely on the defendant's representations, but upon his own judgment, after an inquiry and investigation into the company's affairs, and that in no material respect were the statements from books or accounts inaccurate, or calculated to deceive. In support of his position, he relied, not only upon evidence given by himself and by other witnesses, but upon what the evidence of the plaintiff himself showed as to his inquiries and examinations to ascertain and fix the actual value of the corporate stock. To discuss the evidence in this record would subserve no useful end. Considerable latitude was allowed by the trial judge, in its admission, to both sides, and not without reason; in view of the more or less necessary range of the inquiry over the acts and transactions of the parties. An issue involving the honesty of the part played by the defendant in procuring the plaintiff to purchase his shares of stock, and the extent to which reliance was, in fact, placed upon his statements by the plaintiff, as an intending purchaser, justified a broader field of judicial inquiry. It was necessary, not only that the evidence

should establish, or tend to establish, the falsity of the statements made, but also that they were known to be false, and, to that end, facts and circumstances showing the defendant's means of knowledge, and bearing upon the candor and integrity of his acts, in his connection with the corporation and the management of its business, were more freely admissible in evidence, in order that there might be furnished the basis for a decision as to the existence of an intention to dispose of his interest upon a fraudulent valuation. The latitude of examination, whether in the investigation of these facts and circumstances, or in those exhibiting the plaintiff's attitude to the defendant and the extent of his dependence upon his statements and of the materiality of the injury complained of, rested largely in the wise discretion of the trial court. A full revelation of facts concerning the formation and affairs of this corporation, organized, as it was, by the defendant to buy out the property and moneys of his old firm, and thereafter, more or less, under his direction, could not prejudice him, if the representations and statements were honest on his part. His liability to respond to the plaintiff's claim depended upon an intention to deceive and damages resulting in consequence. If he made his statements and representations in an honest belief of their truth, he would not be liable in such an action. If it was a case of bad judgment, or of carelessness in statement, merely, there would be no element of fraud. It was for the jury, therefore, after being put in possession of all the facts and circumstances of the case, to pronounce upon the questions raised, and to say whether the plaintiff made the purchase as the result of his own investigations, and in the exercise of his judgment, as informed in material matters by himself, or whether the defendant had intentionally deceived him, and had procured him to make the purchase, relying upon his statements, to his material injury. Their decision, affirmed by the general term below, should be conclusive upon us as to the inferences to be drawn from the conflicting evidence, under the well-settled rule. The case was essentially one, in all its features, for the determination of a jury, and we are unable to agree with the appellant in his assertion that there was no question of fact presented. It was not altogether a matter of bookkeeping, as to what were the actual assets or the liabilities of the corporation, or what it had earned in the conduct of its business; and whether, in their statement, the defendant had, by causing to be made improper or false entries in the accounts, or by suppressing items of liabilities incurred, exaggerated the corporate assets, and diminished its liabilities, and made the business to appear prosperous and productive, with the design to induce the plaintiff to buy his stock at a high figure of valuation, was a question upon the facts in evidence. It was so, too.

as to whether he made representations as to the cash put into the business, upon organization, or as to the machines and tools added to the works since, and whether, if made as charged, they were intentionally and knowingly false. There were not wanting circumstances capable of inferences unfavorable to the defendant's honesty of action in the transaction leading to the plaintiff's purchase; such as, for instance, a destruction of account books and papers by him, after the sale of his stock and during the plaintiff's absence, which included some of the corporate accounts, and in the making of supplementary entries in the books for the year 1890, after a trial balance had been made up for the plaintiff. None of these or of the other circumstances were, of themselves, conclusive upon the question of a fraudulent intent; but it was for the jury to say how far, under all the circumstances disclosed, they went to prove the perpetration of fraud.

The basis of all dealings is good faith, and the plaintiff had the right to rely upon the truth of the defendant's statements in relation to the subject-matters of their negotiations, which were actually or presumably within his personal knowledge, and that there was no suppression or concealment, with a view to obtain an advantage over him. Whether he did so rely, and whether there was misrepresentation or concealment by the defendant, were the questions presented to the jury upon the evidence. As there was evidence which tended to establish fraud, the trial court properly decided to submit the case to the jury for their decision as to whether the fraud was proven. The jury might consider that the plaintiff was no novice in such matters, and that he availed himself of opportunities offered to independently examine into the affairs of the corporation; but they might also consider, with reason, that there were, nevertheless, facts in its formation and business operation which might be, and which were, falsely stated or designedly suppressed, to the defendant's advantage in the negotiation for a sale.

Upon the question of whether damage was shown, it is sufficient to say that the valuation of the stock for purchase by the plaintiff was directly affected by the truth of the figures shown in the statement of the company's assets, liabilities, and business. It was not a question of what the plaintiff succeeded in doing thereafter under his management, but of what was the actual value of the stock when he negotiated for its purchase.

The appellant urges that there were errors committed by the trial court in the rulings upon the trial. Some of these rulings related to the latitude of the examination or cross-examination of witnesses; but, as has before been observed, in such an action there must be considerable liberality in the conduct of the trial, in the method of the examination, or in the scope of the inquiry. *Loos v. Wil-*

kinson, 110 N. Y. 195, 18 N. E. 99; *White v. Benjamin*, 150 N. Y. 258, 44 N. E. 956. We do not perceive that there has been any abuse of that discretion which is vested in the court in such actions, or that the defendant has been prejudiced by any of such rulings.

Objection was made to the introduction of a letter written by the plaintiff to the defendant in September, 1891, upon the ground that it was a statement of the plaintiff in his own favor, and not in response to any from the defendant. The letter related to the absence of an invoice book, which was missed about the time the defendant moved his personal papers from the office, and it asked him to make an effort to find it; stating, incidentally, that the company was "at a loss to look up their business intelligently." While it does not appear to be in response to anything from the defendant, the parties had been in correspondence about a meeting, which the defendant, in a letter of a few days before, had declined to have with the plaintiff personally, and the witness testified that that letter occasioned the one in question. It being shown to be one in, and necessitated by, the correspondence, it became admissible to complete it. It showed the attitude of the parties, and the statement of the fact of a missing book did not necessarily amount to a charge of misconduct, nor to the making of evidence.

Objection was made to inquiries of stockholders as to what information they had received from the defendant, at the time of their subscriptions, upon the subject of a patent account forming part of the assets turned over to the company by Volker & Felthousen. It was not so collateral to the issue as to be inadmissible, inasmuch as the defendant had gone into the subject of the organization of the new corporation, and had testified upon cross-examination that he had informed the subscribers at what figure the patent account was taken over as part of the assets. The subsequent inquiry of the stockholders concerning this subject was proper in impeachment of the defendant's testimony. It did not raise a new issue, because it bore upon the general question of the composition and value of the corporate assets, as affected by the acts of the defendant, who was the promoter and manager of the corporation.

So, also, objection was made to going into questions relative to the value of the property transferred by Volker & Felthousen to the new corporation. This inquiry, however antedating the period of the transaction in question, had been justified by the fact that, as part of the defendant's representations to induce the plaintiff's purchase of his stock, he showed an affidavit of Walker, a former bookkeeper of his firm, as to the value of the properties turned over to the new corporation. This was testified to by the plaintiff, and upon his cross-examination the defendant caused the affidavit to be put in evidence,

and subsequently Walker himself was called as a witness for the defendant, and examined upon the subject of the assets of the firm. The question of the trial involving the existence of an intention in the defendant to defraud the plaintiff in the sale of the stock, it was not beyond the proper scope of inquiry to inquire into the truth of that portion of the representations which concerned the value of the properties turned over by Volker & Felthousen to the new corporation, and which entered into the basis of a valuation of the shares of its stock. It tended to exhibit a scheme of the defendant to make such a showing of the corporate affairs as to enable him successfully to make a good sale of his interests in the corporation which he had caused to be formed. It was competent as evidence of what was done by the defendant to influence the plaintiff's mind in making the purchase of the stock, and was made a factor in the transaction. It is within the principle that a misrepresentation by the vendor as to the cost of property about to be sold is a material fact, and naturally calculated to mislead the purchaser. *Sandford v. Handy*, 23 Wend. 260; *Falschild v. McMahon*, 139 N. Y. 290, 34 N. E. 779.

No other questions require discussion. We think that no errors were committed in the trial of a substantial or prejudicial nature. The case was carefully and fairly tried and submitted to the determination of the jury, and the judgment of the general term approving that determination should be affirmed by us. All concur. Judgment affirmed.

(156 N. Y. 600)

STOWERS v. GILBERT.

(Court of Appeals of New York. Oct. 4, 1898.)

TRESPASS—ADJOINING OWNERS—INJUNCTION—DAMAGES.

Where a lot owner sues to enjoin a trespass by the adjoining owner's entering his premises, cutting off the cornice of his house situated thereon, and erecting a wall of a building on his ground, and the trespasser has no power to condemn the property, the court can render judgment for such damages only as have then accrued, and not for permanent damages.

Appeal from supreme court, general term, Fifth department.

Action by Eugenia Stowers against Thomas Gilbert. The plaintiff had judgment, which was modified and affirmed by the general term (33 N. Y. Supp. 101), and defendant appealed. Reversed.

Frederick A. Mann, for appellant. Charles M. Allen, for respondent.

BARTLETT, J. This is an equitable action, brought for the purpose of restraining defendant from erecting a brick wall which plaintiff avers encroached upon her land, and to recover damages for the alleged trespass. The plaintiff and defendant are adjoining

owners of land situate upon the north side of Atkinson street, in the city of Rochester, the premises of the defendant lying next east of the plaintiff's. The referee found that the plaintiff's house has stood in its present position for many years, and is within or west of the true line between plaintiff's and defendant's lands. It is also found that between the old house, which defendant removed in order to erect the present structure, and the plaintiff's house, there was a narrow passageway, through which a person could pass, and that the eaves of the two houses did not overlap each other. The defendant, in erecting his new west wall, of which complaint is now made, evidently proceeded upon the theory that plaintiff's east wall encroached upon his land near the rear of the house several inches, and that it was his legal right to place the wall along the true line as he claimed it. While attempting to do this, he was served with the injunction in this action, the complaint praying that the defendant be restrained from interfering with, cutting, or injuring in any manner plaintiff's said dwelling house, or the fences between the plaintiff's lot and defendant's lot, and restraining him from trespassing upon plaintiff's premises. It is found that the defendant trespassed upon the plaintiff's land, removed the underpinning from the east end of a piazza or stoop, broke and tore down the line fence and grape trellis, tore up boards and shingles, and cut off a portion of the shingles and cornice on the east side of plaintiff's house, but that the cutting of the eaves was done under and in pursuance of an order of the court made in this action, granted upon condition that the defendant give a bond with two sufficient sureties providing for the payment of any judgment which might be recovered by the plaintiff in this action on account of any cutting of the eaves of plaintiff's building pursuant to the permission granted by the order. The defendant then completed the erection of his wall. This case was tried thereafter, and resulted in a permanent injunction and a judgment for \$500 damages against the defendant. The general term reduced the damages to \$100, and affirmed the judgment as modified.

It is unnecessary to examine the merits of this case, as the court below adopted an improper measure of damages, and the judgment must be reversed. The damages proved on the trial before the referee were not temporary, but permanent, in character, and the evidence to establish the same was admitted over the objections and motions to strike out of the defendant. The plaintiff swore two real-estate brokers on the question of damages. The first witness, Durgin, testified that the value of the premises before the trespass was \$2,000, and after the erection of wall \$1,500. He fixed the value of house before trespass at \$500. The witness stated that he took into consideration drip, also

light and air shut off. The other witness, Knapp, fixed the damage to plaintiff's house by the erection of the wall at \$500. He also stated that he took into consideration in fixing the damages the leakage of water from the higher building, and cutting away the cornice and eaves, but shutting off light and air did not enter into his computation. The evidence of these two witnesses, considered as a whole, covers to some extent the ground of permanent damages. It is, to say the least, unusual that two real-estate experts should swear that the erection of defendant's wall damaged the plaintiff's house in a sum equal to its full value. The general term held the damages excessive, and reduced the amount to \$100. This reduction was, however, without warrant of law, as there is no evidence fixing the temporary damages of plaintiff up to the entry of judgment, which was the limit of recovery. A judgment against defendant for any sum as this record stands is fatally defective, being unsupported by evidence. The rule of damages is settled in this state as to trespasses on land. In a case where the defendant has the power to condemn the property he has entered upon (illustrated in the elevated railway cases), the plaintiff proceeds in equity for injunction or for his permanent damages. The plaintiff, if he receives the amount of the permanent damages, is by the court compelled to convey the interest to the defendant which the latter pays for in that way, and condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and the defendant concedes it when he avails himself of the condition, and pays the permanent damage in order to receive the conveyance. It is only in this way that the plaintiff recovers as for a permanent damage to his property. *Pappenheim v. Railway Co.*, 128 N. Y. 436, 444, 445, 28 N. E. 518; *New York Nat. Exch. Bank v. Metropolitan El. Ry. Co.*, 108 N. Y. 660, 15 N. E. 445.

In a case like the one at bar, where the defendant has no power to condemn the property he has entered upon, two remedies are open to the plaintiff,—an action at law for damages, and a suit in equity for an injunction and damages. In the action at law, only such temporary damages are recoverable as have been sustained up to the time of the commencement of the action, and the plaintiff may bring successive actions until the defendant abates the nuisance. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518; *Pond v. Railway Co.*, 112 N. Y. 186, 19 N. E. 487; *Plate v. Railroad Co.*, 37 N. Y. 472; *Mahon v. Railroad Co.*, 24 N. Y. 658. In the suit in equity, which is the remedy invoked in this case, the plaintiff recovers only his damages up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. *Pappenheim v. Railway Co.*, 128 N. Y. 436, 445, 28

N. E. 518. The wall erected by defendant upon plaintiff's land is a nuisance, and the defendant is under legal obligation to remove it; and it is not to be presumed he will seek to continue it permanently, in violation of the injunction of the court, thereby subjecting himself to damages in contempt proceedings, or ejectment. Damages in the present action are not to be awarded upon the assumption of permanent injury, as the judgment does not and cannot operate as a purchase of the right to have the wall remain as at present constructed. The rule of damages in cases of private trespass and nuisance has been so exhaustively examined in the able opinion of Judge Earl in *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536, that it is quite unnecessary to review the authorities in detail. The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed.

(156 N. Y. 521)

DOUGLAS et al. v. COONLEY et al.

(Court of Appeals of New York. Oct. 4, 1898.)

PARTY WALLS—REVIVAL OF EASEMENT—PLEADING—DEMURRER.

1. An easement in a stairway and party wall between adjoining buildings, though suspended by the destruction of the buildings by fire, is revived by the reconstruction of the buildings including the stairway and party wall, as they existed originally.

2. Where new matter is set up in an answer which is demurred to, all the allegations of the complaint and answer are to be taken as true for the purposes of the demurrer.

3. Where an answer is demurred to, the allegations of the complaint referred to in the answer are to be treated as incorporated in the answer for the purposes of the demurrer. Gray and Bartlett, JJ., dissenting.

Appeal from supreme court, general term, Third department.

Action by Nathan G. Douglas and another against Daniel S. Coonley and another. From a judgment of the general term, Third department (32 N. Y. Supp. 444), reversing a final judgment entered upon the decision and order of the court at special term, sustaining plaintiffs' demurrer to defendants' answer, plaintiffs appeal. Order reversed, and judgment of special term affirmed.

William P. Cantwell, for appellants. Walter J. Mears, for respondents.

PARKER, C. J. By his will, Henry B. Smith conferred upon executors named therein the power to sell and convey his real estate. It consisted in part of a three-story building that had three stores on the ground floor. The executors conveyed the middle store to Margaret A. Cantwell, and the store next adjoining it on the west to this defendant Coonley and one John Hughes and Hughes' title has since been acquired

by the defendant Sophronia C. Smith. Between the said middle and west stores was a wall that the conveyance made a party wall, and from the street to the upper rooms of the building, immediately adjoining this party wall on the west side, there was a stairway that was used by the occupants of both buildings, it being the only mode of access between the upper and lower floors of either building. After Coonley and Hughes had become the owners of the west store, they undertook to confirm the alleged right of Margaret A. Cantwell to use this stairway in common with themselves as a means of ingress and egress to and from the two floors above her store, and to that end executed a deed of conveyance, by which, as the complaint recites, was "granted, sold, and conveyed to the said Margaret A. Cantwell, her heirs and assigns, the right of way to pass and repass up and down the passageway or stairway between the store owned by Margaret A. Cantwell and of the parties of the first part hereto at all times, in common with the parties of the first part hereto, for the purpose of going and returning to and from the rooms in the upper part of said stores; the party of the second part to pay one-half of the expense of keeping the stairway in repair." Subsequently, these plaintiffs succeeded to the title of Margaret A. Cantwell in and to the middle store; and thereafter, and on the 11th day of January, 1893, the entire building was destroyed by fire. The parties at once reconstructed the buildings on the same foundation as before, and united in the construction between the two stores of a party wall similar to the one formerly existing, except as to the doorway leading from the head of the stairway to the second floor of the plaintiffs' building. The plaintiffs put in a frame for such doorway when the wall was being constructed, but afterwards defendants tore the frame out, and built that portion of the wall up solid, thus preventing the plaintiffs from obtaining access to their premises by means of the stairway. The defendants, though frequently requested, refused to permit the plaintiffs to enjoy the stairway in common with them.

It is conceded that, prior to the destruction of the building by fire, the plaintiffs had a legal right to use, as they did, this stairway and the doorway in the party wall as well, in common with the defendants. But it is contended that the effect of the destruction of the building by fire was to destroy this easement. The diligence of counsel has not succeeded in bringing to light a similar case, in this country, nor have we been more fortunate. The appellate division regarded the case as controlled by *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. 841. That case is certainly authority for the proposition that these plaintiffs had no right to insist upon a reconstruction of the party wall or of the stairway. The buildings having been de-

stroyed without fault on the part of the defendants, it was their right thereafter to make such use of the land as should seem to them most conducive to their interests. They could not by their own act affect the plaintiffs' easement, but, an outside force beyond the defendants' control having destroyed the buildings and the major part of the party wall, it was within their power thereafter to so use the land that the plaintiffs' easements should not be revived. Had they done so, a situation would have been presented within the doctrine of *Heartt v. Kruger*, supra. But this they did not do. Instead, they united with the defendants in constructing a party wall, and rebuilt the stairway in precisely the same place as before; and thus within a comparatively short period of time the buildings, so far at least as the stairway and party wall are concerned, were exactly the same as if the fire had never taken place. And the question is, did this conduct of the parties operate to revive the easement that was suspended by the destruction of the property? If such be the effect of this action, the result is certainly equitable and in accordance with good conscience. The plaintiffs' predecessor in title, in purchasing the middle store, acquired the right to use the stairway and the doorway through the party wall as a necessary incident to her enjoyment of the second and third stories of her building. Apparently, for the purpose of further assuring her right to use the stairway and the doorway as well, a grant of such right, presumably upon a good and sufficient consideration, was made to her by these defendants. The grant was not intended to be a temporary matter, or one purely for her personal convenience, for it ran to her, her heirs and assigns. Why should she or her assigns be deprived of it now, inasmuch as the situation of the property is precisely the same as it was then? No good reason has been suggested by counsel for relieving the defendants from the easement which they undertook to confirm, if not create. The law afforded them an opportunity for the destruction of the suspended easement by an entirely different method of construction; and the reason of the law is that, in case of the destruction of an easement by the act of God, then a party ought to be at liberty to make the best possible use of his property, and should not be burdened with the necessity of a reconstruction along the same lines. Presumably, these defendants found that a reconstruction of the building upon the old plan was the best possible use to which they could put the land, and now, that such reconstruction is accomplished, they insist that the other parties shall not enjoy the easement. The plaintiffs need not have united with the defendants in the construction of the party wall, but did so with the expectation, undoubtedly, of enjoying the right supposed to be secured to them of access to the upper stories of the building. It certainly seems but

just under all the circumstances that these expectations should be realized, and hence it becomes the duty of a court of equity to work out that result, provided it can be done within established equitable principles.

Mr. Washburn, in his work on the Law of Easements and Servitudes, says, at page 568 (page 686, 3d Ed.): "It may be observed as a well-settled rule of the civil law, which would doubtless be regarded as a part of the common law, that if a house, a wall, a water spout, or anything of that kind with which or by which a servitude exists or is enjoyed, is destroyed, and the same is afterwards, within the period of prescription, reconstructed or restored, whatever may have been the servitudes connected therewith, they are, by such restoration, revived." Courts of equity have frequently borrowed from the civil law certain of its rules, and advantageously ingrafted them upon our system of jurisprudence; and, indeed, the father of equity jurisprudence in this state, Chancellor Kent, made special use of it in the party-wall case of *Campbell v. Mesler*, 4 Johns. Chancery, 333, and, by way of introduction to its consideration, he said: "The rules and doctrines of the French law may be referred to by way of illustration, and to show the prevailing equity and justice of the rule of contribution in respect to party walls." From 3 Toullier, *Droit Civil Français*, 522, the following is taken: Section 684: "Servitudes cease when the things are found in such condition that one can no longer use them. As if a dominant and a servient estate are destroyed. If they are submerged. If the house which holds the servitude and that to which it is due, are burned or demolished. * * *" Section 685: "But the servitudes revive if the things are re-established in such a manner that one can use them, unless there has already elapsed a space of time sufficient to make a presumption of the extinction of the servitude. Thus where there is reconstruction of a mesne wall or a demolished or burned house, the servitudes, active and passive, continue in relation to the new wall without the power of their being increased, and provided that the reconstruction is made before the prescription is acquired." Mr. Wait, in his *Actions and Defenses* (volume 2, p. 680), under the head of "Easements for Special Purposes," asserts the doctrine that an easement is only suspended when the property is destroyed, and that it is revived when the estate is so restored that the servitudes are again of value to the dominant estate. That author asserts the same doctrine under the head of "Unity of the Two Estates," at page 734. After stating the rule that the effect of the unity of the title of both the dominant and servient estates in one person is to extinguish the easement, he says: "The same is true to a limited extent when the possession only is united in one person. Thus, where the owner of the dominant tenement is also the lessee of the servient estate, the easement

will be suspended. But, when the relation between the two estates terminates by the expiration of the lease or other lesser estate, the right is revived with the separation of possession." This rule, well founded in reason, is applicable to this case, and therefore it becomes the duty of the court to hold that the effect of the reconstruction of the buildings, including the party wall and the stairway as they were before, operated to revive the easement that had been for a time suspended by the destruction of the former buildings by fire. The judgment under review was entered upon an order sustaining a demurrer to the defendants' answer, and their counsel now urges that the demurrer should have been overruled if either of the actions or defenses were well pleaded, and also if one material allegation in the complaint was put in issue. If nothing else therein was denied or answered, the plaintiff must be put to his proof. True; but the counsel omitted to call the attention of the court to the material allegation in the complaint put in issue by the answer, and we are unable to find it. New matter is set up in the answer, and in such case all the allegations of the complaint and the answer are to be taken as true. For the purpose of the demurrer, the allegations of the complaint referred to in the answer are to be treated as incorporated in it. *Cragin v. Lovell*, 88 N. Y. 258. And, thus reading the answer, it does not set up a defense to the cause of action alleged in the complaint. The order appealed from should be reversed, and the judgment of the special term affirmed, with costs. All concur, except GRAY and BARTLETT, JJ., dissenting, and HAIGHT, J., absent. Order reversed.

(156 N. Y. 529)

LOEB et al. v. KEYES et al.

(Court of Appeals of New York. Oct. 4, 1898.)

CONSTRUCTION OF CONTRACT.

Defendant entered into an agreement with plaintiffs that the latter should, from time to time, sell him merchandise, for which he should give his own notes, indorsed by a third person, and also customers' paper, and that he should be credited with such notes and customers' paper, and, as they became due, whenever there was a balance to his credit sufficient to take up any new note coming due, it should be taken up by plaintiffs, and returned to him. *Held*, that the agreement contemplated that the notes of both series should be credited to defendant, and that the balance should rest upon credits from both sources, and not on credits of customers' paper only.

Appeal from supreme court, general term, Fourth department.

This action was commenced on the 12th of August, 1893, to recover the amount of a promissory note dated January 12, 1893, whereby the defendant Frank R. Keyes promised to pay to the order of the defendant Cora W. Keyes the sum of \$1,442.82 six months after date. Said note was indorsed by the payee, and delivered to the plaintiffs

before maturity. The defendants claim that said note was not due when the action was commenced, and that it had in fact been paid by certain credits made pursuant to an arrangement between the parties. The action was tried before a referee, who reported in favor of the plaintiffs, and, the judgment entered upon his report having been affirmed by the general term (33 N. Y. Supp. 491), the defendants appeal to this court. Reversed.

H. D. Hinman, for appellants. Alexander Cumming; for respondents.

VANN, J. (after stating the facts). During the years 1892 and 1893 the plaintiffs, who did business in the city of Philadelphia, sold certain goods to the defendant Frank R. Keyes, who did business in the city of Binghamton, under an arrangement which, as stipulated upon the trial, was as follows: "It is stipulated that the arrangement between plaintiffs and defendant F. R. Keyes was that plaintiffs should, from time to time, sell and deliver to F. R. Keyes tobacco, for which he should give his notes, indorsed by Cora W. Keyes, as well as such customers' paper as might be acceptable to the plaintiffs; and that he should be credited with such notes and customers' paper, and, as the same came due from time to time, whenever there was a balance to the credit of F. R. Keyes sufficient to take up any new note coming due, the same should be taken up by plaintiffs, and returned to him, and these transactions should continue during the pleasure of the plaintiffs." The learned referee construed this agreement to mean that, although credit was to be given to Mr. Keyes, both for his own notes and the notes of his customers, still, "as said Keyes' own notes became due from time to time, if he had sufficient credit with the plaintiffs on account of such customers' notes so credited to him, that his own notes should be taken up by plaintiffs, and returned to him." In other words, he held that the "balance to the credit of F. R. Keyes," as used in the stipulated agreement, meant only such "balance" to the credit of Mr. Keyes as should arise on account of customers' notes, excluding altogether the credit on account of his own notes. The learned general term, without argument, adopted this construction of the agreement, and upon this basis the judgments below are clearly right. If, however, the true construction of the agreement is that said "balance" was to rest upon credits from both sources,—that is, Keyes' own notes as well as customers' notes,—then the judgments are clearly wrong. The agreement provided that Mr. Keyes should be credited "with such notes,"—that is, his own notes indorsed by his wife,—and customers' paper." Thus it is clear that both kinds of notes should make up the credit side of the account. A "balance" is the difference between the debits and credits of

an account, and hence the "balance" meant by the agreement is the "balance" left after such credits have been made. If the parties meant what they said when upon the trial they stipulated that this was the agreement, we see no escape from the construction thus indicated. The "balance" meant by the parties necessarily contemplated what was left after all the notes made by Mr. Keyes and by third persons had been credited. The practical effect of the arrangement was that, as fast as goods were sold to Mr. Keyes by the plaintiffs, he gave his own notes, duly indorsed, for the amount. Subsequently, as notes were given to him by his customers, he transferred them to the plaintiffs, and both series of notes were credited to him. This, however, might result, and did result, in a double credit to some extent, which was guarded against by the provision that when one of Mr. Keyes' own notes became due, and the "balance" in his favor arising from the double credit was sufficient to take it up, the plaintiffs were bound to do so. This construction makes the agreement reasonable and fair to both parties. The construction thus far adopted, however, makes the agreement one-sided and unreasonable, for the plaintiffs, having the promise to pay of their purchaser for all the goods sold to him, such promise being duly secured by a responsible indorser, as well as other credits on the same account by reason of customers' notes, could not, in reason, ask him to pay a note of his own that fell due, if at the time the "balance" from both credits exceeded the amount of such note, because there would be no necessity for it, as the customers' notes, added to Mr. Keyes' own notes still left, would cover the entire claim of the plaintiffs. We think that the construction contended for by the appellants, which is confirmed by the course of dealing between the parties, is the correct one, and that when this suit was commenced the note in question was *functus officio*, and the defendants were entitled to have the same surrendered, because the "balance" in their favor exceeded the amount of the note sued upon.

The forced "balance" in favor of plaintiffs, made by charging Mr. Keyes with his own notes before they were due, was not the "balance" contemplated by the agreement. By accepting his notes the plaintiffs extended the time of payment of the goods for which they were given. *Iron Co. v. Walker*, 76 N. Y. 521, 524. They could not credit the notes, and also charge them before they became due, as the charge would destroy the credit, and the entries would have no practical effect. It was not until one of the notes became due that the last part of the agreement was called into action. If, then, the "balance" in favor of the defendants exceeded the amount of the note so falling due, that note was to be surrendered, every other part of the account remaining in statu quo until something transpired to change it. Such is the situation disclosed by the record before us. We think the

judgment should be reversed, and a new trial granted, with costs to abide the event: All concur, except BARTLETT, J., not voting, and MARTIN, J., not sitting. Judgment reversed, etc.

(156 N. Y. 423)

In re GOULD'S ESTATE.

(Court of Appeals of New York. Oct. 4, 1898.)

SUCCESSION TAX—PROPERTY SUBJECT—LEGACY TO CREDITOR.

Where a testator bequeaths a legacy to a creditor in payment of his claim, and the creditor accepts it, it is a transfer, within the meaning of Laws 1892, c. 899, declaring that "a tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will."

Appeal from supreme court, appellate division, Third department.

In the matter of the appraisal for taxation of the estate of Jay Gould, deceased, under the act taxing transfers of property. From an order of the appellate division (46 N. Y. Supp. 506) affirming an order made by the surrogate adjudging the amount of taxes to be paid by the property of the estate transferred by will, the state comptrollers appeal. Modified and affirmed.

David B. Hill, John R. Dos Passos, and Edmund Francis Harding, for comptrollers of the state and city of New York. John F. Dillon and Harry Hubbard, for executors and trustees of Jay Gould's estate.

PARKER, C. J. In a codicil to the last will of Jay Gould appears the following: "My beloved son George J. Gould having developed a remarkable business ability, and having for twelve years devoted himself entirely to my business, and during the past five years taken entire charge of all my difficult interests, I hereby fix the value of his said services at five millions of dollars, payable as follows: Five hundred thousand in cash, less the amounts advanced by me for the purchase of a house for him on Fifth avenue, New York City, and such amount as I shall hereafter advance to purchase stables; five hundred thousand dollars in Missouri Pacific Railway Co. six per cent. consolidated mortgage bonds; five hundred thousand dollars in St. Louis, Iron Mountain & Southern Railway Co. consolidated five per cent. bonds; five hundred thousand dollars in Missouri Pacific Railway Co. trust five per cent. bonds; ten thousand shares of the stock of the Manhattan Elevated Railway Company; ten thousand shares of the stock of the Western Union Telegraph Company, and ten thousand shares of the stock of the Missouri Pacific Railway Company,—all the foregoing bonds and stock to be treated as worth par; and the receipt of the said George J. Gould in full for the said services and all other services down to the time of my death, not otherwise paid for by me during my lifetime, unless I

shall hereafter by a different testamentary provision provide, shall be all the voucher required by my executors and trustees." Upon the hearing before the appraiser evidence was introduced tending to show an agreement between Jay Gould and George J. Gould that the latter should perform services of an important nature for the former, who in turn should compensate George J. for such services, and that the provision quoted was inserted to provide such compensation, and for no other purpose; and, further, that such sum was agreed upon by the parties. In the appraisal proceedings this was found as a fact, and, the appellate division having affirmed such finding, it is not open for inquiry in this court, and the further discussion will treat as established that it was the purpose of the testator by this provision of the codicil to his will to discharge his debt to his son. It should further be observed that George J. Gould consented to accept payment for his services under this provision. He testified upon that subject as follows: "Q. You are the son of the late Jay Gould? A. Yes. Q. Mr. Gould, in the eighth article of the second codicil of your father's will there is a provision which I shall ask you to read for the purpose of refreshing your mind. [Copy will be handed to witness, who looks at same.] When did you first know of that provision, and in what manner and under what circumstances? A. A week before my father's death,—about a week. Q. State the circumstances. A. He was sick in bed, and he told me where his will was, and told me to go and get it; and when I had gotten it he asked me to open the envelope, and read it through, which I did. Then he asked me if I understood it. I said I did, and then he asked me whether this provision which he had made—the one I have just read—was satisfactory to me. I told him it was. Q. When you say he asked you whether the provision which was made was satisfactory to you he had reference to the provision as it now stands in the will, which is contained in the eighth paragraph of the second codicil? A. Yes." He could have refused compensation in this manner, and had he done so whatever sum he might have recovered against the estate under the agreement with his father would not have been taxable under the taxable transfer act, for there would have been in such case no transfer by will. This he did not do, but instead elected to accept a transfer of a certain amount of money, bonds, and stocks, under the will, in compensation for his services; and the question is, is the money and property thus transferred taxable? To that question the statute must furnish the answer. The statute reads: "A tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will." It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. Was not the property

mentioned in this codicil transferred by will? Certainly it was, for the title to the bonds and stocks described in the codicil was taken away from the estate of Jay Gould and vested in George J. Gould under and by virtue of the second codicil of the will; and such property is, therefore, taxable under the express provisions of this statute. If Jay Gould did owe his son George \$5,000,000 for services,—and we must assume that he did,—he selected a method of payment which brought the transaction within the taxing provisions of the statute. Whether this action was taken by Jay Gould for the purpose of absolutely securing to the state the tax, or because he wished to retain possession of all his property during his life, or for some other satisfactory reason, we need not inquire. The question of motive on the part of the testator is not for our consideration. We are now dealing with a taxing statute which undertakes to tax all property transferred by will, and which is applicable to every transaction of that kind, whether advisedly or mistakenly entered upon and carried out.

Neither the taxing officers nor the courts are at liberty to hold that because Jay Gould might have paid his debt to his son George in such a manner as to have freed the property from the burden of a tax, therefore a different transaction, one upon which the statute expressly imposes a tax, shall be treated as the equivalent of the other, and given the same effect. So far in the progress of this proceeding the question as to the right of the state to collect a tax upon the property has been disposed of by the courts below as if the statute provided in terms that only property "gratuitously given by will" should be taxed. But the statute does not so provide, and the duty of the courts is to read it as it is written. It is certainly within the constitutional power of the legislature to tax all property transferred by will, whether the motive of the testator be to make a gift or pay a debt, and the language, absolutely unambiguous and free from saving clauses, which the legislature employed to accomplish that result, affords the best indication that the word "transfer" in the statute is used advisedly and according to its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. *Bouv. Law Dict.* Indeed, it can easily be imagined that the legislature aimed to prevent parties from avoiding payment of the tax by changing intended beneficiaries into testamentary creditors. It matters not what the motive of a transfer by will may be,—whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection,—if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state, by the statute in question, makes a tax to impinge upon that performance. That Jay

Gould attempted to transfer the property mentioned in the codicil to his son George by will appears upon the face of the instrument. That the son agreed to accept the transfer of the property to him by that method appears from his testimony that he stated to his father that the provision for compensation was satisfactory, and that he has accepted the benefit of this provision is unquestioned. The result, therefore, is a transfer to him by will of the property therein described, and the statutory command that upon property thus transferred a tax should be imposed must be obeyed. The market value of this property was found to be \$4,201,250, and the tax thereon is the sum of \$42,012.50. The order appealed from, therefore, should be so modified as to adjudge that the taxes on the share or interest of George J. Gould is the sum of \$132,784.44, and, as thus modified, the order should be affirmed, with costs to the appellant comptrollers. All concur. Order modified.

(156 N. Y. 541)

PEOPLE v. SICKLES.

(Court of Appeals of New York. Oct. 4, 1898.)

CRIMINAL LAW—SECOND OFFENSE—EVIDENCE—
DUE PROCESS OF LAW—PRESUMPTION
OF INNOCENCE.

1. Under Pen. Code, § 688, providing an increased penalty for the commission of a felony after a previous conviction, the former conviction is an ingredient of the aggravated offense, so that it must be pleaded and proved in order that defendant may be informed of the charge brought against him.

2. In the absence of any statutory provision relating to procedure in such case, proof of such former conviction need not be deferred until after defendant has been found guilty of the offense on trial.

3. Pen. Code, § 688, provides for an increased penalty for the commission of a felony after a former conviction. *Held*, that proof of such former conviction upon the trial, and before conviction of the second offense, is not objectionable, as not being due process of law, or as depriving defendant of the benefit of the presumption of innocence.

Bartlett, J., dissenting.

Appeal from supreme court, appellate division, Second department.

Livingston Sickles was convicted of robbery in the first degree, as a second offense, and from a judgment of the appellate division (50 N. Y. Supp. 377), affirming the judgment of conviction, appeals. Affirmed.

Martin W. Littleton, for appellant. Robert H. Elder, for the People.

GRAY, J. The defendant was indicted for the crime of robbery in the first degree, as a second offense, and, on being arraigned, entered a plea of not guilty. He was tried and found guilty by the verdict of a jury, and, upon appeal, the judgment of conviction was affirmed by the appellate division. When the trial was moved, and before the jury was impaneled, the defendant admitted his former

conviction, and he thereafter sought to have evidence thereof excluded. His objection to such evidence was overruled, and the exception taken to the ruling raises the question presented now for our review.

I think there was no error in the ruling. The prevailing opinion below, by Mr. Justice Cullen, has very ably discussed the question involved, and leaves little to be said. Indeed, the question may be regarded as practically settled upon the authority of certain decisions of this court.

The argument against the correctness of the ruling, in substance, is twofold. In the first place, it is argued that a correct construction of section 688 of the Penal Code, which provides for an increased penalty where there is the commission of a crime after a previous conviction of the offender, only authorizes the introduction of the evidence of such former conviction after the jury has found the defendant guilty of the crime for which he is being tried. In the second place, it is argued that if such a construction be not given and such evidence is made admissible as part of the case against the prisoner, then certain rights secured to him by the constitution and laws of the state are invaded, in that he is deprived of his liberty without due process of law, and is not given the benefit of the presumption of innocence.

The first of these positions is taken upon the language of the section, which reads that "a person, who, after having been convicted within this state, of a felony, * * * commits any crime, within this state, is punishable upon conviction of such second offense, as follows," etc. It is argued that the words, "upon conviction of such second offense," warrant the view that it was not intended that the fact of the former conviction should be used by the prosecution until after the defendant has been found guilty of the offense for which he is being tried. The statute in question is not dealing with, nor regulating, criminal procedure, but is declaring the enhanced penalty which a subsequent offender against the laws of the state will incur upon conviction. When the people present a case under its provisions, the procedure to establish it is governed by the provisions of the Code of Criminal Procedure. The indictment of the person accused of being a second offender must bring the case within the statute by setting forth the facts depended upon for the imposition of the severer punishment prescribed by the Penal Code. *People v. Powers*, 6 N. Y. 50; *Wood v. People*, 53 N. Y. 511; *Johnson v. People*, 55 N. Y. 512. This is necessary in penal proceedings, in order that the defendant may be clearly informed of the charge which he is called upon to meet. The Code of Criminal Procedure requires it, and it is in accord with all just penal legislation. In such a case as this, the charge is not merely that the prisoner has committed the offense specifically described, but that,

as a former convict, his second offense has subjected him to an enhanced penalty. In *Wood v. People*, supra, it was held that it was an essential ingredient of the aggravated offense, charged upon the accused, that the alleged felony was committed after a former conviction of an offense, and that the prior conviction entered into and made a part of the offense of which the accused was convicted. Judge Allen observed that, "when the statute describes the offense, the proof, as well as the allegations of the indictment, must bring the case within the statute. * * * The defendant should be brought within all the material words of the statute, as well by the proof as by the indictment." In *Johnson v. People*, supra, it was said that, as "a more severe penalty is denounced by the statute for a second offense, all the facts to bring the case within the statute must be established upon the trial." Section 388 of the Code of Criminal Procedure, in prescribing the order of procedure upon trial, provides that the prosecution "must open the case and offer the evidence in support of the indictment."

The objection of the appellant is aimed at the procedure by which the people established the charge and made a case under the Penal Code, but the statute and the cases seem conclusive upon the question of the proof required of the prosecution. It is not easy to see how, in the absence of some statutory provision permitting it, the defendant can plead in part, and thus restrict the issue and the proof to be offered under the indictment. His admission of the former conviction, if made upon the trial, before the jury, may render evidence thereof unnecessary to be given; but whether it is made, or the fact is to be proved, the question for the jury to determine is whether the defendant is guilty of the present crime described in the indictment, and whether he is the person charged therein as having been formerly convicted. Under the present English practice, as changed by an act passed in 1837, the principal charge must be first passed upon by the jury, and then the proof is to be presented of the former conviction. That may be fairer procedure from the prisoner's standpoint; but, as Chief Judge Church observed in *Johnson v. People*, in advertent to the English practice, "we have no such statute." In the absence of legislation effecting a change in the Code of Criminal Procedure, there is no warrant for departing from its requirements. The very fact that in England it was necessary to enact a statute to remedy what was probably deemed a defect in criminal procedure at the common law tends to show that, until legislation has changed the rule, it is essential that the prior conviction be proved by the people as a part of the case against the prisoner. Even with the change effected in the English criminal procedure, it would appear that the former conviction is regarded as an element entering into the grade of the guilt of the defendant,

inasmuch as proof must be made of it and the jurors must deliver their verdict upon that proof. Reference is made to *People v. Raymond*, 96 N. Y. 38, by the appellant, where it was observed by Judge Finch that "the first offense was not an element of nor included in the second, * * * but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense." I do not think, however, that the learned judge's observation is to be taken in as broad a sense as the appellant claims for it. He was considering this contention: "That no offense can be considered a second offense, under the Penal Code, unless it appears that the first offense charged is a crime under such Code, and that the first offense was before the Code went into operation." He pronounced the contention to be without adequate foundation, and then makes the observation referred to. The present point was not being discussed. What he should be regarded as holding is that the second offense alone is to be punished, and that proof of the commission of the prior offense was not necessary to, and could not, establish the prisoner's guilt upon the principal charge. In a sense, the prior offense was not an element of the second offense, for they were disconnected acts; but the prior conviction so affected the grade of the prisoner's guilt and the degree of his liability to punishment that, in that sense, it entered into the offense of which he is convicted, and that I cannot regard Judge Finch's opinion as denying. His remarks have their proper significance, when read in connection with the case under consideration, and are not to be understood as overruling what had been previously so distinctly held in *Wood v. People*, supra. I regard it as, a necessary and logical conclusion, where an increased punishment is prescribed by the statute upon conviction for a second offense, that the prior conviction enters as an ingredient into the criminality of the prisoner, not that the fact of the prior conviction tends, in any wise, to prove the commission of the second offense, but that it aggravates the guilt of the prisoner, and, as a hardened or unreformed criminal, subjects him to an increased punishment for the repeated crime.

The second position taken by the appellant is that, if the construction of the statute he contends for is not correct, then it is made to conflict with, and to destroy, the presumption of innocence, to which he is entitled under the law, and to deprive him of his liberty without that due process of law which is guaranteed by the constitution to every citizen. "Due process of law" has been well defined to be "law in its regular course of administration through courts of justice." 2 Kent, Comm. 13. It is provided for if the statute under judicial examination provides for the regular administration of its provisions by the courts of the state. *Sheppard v.*

Steele, 43 N. Y. 52. It means that every citizen shall have his day in court, and that he shall have the benefit of those rules of the common law, generally deemed to be fundamental in their nature because sanctioned by reason, by which judicial trials are governed. These rules, which secure to the accused a judicial trial, it is beyond the power of the legislature to subvert. *Wynehamer v. People*, 13 N. Y. 378, 447. It is beyond its power to deprive a person of his liberty, or to deprive him of his property, by mere legislation. It is not beyond the legislative power to regulate what shall be the due process of the law, by which the citizen may be put upon his trial concerning his liberty or his property, provided that the statute destroys none of those safeguards to individual freedom and rights which the people of England finally acquired for themselves, and which, as part of the common law of that land, we took over and adopted in the formation of a state government. They are preserved to all persons by the constitution of the state, and it is the duty of the judicial branch of the government to uphold them whenever brought into question. The legislature has plenary power to make laws for the community, in its social and aggregate capacity, within limits set by the constitution. It is its duty, and it has the amplest power, to prescribe the punishments for offenses against the laws of the state, and there is no arbiter beyond the state itself to determine what legislation is just. Punishment is inflicted because it is right that the state, in the interests of society, of which it is the organized expression, should prescribe it as a measure for the prevention of crime. In so doing it is right that the degree of punishment should be measured by the criminality of the individual, and that such an example shall be made as will tend to establish a deterrent influence over the members of society. Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed to compel him to reform his ways and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right.

How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial under the charge of being for a second time an offender, and therefore liable to suffer a severer punishment. His sentence was pronounced after he had been tried and found guilty by the verdict of a

jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction, the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument. The statute has not abrogated the rule as to the presumption of innocence. It is expressly preserved to the defendant by section 389 of the Code of Criminal Procedure, and the defendant had the benefit of it upon his trial, in that the court distinctly instructed the jury to that effect. It will not be presumed that the jurors failed to obey the instruction, or that they did not accord to the accused the benefit of every reasonable doubt upon the evidence. There can be no legal presumption that the presumption of the defendant's innocence will be prejudiced. The legislature can do as the English parliament has done by changing the rule of procedure. But that rests in the legislative discretion, and, until it is exercised in that direction, the established procedure must be followed, and the proof must be such as to meet the charge and bring the case within the statute. Nor is there force in the argument that a discrimination is made in the trials of persons charged with the same crime. The discrimination is made between first and second offenders and the punishments which are visited upon them. The legislature has made the conviction of the commission of a former offense an ingredient of the guilt of the defendant upon a second offense being committed. If it were not so, there would be no warrant for the infliction of the increased punishment. The objection that proof of the former conviction might affect the prisoner's character was considered in *Johnson v. People*, supra, and it was held to have no force when such evidence relates to the issue to be tried. I think enough has been said upon the question presented, and that the judgment of conviction was properly sustained below, and should be affirmed by this court.

BARTLETT, J. (dissenting). I am unable to agree with the majority of the court that this defendant was convicted by due process of law. It is the boast of the common law that every accused person is presumed to be innocent until proven guilty, and we have made this presumption a part of our criminal procedure. Code Cr. Proc. § 389. The fact that a second conviction of felony subjects the defendant to a heavier penalty is no justification for pleading the first conviction in the indictment for the second offense. In *People v. Raymond*, 98 N. Y. 38, Judge Finch, speaking for the court, said: "The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second

offense. That only is punished." In other words, the fact of a first conviction does not become material until after the second conviction, and then only for the purpose of enabling the trial judge to impose the proper term of imprisonment. The first conviction can be established by the production of the record before the trial judge, and the only possible fact to be litigated would be the identity of the defendant if disputed. If this inquiry into the past history of the accused is to be made by a jury, the legislature should provide that the jury who have just rendered their verdict of guilty, or a new one to be drawn, shall hear the evidence and determine the question. This has been the law of England for 50 years and more. To project the issue of a former conviction into the second trial, before verdict rendered, practically deprives the defendant of the legal presumption of innocence, inevitably prejudices the jury against him, and takes from him his constitutional right to be convicted only by the judgment of his peers and due process of law.

It is urged that the constitutional question is not an open one in this court, and to support the contention two cases are cited: *Wood v. People*, 53 N. Y. 511; *Johnson v. People*, 55 N. Y. 512. In neither of these cases was the constitutional question raised; they deal wholly with procedure. The mere fact that for years it has been the practice to plead and prove the former conviction on the trial for the second offense does not show that the constitutional question has necessarily been passed upon, but rather overlooked. This practice is a reproach to the administration of justice, and speedy legislation should render it impossible. I vote for a reversal of the judgment.

All concur with **GRAY, J.**, for affirmance, except **BARTLETT, J.**, who reads dissenting memorandum, and **PARKER, C. J.**, not voting. Judgment affirmed.

(156 N. Y. 429)

BANZER v. BANZER et al.

(Court of Appeals of New York. Oct. 4, 1898.)

WILLS—CONSTRUCTION—DEVISE OF A FEE SIMPLE—HUSBAND AND WIFE—JOINT TENANCY.

1. Testator gave to his wife all his real and personal estate. A subsequent clause provided that his personal estate, and whatever belonged to him at his death, of whatever nature, she could dispose of according to her own judgment, and that after her death his children should divide the same. *Held*, a devise of the real estate in fee, since the manifest purpose of the first provision to so devise it is not clearly altered by the subsequent clause.

2. Where one tenant in common conveyed his undivided half interest to his co-tenant's wife by a deed intended to convey to her, not as a wife, but separately, the relation of joint tenants does not arise between herself and husband.

Appeal from common pleas of New York city and county, general term.

Partition by Ellen Banzer against Adam Banzer and others. From a judgment of the general term of the New York court of common pleas (32 N. Y. Supp. 266), affirming a judgment entered on a decision of a special term (30 N. Y. Supp. 803) dismissing the complaint on the merits, the plaintiff appeals. Affirmed.

The action was for the partition of real property situated on West Thirty-Second street, in the city of New York. The property was originally owned by Michael Banzer and John Maier, as tenants in common, each owning an undivided one-half. Maier subsequently conveyed his interest to Susanna Banzer, the wife of his co-tenant. Michael Banzer died in the city of New York, September 28, 1882, seised of an undivided one-half interest in the property mentioned. He left, him surviving, the defendants John Banzer, Adam Banzer, Anna Hanf, Elizabeth Howell, and Christopher Banzer, who were his only surviving children and heirs at law. He also left a widow, Susanna Banzer, who was the mother of these children. He left a last will and testament, which is as follows: "After all my lawful debts are paid and discharged, I give and bequeath to my beloved wife, Susanna Banzer, all my real and personal estate now at present and hereafter in my possession. My real estate consisting at present of a part of a house known by the number 220 West 32d Street, 20th Ward, so as described in the deed of said house. And my personal estate, and whatever belonging to me at my death, whatsoever and wheresoever of what nature, kind and quality soever may be, that she shall have undisputed right, to do and dispose of, according to her own judgment, that, after her death, my beloved children, or their Executor, Administrator shall divide the same, Chair and Chair alike." Christopher Banzer, a son of the testator, married the plaintiff, and died in February, 1891, leaving one child, who was also named Christopher, who died before the death of Susanna Banzer, and left the plaintiff, his mother, his only heir at law. Susanna Banzer died, intestate, March 19, 1894, leaving the defendants John Banzer, Adam Banzer, Anna Hanf, and Elizabeth Howell her only surviving children and heirs.

James Kearney, for appellant. Edward W. S. Johnston, for respondents.

MARTIN, J. (after stating the facts). The plaintiff bases her right to maintain this action upon the will of Michael Banzer, deceased. She insists that, under its provisions, an estate vested in her husband as one of the children of the testator, subject only to a life estate in the testator's wife; that, upon the death of the plaintiff's husband, it passed to her son; and, upon the death of the latter, it descended to her. Thus, the material question to be determined is whether, under the will of Michael Banzer, any interest in the

real estate in question passed to or became vested in his children, of whom the plaintiff's husband was one. This depends upon the testator's intent, which must be sought for in his will, read in the light of the surrounding facts and circumstances. Was it his purpose to devise to his children a vested remainder in the real property given to his wife, or was the devise to her intended to convey the absolute fee? At the time of his death, his wife was the owner, as tenant in common with him, of one undivided one-half of the real property sought to be partitioned. The provisions of the will relating to his real estate are substantially as follows: "I give and bequeath to my wife all my real and personal estate at present or hereafter in my possession; my real estate consisting at present of a part of a house known as number 220 West 32d street." These are the only provisions which in any way refer to the real estate of the testator. Those provisions disclose a clear and manifest intent to devise to his wife the real estate in question, and to vest in her an absolute fee to the property. No clearer or more decisive language could have been employed to effectuate that purpose. After that provision, he, however, adds: "And my personal estate, and whatever belonging to me at my death, whatsoever and wheresoever, of what nature, kind, and quality soever may be, that she shall have undisputed right to do and dispose of according to her own judgment; that, after her death, my beloved children or their executor, administrator, shall divide the same, share and share alike." The appellant contends that the last provision should be regarded as a part of the provision by which the real estate was devised; that it modifies it, and evinces an intention upon the part of the testator to cut down the devise to his wife to a mere life estate in the house described, and to convey a vested remainder to his children to be enjoyed by them after her death. We think the construction contended for should not obtain. It seems quite obvious that the intention of the testator to devise his real estate to his wife was not affected by the subsequent provision which relates to property other than the real property described. The language of the first provision shows a clear and positive intent to devise to his wife the house and lot described. It is plainly identified, and the devise is absolute, without limitation or restriction.

It may be said that the first clause also refers to the testator's personal estate. That is true; but it refers only to such as was or might be in his possession. It is quite probable that the testator's purpose was to give his wife an absolute title to such of his personal estate as was in his actual possession, as his household furniture and the like, and that the subsequent clause was intended to apply only to such other personal property as he might own at his death. But be that as it may, we think it is quite apparent that that

clause was not intended and cannot be held to affect or cut down the devise of his real estate to his wife. Its provisions are distinct and disconnected from the clause disposing of the real estate in suit. The manifest purpose of that provision was to dispose of the remainder of his property not previously and specially devised, and not to change or modify the previous provisions of his will. The portion of his property mentioned in the last clause he gave his wife an unqualified right to dispose of according to her judgment, with a provision that after her death it should be divided between his children. While, if it stood alone, it might be proper to construe this last provision as relating to all the property of which the testator died seised, still, upon reading the whole will in the light of the existing circumstances, and applying the established canons of construction, it is quite evident that that provision should be held to relate to his property other than the real estate described, and that it was not intended to limit or cut down the estate he had already devised to his wife by the previous clause of his will. Where an estate is given in one part of a will in clear and decisive terms, that it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate, is a well-established rule applicable to the construction of wills. As was said by Judge O'Brien in *Goodwin v. Coddington*, 154 N. Y. 283, 286, 48 N. E. 729, 730: "Whenever the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention in that direction as the prior part does to make it." In *Clarke v. Leupp*, 88 N. Y. 228, 231, this court said: "It is well settled by a long succession of well-considered cases that, when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent." In *Roseboom v. Roseboom*, 81 N. Y. 356, where the will of the testator provided: "I give and bequeath my beloved wife, Susan, one-third part of all my property, both real and personal, and to have the control of my farm as long as she remains my widow; * * * and at the death of my wife all my property, both real and personal, to be equally divided between my eight children,"—this court held that the widow took an absolute fee in one-third of the premises, and quoted the rule in *Thornhill v. Hall*, 2 Clark & F. 22, as sustaining that decision. In *Byrnes v. Stilwell*, 103 N. Y. 453, 460, 9 N. E. 241, 243, it is said: "An estate in fee created by a will cannot be cut down or limited by a subsequent claim [clause], unless it is as clear and decisive as the language of the clause which devises the estate,"—citing

Thornhill v. Hall, supra; *Roseboom v. Roseboom*, 81 N. Y. 356, 359; *Campbell v. Beaumont*, 91 N. Y. 467; and *Freeman v. Colt*, 96 N. Y. 63, 68. In *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388, the rule that courts will refuse to cut down an estate already granted in fee or absolutely when the supposed terms of limitation are to be found in some subsequent portion of the will, and are not clear in themselves, unmistakable, and certain, so that there can be no doubt of the meaning and intention of the testator, was again recognized and followed. The same principle was held in *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. 11. Applying the rule so firmly established in this state to the will under consideration, it becomes quite obvious that the devise by the testator to his wife of the real estate described in his will was not affected, nor her estate therein lessened or diminished, by the provisions contained in the second clause of the will to which we have adverted.

There is no force in the claim of the respondents that the testator and his wife held the title to the real estate in question as tenants by the entirety, and that she, as survivor, took the whole. This court has already held in *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. 136, that a woman may take and hold real property as a joint tenant with her husband, and where, by the deed, it appears that the intent was to convey to her not as a wife, but separately, she has a right to dispose of her interest independently of her husband, and the relation of tenant by the entirety does not arise. Moreover, in this case the court below so held, and, as the defendants have not appealed, the question is not here for determination. We are of the opinion that the plaintiff had no title to the premises in question; that the complaint was properly dismissed; and that the judgment appealed from should be affirmed, with costs. All concur, except VANN, J., not voting. Judgment affirmed.

(156 N. Y. 585)

PEOPLE ex rel. UNITED VERDE COPPER CO. v. ROBERTS, Comptroller.

(Court of Appeals of New York. Oct. 4, 1898.)

TAXATION — CORPORATE FRANCHISES — CAPITAL — WASTING PROPERTIES — REVIEW OF COMPTROLLER'S DECISION — BURDEN OF PROOF.

1. An investment of a mining corporation's profits, accumulated by passing dividends, in stock of a railroad to facilitate working the mines, is not to be considered as capital, for the purpose of taxation, because derived from a wasting property in which the capital was invested.

2. Under Laws 1885, c. 501, § 11, making it the duty of the comptroller to ascertain as a basis for taxation the amount of capital employed within the state by corporations conducting part of their business out of the state, where it is undisputed that an investment sought to be taxed as capital was made out of surplus, the rule that the corporation must show the comptroller's valuation to be erroneous is inapplicable.

Appeal from supreme court, appellate division, Third department.

Proceeding on the relation of the United Verde Copper Company against James A. Reberts, state comptroller. A decision of the comptroller was affirmed by the appellate division (48 N. Y. Supp. 881), and relator appeals. Reversed.

Henry G. Atwater, for appellant. T. E. Hancock, for respondent.

BARTLETT, J. The relator is a domestic corporation, organized in 1883, in the language of its certificate, "for the purpose of carrying on some of its business in the city of New York, but the mining, milling, and other operations of the company are to be carried on near the city of Prescott, county of Yavapai, Arizona Territory." The record discloses that the only business transacted in the state of New York is the maintaining of an office, where certain accounts are kept, and where the vice president, secretary, and treasurer attend, and the occasional making of contracts to be performed in other states; that the business of the company is the mining and milling of copper ore, all of which is carried on at Jerome, Ariz., and the product of the mine is shipped to purchasers from that place, and none of it is brought into the state of New York by the relator. The company has a selling agency in Chicago, and keeps a bank account there; also an office in Butte, Mont., and at Prescott, Ariz., a bank account being also kept at the latter place. The relator insisted before the comptroller that the only capital stock of the company employed within this state was represented by office furniture, valued at \$500, and its average bank balance. The tax under review was imposed for the year ending November 1, 1895. The comptroller found that \$480,000 of the capital stock of relator was employed within this state, and made up as follows, viz.: Average bank account and chattels, and the amount invested by the corporation in the bonds and stock of the United Verde & Pacific Railway Company, a corporation operating a railroad in the territory of Arizona, under the following circumstances: The relator is the owner of copper mines located at Jerome, Ariz. Its capital stock is \$3,000,000, all of which was issued for the mines. The company operated its property for some years, transporting its product by wagons to the nearest railway station, a distance of 25 miles. Owing to the almost impassable condition of the roads in the winter season, it became necessary to construct a railroad over this route, and the United Verde & Pacific Railway was built. It is conceded that nearly the entire business of the railroad company consists in transporting goods to the mines and the copper product therefrom. The relator took \$329,000 worth of stock and bonds of the railroad, which amount was sufficient to build and equip it. It appears that some little time after

this money was advanced to the railway company, and in December, 1895, the bonds were issued to the relator, in the city of New York, but very soon after were sent to the president of the company, in Arizona. It also appears that the company had prosperously operated its mine for some years, paying an annual dividend at times as high as 10 per cent., and at others varying from 6 to 10 per cent. When the mining company determined to purchase the bonds and stock of the railroad company, it ceased paying dividends until that amount was accumulated. It is undisputed that this amount was surplus, unless the theory adopted by the comptroller, and to be presently referred to, is correct. The vice president of the company, when on the stand, was asked the following questions in regard to this amount: "Q. It might have been profits, and it might have been other moneys? A. Well, it must have been profits, because the same year we paid \$75,000 in dividends, and still had a bank balance left. Q. And paid the officers of the company their salaries and the wages of employes? A. Yes, sir." In order to meet this direct evidence, that the money used in the purchase of the bonds and stock was accumulated by passing dividends, and thus surplus, the learned attorney general argues that as the mines had been worked ever since 1883, the ore extracted and sold, and large dividends paid, they were necessarily to some extent depleted and exhausted, and the capital stock of relator impaired, so that no surplus, as matter of law, could be accumulated. The logic of this argument leads to the conclusion that the most prosperous mining corporation, doing the heaviest business, and paying the largest dividends, is suffering from the greatest impairment of capital, and has drifted furthest towards final and hopeless insolvency.

The learned appellate division, while affirming the decision of the comptroller, stated that the operation of a mine may decrease its value by exhaustion, or increase it by development. This is very true, and the future of most mining enterprises is matter of conjecture. It is common knowledge that there are copper mines which have yielded enormous returns for years, and at present show no signs of exhaustion, but rather increased development. We are of opinion that this speculative theory as to mining in general does not overcome the positive proof that these bonds and stocks were purchased by the surplus moneys of the relator. The English courts have held that a company working a wasting property, like a mine or patent, is not prohibited from making dividends, nor is it obliged to set apart a sinking fund to meet any anticipated depreciation. *Lee v. Asphalte Co.*, 41 Ch. Div. 1. In the case cited, the company was operating under a lease, which might be more of a "wasting property" than a copper mine well located. Mr. Morawetz, in his work on Private Corporations (section 442), points out that the capital of a

mining company is not designed to be used like that of a banking or manufacturing company, in carrying on business permanently; that the exhaustion of a mine cannot be repaired, and there would be no object in accumulating the money obtained by the company through working the mine, so as to keep up the original amount of capital. He then adds: "It is implied from the character of the speculation of a mining company that the income derived from working the mine shall be distributed among the shareholders as dividends, after deducting the expenses, and making reasonable provision for contingencies." The appellate division affirmed the decision of the comptroller, upon the ground that the burden rested upon the relator to show that the comptroller was wrong in his valuation of the capital stock employed within this state. It is undoubtedly the established rule that the determination of the comptroller must stand upon the question of valuation, unless clearly shown to have been erroneous. *People ex rel. American C. & D. Co. v. Wemple*, 129 N. Y. 568, 29 N. E. 812; *People ex rel. Roebbing's Sons' Co. v. Wemple*, 138 N. Y. 582, 34 N. E. 386; *People v. Campbell*, 145 N. Y. 587, 40 N. E. 239. This rule, however, has no application to the case at bar, as it appears by undisputed evidence that the purchase of the bonds and stock was made with the surplus money of relator; and, as the theory adopted by the comptroller to show the contrary is unsupported by evidence or authority, it follows that the amount represented by this investment must be deducted from the total amount of capital stock found to be employed within this state. This surplus of the relator, even if placed in the stock and bonds of the railroad company as an independent investment, cannot be regarded as a part of its capital stock employed within this state. *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 46, 44 N. E. 787. This corporation tax, under the Laws of 1880 (chapter 542, as amended), is not imposed upon property, but, in the case of a domestic corporation, on its franchises, and, of a foreign corporation, on its business. *People ex rel. Pennsylvania Ry. Co. v. Wemple*, 138 N. Y. 1, 33 N. E. 720. In the case of the relator, where its principal business was conducted outside of this state, it became the duty of the comptroller to ascertain the amount of capital stock employed within this state (Laws 1885, c. 501, § 11), for the purpose of computing the franchise tax.

The relator makes the additional point that, even if the stock and bonds were capital stock of the relator, it could not, under the circumstances disclosed, be regarded as employed within this state, as the object of the expenditure was not primarily an investment, but rather to promote the construction of a railroad for the purposes of the mining company. For reasons already stated, we do not deem it necessary to decide this question, but

rest our decision upon the ground that the stock and bonds represent surplus. The order appealed from should be reversed, with costs, and the comptroller directed to readjust the account against the relator by deducting from the amount assessed against it for capital stock employed within this state the sum used in purchasing the stock and bonds of the United Verde & Pacific Railway Company. All concur, except VANN, J., not voting. Order reversed.

(156 N. Y. 580)

PEOPLE ex rel. MITCHELL v. STURGES.
(Court of Appeals of New York. Oct. 4, 1898.)

STATUTES—LEGISLATIVE INTENT—PUBLIC OFFICERS—CONSTITUTIONAL LAW.

Laws 1895, c. 247, amending the charter of Saratoga Springs, doubles the number of wards and trustees in the village, and requires the president to be appointed by trustees, instead of elected by the village, and confers on him additional power, and provides that the term of office of the incumbent should be vacant on the appointment of another by the trustees. *Held*, that there is nothing in the chapter showing that the legislature intended it to affect the president rather than his office, thereby rendering it repugnant to Const. art. 1, § 1, forbidding the deprivation of a right or privilege "unless by the law of the land."

Parker, C. J., and O'Brien, J., dissenting.

Appeal from supreme court, appellate division, Third department.

Quo warranto, on the relation of Caleb W. Mitchell, against Charles H. Sturges. From a judgment dismissing the complaint, plaintiff appealed to the appellate division, which affirmed the judgment (50 N. Y. Supp. 5), and plaintiff appeals. Affirmed.

Charles Haldane, for appellant. Charles H. Sturges and A. W. Shepherd, for respondent.

HAIGHT, J. This action was in the nature of a quo warranto, brought for the purpose of ousting the defendant from the office of president of the village of Saratoga Springs, and declaring the relator entitled thereto. In March, 1894, the relator was elected president of the village of Saratoga Springs, for the term of two years, under the charter then in force. He entered upon the duties of his office, and continued until the first Monday of May, 1895, when the defendant entered into the possession of the office, to the exclusion of the relator, and has since retained possession and discharged the duties relating to it. On that day, the board of trustees of the village, acting in pursuance of the provisions of chapter 247 of the Laws of 1895, appointed the defendant president of the village for the term of two years; and he thereupon immediately qualified, and entered upon the duties of the office. The relator insists that this statute is void, in that it is in conflict with the provisions of the constitution of the state: (1) That it violates section 1 of article 1, which provides that no one shall

be deprived of any of his rights or privileges "unless by the law of the land or the judgment of his peers"; (2) that it violates sections 5, 7, and 8 of article 10, in relation to the creation of, and filling vacancies in, offices, in that it provides for the selection of an incumbent for an office not vacant at the time the selection is made; (3) that it violates section 2 of article 10, which provides that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose."

The act in question is entitled "An act to amend chapter 220 of the Laws of 1866, entitled 'An act to amend the charter of the Village of Saratoga Springs, and the several acts amendatory thereof,' passed March 26, 1866." The first section of the act amends section 2 of the charter by dividing the village into six wards, and defining their boundaries. Section 2 amends section 4 of the charter so as to provide that the officers of the village shall consist of a president, 13 trustees, and other officers specified. Section 3 provides for the first election of trustees, their terms of office, etc. Section 4 inserts in place of section 13 of the charter, which had theretofore been repealed, the following: "The board of trustees shall upon the first Monday in May in the year 1895 and upon the first Monday in April, in each odd-numbered year thereafter, assemble at the place provided for the meetings of the board of trustees in said village, and shall proceed to elect some suitable person who shall be a resident and taxpayer of said village, to the office of president of the village, and the president so elected shall hold his office for two years and until his successor is duly chosen and qualified; but in case the person so elected shall refuse to serve, and as often as any vacancy occurs in said office, said trustees shall reassemble at such time and place as may be designated by a majority of said trustees for that purpose, and proceed to elect some other person to said office or to fill such vacancy. Upon the election of a president of the village pursuant to this section the term of office of the present president shall cease and determine." Section 5 provides for the appointment of fire commissioners by the trustees of the village, with the approval of the president. Section 6 provides for a like appointment of water commissioners. Section 7 amends section 22 of the charter so as to give the trustees the power of removal of the officers appointed by them, except the president; and section 8 contains provision for the first election of trustees.

The counsel for the appellant has submitted an able and carefully prepared argument upon the construction which he claims should be given to section 1 of article 1 of the con-

stitution. We have not thought it necessary to enter upon a discussion of the meaning of this provision, for the reason that it is frankly conceded by him that the charter of the village, having been created by the legislature, can be revised, amended, or repealed by it. He insists, however, that the legislation in question was directed against the relator, and not against the office held by him, and for that reason it is brought in conflict with what he claims to be the true intent and meaning of the provision of the constitution. We, however, have before us no evidence from which we are justified in concluding that such was the legislative intent, and we cannot so assume. The legislative intent must ordinarily be gathered from the act itself. Sometimes, in the ascertaining of the meaning of an act, we consider it in the light, of the common knowledge of the public at large, of the conditions which led to its adoption. Such extraneous facts are resorted to, to aid in its interpretation, and not to defeat the act, unless in cases where personal liberty is involved, or private property is sacrificed under a pretense of protecting the public health or morals, or is taken for the public use. *Manufacturing Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358.

Upon referring to the act, we find that there has been a general revision of the provisions of the charter, and a radical change made in the plan of the government of the village. Under the old charter, there were but three wards and six trustees, and the president was elected by the electors of the village. Under the new revision, the wards were doubled in number, as well as the trustees, the office of president as elected by the electors was abolished, and the office of president appointed by the trustees created, with additional powers and duties with reference to the appointment of fire commissioners, water commissioners, etc. The fact that the name of the new office is the same as that of the old is unimportant. The further fact that many of the duties devolving upon the old officer are continued upon the new officer does not necessarily establish that the legislation was aimed at the officer, and cannot be held to outweigh the other undisputed facts that the office of president of the village as elected by the people was abolished, and the office of president appointed by the board of trustees was created, with additional powers and duties. In this respect the case is not distinguishable from that of *Koch v. City of New York*, 152 N. Y. 75, 46 N. E. 170. The contention of the appellant, that the act violates the other provisions of the constitution, are so fully and correctly answered in the opinion by Landon, J., in the appellate division, that we do not deem it necessary to further prolong the discussion. The judgment should be affirmed, with costs. All concur, except PARKER, C. J., and O'BRIEN, J., dissenting. Judgment affirmed.

(156 N. Y. 645)

NEW YORK SECURITY & TRUST CO. v.
SARATOGA GAS & ELECTRIC
LIGHT CO. et al.

(Court of Appeals of New York. Oct. 4, 1898.)

APPEAL—DECISIONS REVIEWABLE—ORDERS IN
SPECIAL PROCEEDINGS.

Orders of the special term settling the account of a foreclosure receiver, and refusing to direct the attorney for the sequestration receiver to pay over to the former the money in his hands, were granted on motions entitled in an action of foreclosure, relating solely to a fund coming into the hands of the mortgage receiver. The purpose of the action was to sell all the mortgaged property, and apply the proceeds to the mortgage debt, and the question whether the mortgage was a lien on the property was involved and determined in the motion. *Held*, that the orders were not final orders in a special proceeding, but were intermediate orders in the action, and were, hence, not appealable.

Appeal from supreme court, appellate division. Third department.

Bill by the New York Security & Trust Company against the Saratoga Gas & Electric Light Company and others. There was a decree of the appellate division (51 N. Y. Supp. 749) reversing that part of an order of a special term which allowed and approved the payment by the mortgage receiver to E. W. Paige, attorney for the sequestration receiver, of the sum of \$4,770.22, and overruled the exceptions of the plaintiff to such payment; and also from another order reversing an order which denied the plaintiff's motion for an order directing Paige to pay to the plaintiff \$4,770.22, and granted the plaintiff's motion for repayment to it by Mr. Paige of the sum of \$3,564.04; and defendants appeal. Dismissed.

The first special term order was entitled in this action with the words, "In the Matter of the Final Accounting of Lafayette B. Gleason, as Receiver," added. The other special term order was entitled in this action, containing the words, "In the Matter of the Final Accounting of Lafayette B. Gleason, as Receiver," and also "On the Application of Lafayette B. Gleason, as Receiver, and the New York Security and Trust Company, as Plaintiff, to compel Edward Winslow Paige, an attorney of this court, representing the defendant, William V. Reynolds, as receiver, now deceased, to repay \$4,770.22, received by Paige, to Gleason, as receiver, or to the plaintiff." The record discloses that in March, 1897, a notice of motion was served upon Mr. Paige for an order directing him, as an attorney of this court, and representing William V. Reynolds as sequestration receiver, one of the defendants herein, to repay to the plaintiff, or Gleason as mortgage receiver, the sum mentioned, which was received by Mr. Paige from Gleason as such receiver. This notice was entitled the same as the last-mentioned order. The motion was noticed for a special term to be held before Mr. Justice McLaugh-

lin in the village of Port Henry on Monday, March 15, 1897. Upon the notice of motion there was indorsed a consent by Mr. Paige that the hearing and decision of that application should be had before Hon. Judson S. Landon at his chambers on the 27th of March, 1897. In one of the affidavits read upon the motions it appeared that an application had been previously made to Mr. Justice Stover for an order directing Reynolds, as receiver, or Mr. Paige, as his attorney, to return the amount mentioned, and that Mr. Justice Stover handed down a memorandum stating that the better course would be to leave the question until the final accounting of the receiver. He therefore denied the motion, without prejudice to a renewal upon the final accounting. A notice of motion was also served for an order to discharge the receiver, for the appointment of a referee to take and state his account and to vacate his bond, to be heard at a term to be held at Port Henry on the 15th of March, 1897. The parties, however, consented to the hearing and decision of that motion by Mr. Justice Landon at his chambers on March 27th. The plaintiff also gave notice that it renewed its exceptions to the report of the receiver, and that they would be brought on to be heard at the same time with the hearing of the motion by the plaintiff to compel Mr. Paige to repay the sum of money mentioned, upon the papers on which that motion was to be heard. This motion was also stipulated to be heard before Mr. Justice Landon on the 27th of March, 1897. All these motions were heard together at that time. Upon that day the court, after reading and filing the affidavits and papers upon which all these motions were made, entered two orders. By the first order the court overruled the exceptions of the plaintiff to the accounts of Gleason as receiver, and in all respects approved and stated his accounts according to his reports which had been filed, discharged such receiver from any further duty as such, and vacated and canceled his bond. There were other provisions in that order, which need not be mentioned, as no appeal is taken from them. By the second order the court denied the plaintiff's motion to require Mr. Paige, as an attorney of the court and representing the sequestration receiver herein, to pay to Gleason, as mortgage receiver, the amount already mentioned. From those two orders an appeal was taken to the appellate division, where they were reversed, and the plaintiff's application for repayment was granted to the extent of \$3,564.04. These proceedings and orders were entitled in the action for the foreclosure of the mortgage given by the defendants to the plaintiff as trustee. The orders and proceedings relating to the accounting of the mortgage receiver had the added words to which reference has been made. While there appears to be some confusion in the title of the various papers used upon the motions in this case, it is

quite manifest that they were all made in this action, which was to foreclose the mortgage, and in which Gleason was appointed receiver.

Edward Winslow Paige, for appellants.
Howard A. Taylor, for respondent.

MARTIN, J. (after stating the facts). The first question presented is whether the appeals herein should be dismissed. The respondent contends that the orders from which they were taken were in the action, and hence not appealable to the court of appeals. The appeal to this court was taken as a matter of right, and not by the permission of the court below. Therefore, unless the orders appealed from were final orders in a special proceeding, it is obvious that we have no jurisdiction to review them. Such an appeal is prohibited both by the constitution and the Code of Civil Procedure. Const. art. 6, § 9; Code Civ. Proc. § 190. Thus the single question presented upon this branch of the case is whether the orders of the appellate division, reversing the orders of the special term settling the account of the foreclosure receiver, and refusing to direct the attorney for the sequestration receiver to pay over to the former the money in his hands, were final orders in a special proceeding. It seems to us they were not, but that they were intermediate orders in the action. The orders of the special term were granted upon motions entitled in this action, and related solely to a fund which came into the hands of the mortgage receiver. He was an officer of the court appointed in this action. If at all, it was by virtue of that appointment that he became entitled to the fund in dispute. The action was foreclosure, and its purpose was to sell all the mortgaged property and apply the avails to the payment of the mortgage debt. Whether the mortgage was a lien upon the property from which the fund in question arose was directly involved in the action. That question was presented to and determined by the court as a motion therein. No objection was made to the manner in which it was presented, so that, confessedly, the procedure by motion was proper. As the extent of the mortgage lien was involved in the suit, and was determined upon a motion therein, it must be regarded as a motion in the action, and not as a special proceeding. The determination of that issue was necessary to a complete determination of the action. It was as essential to determine what property was covered by the mortgage as it was to ascertain the amount due. Had a motion been made to ascertain the amount due, and had the court, on such motion, ascertained and stated it in an order, it would not be claimed that the order was in a special proceeding, or that it was final. Obviously, such an application could be regarded only as a motion in the action. It is equally manifest

that the application to the court to determine whether the property in question was a part of the mortgaged property was merely an application in the action, and that the order granted in pursuance of it cannot be properly regarded as a final order in a special proceeding.

In *People v. Trust Co.*, 150 N. Y. 117, 44 N. E. 949, this court held that an order of the appellate division, affirming an order of the special term directing the receiver of an insolvent corporation, appointed in an action for its dissolution, to pay out of the funds in his hands the claim of a certain creditor, was not an order determining a special proceeding, but was an order in the action, and was not appealable as of right to this court. The same doctrine was held in *People v. St. Nicholas Bank*, 150 N. Y. 563, 44 N. E. 1127. In *Merriam v. Lithographing Co.*, 155 N. Y. 136, 49 N. E. 685, which was an application by an assignee for restitution of money paid upon the debt of an attachment creditor, where upon appeal to this court the attachment was set aside, it was said that an order granted by the appellate division awarding restitution which was entitled and made in the action, was simply a motion or application in the action incidental to it, and not in any just sense a distinct or independent proceeding. In *Agency v. Rothschild*, 155 N. Y. 235, 49 N. E. 871, it was held that an appeal could not be taken to this court from an order, unless it finally determined a special proceeding, and that an order punishing the defendant for contempt in failing to pay a judgment was an order in the action, and not in a special proceeding. The last part of this decision was based upon the provisions of the Code. In *Van Arsdale v. King*, 155 N. Y. 325, 49 N. E. 866, this court decided that the provisions of section 190 of the Code of Civil Procedure allowing appeals as of right to the court of appeals from judgments or orders finally determining actions or special proceedings, refer only to final judgments in actions and final orders in special proceedings, and that under that section an appeal cannot be taken to the court of appeals from an order in an action, although it is one which ends the litigation. In *Re Attorney General*, 155 N. Y. 441, 50 N. E. 57, this court determined that an order for the examination of a witness, before the commencement of an action under a special statute, was not a special proceeding, and hence that the order of the appellate division, vacating an order for such an examination, was not an order finally determining a special proceeding, and was not appealable to the court of appeals. The principle of these cases seems to be decisive of this question, and is adverse to the contention of the appellants that the orders are appealable. The appeal should be dismissed, with costs. All concur, except O'BRIEN, J., not voting. Appeal dismissed.

(156 N. Y. 533)

PEOPLE v. GRAND LODGE OF EMPIRE
ORDER OF MUTUAL AID OF STATE
OF NEW YORK et al.

(Court of Appeals of New York. Oct. 4, 1898.)

MUTUAL AID SOCIETIES—DISSOLUTION—ASSETS—
RIGHTS OF BENEFICIARIES—ASSESSMENTS.

1. In an action for the dissolution of a mutual aid society and a distribution of its assets, the rights of a beneficiary who claims a preference out of the assets are to be determined as they existed at the date of the commencement of the action.

2. In an action for the dissolution of a mutual aid society and a distribution of its assets, the rights of a beneficiary claiming a preference out of the assets are to be determined, not by the general rules of equity, but by the constitution and by-laws and certificate of membership of the society.

3. The constitution and by-laws of a mutual aid society provided for the payment of losses out of a reserve fund raised by assessments, and replenished by another assessment whenever a death claim was paid. If the fund was insufficient to pay all claims, they were paid out of the assessment, and, if there were claims still unpaid, they could not be paid until the next assessment. Each claim was for a definite amount. Each assessment notice contained the names of deceased members entitled to participate in the fund. *Held*, that the proceeds of an assessment made on the death of a member do not inure to the special benefit of the member named in the notice, and therefore his beneficiary has no preferred claim to such assessment.

4. When an assessment collected in pursuance of a notice containing information of the death of a member is paid out to the beneficiaries of other members whose deaths had occurred previously, and no portion of such assessment reaches the hands of a receiver of the association afterwards appointed, the beneficiary of such member has no preferred claim on the funds which are in the receiver's hands.

Appeal from supreme court, general term, Third department.

Proceeding by the attorney general of the state to dissolve the Grand Lodge of the Empire Order of Mutual Aid of the State of New York, and to distribute its assets. A receiver was appointed, and, at a trial by a referee, Jane Draper claimed a preference out of the assets. From an order of the general term (34 N. Y. Supp. 1145) affirming an order confirming the referee's report, claimant appeals. *Affirmed*.

The defendant was incorporated by chapter 189 of the Laws of 1879. One of the purposes of its incorporation, as stated in the act, was to aid, assist, and support members or their families in case of want, sickness, or death. It was authorized to create, manage, and disburse a beneficiary fund for the relief of its members, under and in pursuance of such rules and by-laws as it might adopt, not in conflict with the laws of the state, and to employ such fund in paying death losses in the manner provided by its constitution and by-laws, and to such person as the deceased member might, while living, direct. Under this authority, it adopted a constitution and by-laws for the regulation and government of its affairs. The powers conferred upon it by

statute were exercised by a grand lodge, which was composed of representatives of subordinate lodges and the officers of the former. Under its rules and regulations, the sole power of making other rules and regulations for its government rested in the grand lodge. It had no stock, but its funds were derived from fees, charges, and assessments upon its members. The funds thus obtained were of two classes: One known as the "mutual aid fund," which was obtained solely by assessments upon members of the order, to be used only for the payment of approved and allowed death claims; the other was known as the "general fund," which was derived from a tax upon the members, membership fees, and incidental charges, and was used to defray ordinary expenses. Upon joining the order, a member was required to pay into the treasury the sum of one dollar for a full-rate membership, which entitled his beneficiary to \$2,000 in case of death, or 50 cents for a half-rate membership, which would, upon his death, entitle him to receive only one-half of the sum named. The money thus paid was to meet the first assessment to which the person paying it should become liable. His liability to assessment and tax ran from the date of his initiation. There was issued to each member a certificate which provided that a member should participate in the mutual aid fund in case of his death to the extent of \$2,000 if a full-rate member, or \$1,000 if a half-rate member, to be paid to the beneficiary mentioned in the certificate, upon due notice of the member's death, and the surrender of the certificate properly receipted, provided he was in good standing at the time of his death. The constitution and by-laws made it the duty of the officers of the grand lodge to make the assessments, and receive the money paid or collected thereon, which were to constitute the mutual aid fund for the payment of death claims; and it was also their duty to pay such claims from the treasury of that body. Each subordinate lodge was required to keep in its treasury, subject to the order of the officers of the grand lodge, the amount of one assessment. There were two notices of assessment provided for: One to the subordinate lodge, requiring it to forward the advance assessment in its hands, and to assess its members for the amount necessary to pay all death losses mentioned in the notice, and leave one assessment in its treasury; and the other was to the members of the order personally. These notices were issued by one of the general officers of the grand lodge. On the 1st of January, 1892, there was in the treasury of the defendant, to the credit of the mutual aid fund, the sum of \$3,708.29, and there were at the time outstanding and unpaid approved death claims to the amount of \$28,000, which were paid before the commencement of this action. This action was commenced by the attorney general for the dissolution of the defendant, for the forfeit-

ture of its rights and franchises, and to obtain a just and fair distribution of its property among its creditors. A temporary receiver was duly appointed on May 28, 1892; and subsequently, and on November 28, 1892, George W. Maxon was made permanent receiver of the defendant and its property, who thereupon duly qualified, entered upon his duties, and has since acted as such receiver. The funds now in his hands for distribution among the claimants amount to the sum of about \$17,000, while the claims established before the referee appointed to take proof and report as to the distribution of the assets of this corporation amount to about \$100,000. Upon the trial before the referee, the appellant presented a claim upon a certificate issued to Richard H. Draper, and payable to her, which was passed upon and allowed to be paid pro rata with the other claims which were established before him. Draper died at Buffalo December 10, 1891. At that time he was a member of the defendant company in good standing. Subsequently, due proofs of his death were filed with the proper officers, and the death claim was duly approved and allowed. Thereupon an assessment was made, and notice thereof issued by the grand lodge, which contained a statement of his death and of the resulting loss. The appellant insists that she was entitled to the proceeds of that particular assessment, so far as it was based upon the death of her husband, and, it not having been paid, that, upon the dissolution of the corporation, the sum of \$2,000 due upon her certificate became and is a lien upon the funds now in the hands of the receiver, and that she is to that extent entitled to a preference, and to have her claim paid in full out of the assets in his hands.

Edward L. Jellinek, for appellant. Charles W. Mead, for respondent.

MARTIN, J. (after stating the facts). The rights of the parties to this controversy are to be regarded as fixed as of the date of the commencement of this action. In re Equitable R. F. L. Ass'n, 131 N. Y. 354, 369, 30 N. E. 114; People v. Life & Reserve Ass'n, 150 N. Y. 108, 45 N. E. 8; People v. Commercial Alliance Life Ins. Co., 154 N. Y. 93, 47 N. E. 908. It is practically admitted that their rights are to be governed by the constitution and by-laws of the defendant and its certificate of membership. This court has several times held in similar cases that the constitution, by-laws, and certificate, when authorized by law, form the contract upon which the rights of the parties rest. In re Equitable R. F. L. Ass'n, 131 N. Y. 354, 369, 30 N. E. 114; Wadsworth v. Jewelers' & Tradesmen's Co., 132 N. Y. 540, 29 N. E. 104; People v. Life & Reserve Ass'n, 150 N. Y. 94, 45 N. E. 8. Therefore the rights of the parties to this litigation are not controlled by the general rules of equity which regulate the distribution of the funds of an insolvent es-

tate, but the contract of the parties is the measure of their rights and liabilities.

The particular question involved upon this appeal is whether, under the contract, the appellant is entitled to the lien or preference claimed. Upon an examination of the constitution and by-laws, it is found that a fund was to be created by the defendant, known as the "Mutual Aid Fund," out of which all death losses which were allowed and approved were to be paid. This fund was derived from assessments upon members of the order. To the amount of one assessment, it was to be collected before any death claim arose, so that to that extent it was a fund collected in advance, and retained for the purpose of paying death losses. If there was one death claim, it was paid from the existing fund, if sufficient, and an assessment was made to replenish it. If there was more than one loss, the officers of the defendant were required to make as many assessments as there were death claims. In this manner the defendant was to create and maintain the mutual aid fund, and, when thus accumulated, it was to be employed in the payment of all unpaid approved death claims. Thus, we see that no particular part of this fund was dedicated to the payment of any special claim. The fund, as a whole, was the source from which all death claims were to be paid in their proper order. If the proceeds obtained from one assessment, with the unexpended portion of the fund on hand, should prove insufficient to pay all approved death claims existing at the time, the excess of the unpaid claims could not be paid until another assessment was made. That the amount to be paid upon each death claim was definite, while the amount to be received from assessments was uncertain and varying, depending upon the membership for its sufficiency, renders it quite obvious that no particular assessment could be regarded as dedicated to the payment of any particular claim. If the amount received upon one assessment was insufficient to pay the claim of a beneficiary, he would not be required to accept the amount collected in satisfaction of his claim. On the other hand, if the amount of the assessment exceeded the amount of the claim, it is evident that the excess would not belong to the claimant, although the notice might have mentioned the death of the deceased member as the occasion for the assessment.

Under this contract, the beneficiary of a member upon the death of the latter was to be paid, not the amount realized upon any particular assessment, but he was entitled to participate in the mutual aid fund, and a sum certain was to be paid him therefrom. These provisions clearly negative the idea that the proceeds of an assessment were to inure to the special benefit of the member named in the notice. That deceased members were named in a notice imports nothing except the death of members who were entitled a partici-

pate in the fund, and merely discloses a reason for making the assessment. It is true that, upon the death of a member, the by-laws required his name to be placed upon the next assessment notice if he was in good standing at the time. Obviously, that was for the purpose of enabling the members of the association and its officers to protect the company against fraud by making improper assessments. The by-laws expressly provided that the funds collected by assessment should be immediately deposited to the credit of the mutual aid fund, and drawn upon solely for the payment of approved and allowed death claims, thus plainly indicating that they were to become a part of the fund out of which all death losses were to be paid. The whole scheme and plan provided by the constitution and by-laws was that a fund should be created by assessments which, after it came into the possession of the defendant, was to be appropriated generally to the payment of death losses, and not that any member should become entitled to receive his claim from the money which arose from any particular assessment. In other words, the defendant became indebted to the beneficiary of a deceased member, which debt, with similar debts of others, was to be discharged from the fund thus created. Thus, it becomes obvious that the appellant's claim that she had a preference or lien upon the funds in the hands of the receiver cannot be maintained.

Moreover, there is no evidence in the record to show that any part of the assessment collected in pursuance of the notice which contained information of the death of the appellant's husband ever reached the hands of the receiver. On the contrary, it tends to show that the money thus collected had been paid out, before a receiver was appointed, to the beneficiaries of other members whose deaths had previously occurred. In the case of *People v. Life & Reserve Ass'n*, 150 N. Y. 94, 116, 45 N. E. 8, a similar question was involved. In that case it was claimed that an assessment had been made in pursuance of a notice which included the name of the decedent under whom the appellant claimed; and she insisted that under those circumstances a fund was established which was expressly dedicated to the payment of the certificate held by her; that a trust was created, and the funds collected were impressed therewith to an extent which entitled her to payment out of the funds in the hands of the receiver. Thus, the claim in that case was practically identical with the claim which is made by the appellant in this. But in that case this court held that, as no portion of the money collected by that assessment reached the hands of the receiver, no such trust or preference existed in favor of the claimant. We think the principle of that case is decisive of the question under consideration, and that the courts below have properly decided that the appellant had no such preference or lien as is claimed, but that the fund in the hands

of the receiver should be divided pro rata among all the creditors whose claims have been established. We think the order appealed from was right, and should be affirmed, with costs payable out of the funds in the hands of the receiver. All concur. Order affirmed.

(156 N. Y. 451)

COATSWORTH v. LEHIGH VAL. RY.

CO. et al.

(Court of Appeals of New York. Oct. 4, 1898.)

PLEADING—CONSTRUCTION—DEMURRER—HIGHWAYS—OBSTRUCTIONS—RIGHTS OF ABUTTING OWNERS—INJUNCTION—EQUITY—MULTIPLICITY OF SUITS—CONTINUOUS TRESPASSES—APPEAL—DECISIONS REVIEWABLE.

1. A demurrer to a petition will be overruled, where the facts alleged, together with what can be implied from them by reasonable and fair intendment, state a cause of action.

2. An owner of land abutting a highway has a right to remove a bridge erected thereon by a railroad company without authority.

3. To prevent a multiplicity of suits, equity will enjoin a railroad company from running its train on a bridge that it has erected in a street abutting plaintiff's land, without authority.

4. Code Civ. Proc. § 190, conferring on the appellate court jurisdiction merely to review the actual determinations made by the appellate division, precludes it from answering questions certified therefrom, but which were not passed on therein.

Appeal from supreme court, appellate division, Fourth department.

Action by Reuben H. Coatsworth against the Lehigh Valley Railway Company and the Lehigh Valley Railroad Company to enjoin defendants from running their trains on a bridge extending over a street abutting on plaintiff's land, and from interfering with plaintiff while moving the bridge, and for damages. From a judgment of the appellate division of the supreme court (48 N. Y. Supp. 511) overruling a demurrer to the complaint, defendants appeal. Affirmed.

Martin Carey, for appellants. John Cunneneen, for respondent.

MARTIN, J. This is an appeal allowed by the appellate division of the supreme court from an interlocutory judgment overruling a demurrer to the complaint. The sole ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. The Lehigh Valley Railway Company is a domestic corporation. The Lehigh Valley Railroad Company is a foreign corporation. The latter has been for several years, and still is, engaged in operating a line of railroad for the transportation of freight and passengers from Sayre, in the state of Pennsylvania, to the city of Buffalo, in this state. At the time, and prior to the construction of the bridge and superstructures mentioned in the complaint, the plaintiff or his grantors were, and he now is, the owner in fee simple and possessed of the premises in the city of Buffalo, which are also described

therein. A portion of the premises is within the bounds of Alabama street, and is subject to an easement or right of way over it for the purpose of a public street. The Lehigh Valley Railway Company, without the consent of the plaintiff or the owners of the land, erected a bridge upon and across the premises lying within the bounds of such street, which is placed upon abutments of solid masonry, one on the easterly and the other on the westerly side, and upon iron pillars resting upon the street between the abutments. The bridge is solid and permanent in character, and is a part of the real estate of the plaintiff. That company, in connection with the bridge, constructed and maintains a line of railroad immediately in front and on the northerly side of that portion of the plaintiff's premises which lie westerly of Alabama street and easterly of Louisiana street, and continues and maintains its railroad easterly and westerly from Alabama street for several thousand feet. A portion of its road is in front of plaintiff's premises, and is upon an embankment from 4 to 15 feet above the level of the plaintiff's land; and the bridge across Alabama street is about 12 feet above the level of the plaintiff's premises and the grade of the street. The Lake Shore & Michigan Southern Railway Company, a domestic corporation, owns and operates a line of railroad from the city of Buffalo to the city of Chicago, and maintains a switch or siding extending from its main line through Scott street in the former city westerly from Hamburg street to Alabama street, which reaches a point within about 12 feet of the northerly line of the portion of the plaintiff's premises lying within the bounds of Alabama street, and about 80 feet northerly of the northeasterly corner of the plaintiff's lands which lie westerly of Alabama street. The location of the plaintiff's lands is such that they are particularly valuable for business and manufacturing purposes, and their value would be greatly enhanced by having a railroad connection with the Lake Shore & Michigan Southern Railroad tracks. Such a connection could be readily made, except for the roadbed, bridge, and superstructure maintained by the Lehigh Valley Railway Company, which prevent any such connection being effected. The plaintiff is desirous of removing the bridge so maintained upon his lands within the street, but is apprehensive that the defendants may attempt to interfere with or prevent his doing so, and may prevent the construction and maintenance of a spur or switch to connect his lands with the track of the Lake Shore Railway Company. No efficient connection can be made with the railroad of the defendant for business purposes, because of its elevation. If the abutments and posts in Alabama street, and contiguous thereto, were removed, a switch or siding could be easily constructed through that street to Scott street, and thus connect the railroad tracks of

the Lake Shore with the plaintiff's premises. The abutments, posts, and bridge were erected and are maintained by the Lehigh Valley Railway Company without the consent or permission of the plaintiff. Their erection and maintenance and the erection of the elevated railroad bed have depreciated the value of the plaintiff's premises at least one-half, have depreciated their rental value about one-half, and, as a consequence, several building lots situated thereon cannot be rented, and have been and are tenantless. The erection of the abutments and posts, the construction of the bridge and superstructure thereon, and their maintenance, have caused the plaintiff continuous damage. The defendants have been and are guilty of numerous trespasses upon his land by running locomotives and cars over it each day. A multiplicity of actions would be necessary to recover for such trespasses, and the plaintiff has no adequate remedy at law to redress them. Subsequently to the construction of such road and bridge by the Lehigh Valley Railway Company, by some arrangement or agreement with the Lehigh Valley Railroad Company, it leased and licensed of the latter the right to use and occupy its line of railroad, including such bridge and superstructure. The two railroad companies are continuously maintaining such posts, abutments, and bridge, and continuously trespassing upon the property of the plaintiff.

The foregoing is a brief synopsis of the material facts alleged in the complaint. The relief sought was a judgment adjudging and determining (1) that the construction of the bridge was illegal, and it became a part of the property of the plaintiff, and that he was entitled to remove it; (2) that it was illegal, and its maintenance was a public nuisance, from which the plaintiff suffered special injury; (3) that the running of locomotives and cars across the plaintiff's premises within the line of the street constituted trespasses for which no adequate remedy at law is available, and that the plaintiff is entitled to an injunction restraining the defendants from trespassing upon such lands and property within the bounds of the street; (4) that the plaintiff is at liberty to remove so much of such superstructure as is within the lines of the street, and that the defendants be enjoined from interfering with the plaintiff in removing them, and to recover the expense thereof from the defendants in this action; (5) that the plaintiff have damages; and (6) that he have costs and such other relief as may be just.

The facts stated are admitted by the demurrer; hence, the only question is whether a cause of action is alleged or can be fairly gathered from all the averments contained in the complaint. A demurrer upon that ground can be sustained only when it appears that, after admitting all the facts alleged or that can by reasonable and fair intendment be implied from them, the complaint fails to

state a cause of action. *Marle v. Garrison*, 83 N. Y. 14; *Sanders v. Soutter*, 126 N. Y. 195, 27 N. E. 263.

Under the more recent authorities, pleadings are not to be construed strictly against the pleader, but averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the necessary evidence to establish his cause of action. *Railway Co. v. Robinson*, 133 N. Y. 242, 246, 30 N. E. 1008.

The alleged facts being admitted, it becomes obvious that the plaintiff was entitled to recover in this action. He was the owner in fee simple of the land where the bridge, or at least a portion of it, was placed, subject only to the right of way of the public over it. If the street should be discontinued or abandoned, he would have the entire and exclusive title and right of possession to the property within its bounds. Therefore, notwithstanding the right of the public to an easement in the street, he, as the owner of the soil, possessed an interest which would entitle him to remove any unauthorized erection upon his premises. *Eels v. Telegraph Co.*, 143 N. Y. 133, 38 N. E. 202; *Williams v. Railroad Co.*, 16 N. Y. 97; *Henderson v. Railroad Co.*, 78 N. Y. 423; *McGean v. Railway Co.*, 133 N. Y. 9, 30 N. E. 647; *Bowen v. Railroad Co.*, 153 N. Y. 479, 47 N. E. 907.

Where trespasses upon land are continuous, the owner has a right to invoke the power of a court of equity to restrain such trespasses, and thus prevent a multiplicity of suits. That doctrine is fully sustained by the cases cited; hence it is clear that the complaint stated a cause of action, and the judgment of the special term overruling the demurrer was properly affirmed.

The learned appellate division, after allowing the appeal in this case, certified to this court for its determination the following questions: "(1) Does the complaint in this action state a cause of action? (2) Is the plaintiff entitled to restrain the operation of the defendants' railroad across Alabama street, for the reason that he is the owner of the fee of Alabama street? (3) Is the plaintiff entitled to restrain the operation of the defendants' railroad because of damage alleged to have been done to the plaintiff's property outside of the bounds of Alabama street? (4) Is the plaintiff entitled to more than nominal damages because of the alleged trespass upon the fee of Alabama street? (5) Is the plaintiff entitled to damages because of any alleged injury to the block of land south of the railroad, and west of Alabama street, and lying wholly outside of the bounds of Alabama street?"

The only question involved on the appeal to the appellate division was whether the complaint stated facts sufficient to constitute a cause of action. That was the only question determined by that court. Consequently, it is the only question that can be determined here. We have several times held that sec-

tion 190 of the Code of Civil Procedure confines the jurisdiction of the court of appeals to the review of actual determinations made by the appellate division. It is erroneous to suppose that a question may be certified for determination by the court of appeals where it did not arise or was not passed upon by that court. We have only such jurisdiction as is conferred by statute. This does not include the determination of abstract questions, nor those which are not actually determined by the court certifying them. *Grannan v. Association*, 153 N. Y. 449, 47 N. E. 896; *Baxter v. McDonnell*, 154 N. Y. 432, 436, 48 N. E. 816; *Hearst v. Shea*, 156 N. Y. 169, 50 N. E. 788; *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967. Therefore, as the only question passed upon by the appellate division was whether the complaint stated a cause of action, it is the only question this court can properly answer. That question we answer in the affirmative. The other questions we decline to answer. The judgment should be affirmed, with costs. The first question is answered in the affirmative, and the other questions certified are not answered. All concur. Judgment affirmed.

(156 N. Y. 437)

BLASCHKO v. WURSTER, Mayor, et al.
(Court of Appeals of New York, Oct. 4, 1898.)

GREATER NEW YORK CHARTER—STREET RAILWAY FRANCHISE—LEGALITY OF MUNICIPAL GRANT—CERTIFIED QUESTIONS.

1. Laws 1897, c. 378, § 73 (Greater New York Charter), providing that, "after the approval of this act," no franchise or right to use the streets, avenues, parkways, or highways shall be granted by the "municipal assembly" for a longer period than 25 years, etc., became operative on May 4, 1897, the date of the approval of the act, and applied to the board of aldermen then in office of the city of Brooklyn, notwithstanding its reference to the "municipal assembly," which was not to come into existence until January 1, 1898.

2. A perpetual charter, granted by the authorities of Brooklyn after the approval of the Greater New York Charter, to a street railway, is not valid as a charter for 25 years.

3. Where a case is sent to the court of appeals on special questions otherwise not reviewable, the questions should be so framed that the answers may determine the particular controversy involved in the appeal, and not merely a part of it.

Appeal from supreme court, appellate division, Second department.

Action by Max Blaschko against Frederick W. Wurster, mayor, the East River & Atlantic Ocean Railroad Company, and others. From an order granting a preliminary injunction affirmed in the appellate division (48 N. Y. Supp. 1101), the railroad company appeals on certified questions. Affirmed.

James C. Church, for appellant railroad company. M. S. Guiterman, for respondent.

O'BRIEN, J. This was an action by a taxpayer to restrain the defendant the city authorities of Brooklyn from granting consent

to operate a railroad in the streets, and the defendant the East River & Atlantic Ocean Railroad Company from receiving any such consent. A preliminary injunction was granted, and the order affirmed at the appellate division. The municipal authorities to whom the railroad made the application have gone out of office since the commencement of the action, by force of the recent charter consolidating the two cities of New York and Brooklyn, and, consequently, are without any power to hear or grant the application, even if the injunction which restrained them had originally been improperly granted. The railroad company alone appeals, for no other purpose than to secure a reversal of the order granting the injunction as a basis for a claim of damages upon the undertaking given by the plaintiff in the action. Formerly such an order was not reviewable in this court, except in cases where it appeared from the face of the complaint that the plaintiff was not entitled to final relief. In such cases the appeal was held to present a question of law. But, where the complaint on its face was sufficient to authorize the interference of equity, the granting of the order pendente lite was matter of discretion. *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 121 N. Y. 397, 24 N. E. 832; *Castoriano v. Dupe*, 145 N. Y. 250, 39 N. E. 1065; *Beekman v. Railroad Co.*, 153 N. Y. 144, 47 N. E. 277. The court below has, however, certified for our consideration certain questions, which, when condensed, may be stated as follows: (1) Whether the new charter (section 73, c. 378, Laws 1897), when approved, deprived the local authorities of Brooklyn of power to grant such consents to a railroad for a period beyond 25 years. (2) Whether a general consent that the defendant railroad might operate its road in certain streets named in the resolution, without any limitation as to time, is good for 25 years. It appears that the aldermanic branch of the city government passed a resolution granting the consent generally, without any limitation as to time, on the 29th day of November, 1897. The resolution, however, had no effect until approved by the mayor, or, in case of his disapproval, passed over his objections by the requisite vote. It appears from the answer of the mayor that the resolution was then in his hands; that the time within which he was by law required to return it to the aldermen had not then expired; and he states that he intended to disapprove it. The railroad company is the only party that brings an appeal to this court, and it is plain that the only effect that the injunction had upon it was to restrain the aldermen, when the resolution came back to them from the mayor, from reconsidering it, or passing it over his objections. Whether it would then have been passed we cannot know, and therefore it is apparent that we are dealing with official acts that never reached the stage of maturity, and with questions that are some-

what academic in character. What the railroad lost by the injunction, if anything at all, was the chance of having the resolution passed by the aldermen over the veto of the mayor. Without scanning too closely the right of the railroad company alone to review the order in this court, in the present condition of the action, we have concluded, since no such question has been raised or argued, to examine and dispose of the questions certified.

The new charter was approved on the 4th day of May, 1897, before the resolution granting the franchise in question was passed. Section 73 of this statute is as follows: "Sec. 73. After the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years." The city referred to in this clause was, of course, the new city created by the act, and the prohibition applies to all the territory embraced within it, and consequently applied to Brooklyn. But the learned counsel for the railroad company contends that this restriction did not take effect until January 1, 1898, and therefore had no application to proceedings for granting franchises before that date. This contention is based upon the language of section 1611 of the act, which reads as follows: "Sec. 1611. For the purpose of determining the effect of this act upon other acts and the effect of other acts upon this act, this act shall, except as in this section is otherwise provided, be deemed to have been enacted on the first day of January, in the year eighteen hundred and ninety-eight. This act shall take effect on the first day of January, eighteen hundred and ninety-eight; provided, however, that where by the terms of this act an election is provided or required to be held or other act done or forbidden prior to January first, eighteen hundred and ninety-eight, then as to such election and such acts, this act shall take effect from and after its passage, and shall be in force immediately, anything in this chapter or act to the contrary notwithstanding." By this section it is undoubtedly true that the main provisions of the statute did not go into effect until January 1, 1898, but to this there is an important exception. Any official act forbidden to be done prior to that date is prohibited from and after the date of the passage of the act; and the granting of street franchises to railroads by the municipal assembly for more than 25 years is one of these forbidden acts. But it is said that the "municipal assembly" was a title given by the charter to the new legislative body which could not come into existence until after the election, and until January 1, 1898, and therefore, that the prohibition upon that body could have no application to the old board of aldermen of Brooklyn in office when the franchise was voted; having still about a month of official

life. This argument gives too much importance to mere names or words, and fails to give effect to the substantial purpose which the lawmakers had in view. It was clearly intended by section 73 to restrict the granting of railroad franchises "after the approval of this act"; that is to say, after May 4, 1897. This restriction, to be effective, would have to operate on the city authorities having the power to make such grants on that date, and up to the time that the municipal assembly came into existence. We think that the words "municipal assembly," found so frequently in the new charter, were employed in section 73 to designate the aldermen, common council, or governing body having the power to deal with the subject-matter of the restriction prior to the date when the new government was to go into full operation, and, therefore, that the restriction applied to the board of aldermen of Brooklyn when the resolution in question was adopted. The new charter contains a comprehensive and elaborate scheme of municipal government. Many of the reforms which it is supposed to have inaugurated could be defeated or greatly embarrassed by official action, before it went into effect, on the part of the old authorities, whose powers were about to be taken away and superseded by the new enactment. In order to guard against that, the restriction upon the power to grant railroad franchises, except as provided in the new scheme, was restricted as of the date of the passage of the act. The fact that the lawmakers used terms perhaps not strictly accurate is of very little consequence, so long as the intention is plain. If the word "authorities" had been used instead of "assembly," no one could then suggest any doubt as to the meaning. The use of a wrong word, conceding it to be such, which was doubtless an inadvertence, should not be allowed to defeat the intention of the law. When the intention of the lawmakers is discovered, it must always prevail over the literal or accepted meaning of words. The courts will consider the mischief which the statute was aimed at, and, in order to give it effect, words absolute in themselves, and language the most broad and comprehensive, may be qualified and restricted by other parts of the same statute, or by the facts and circumstances to which they relate. *Smith v. People*, 47 N. Y. 330; *People v. Potter*, Id. 375. It follows that the new charter operated to restrict the power of the aldermen or city authorities within the territory comprehended within the limits of the new city thereby created, and this answers the first question in all its parts.

The other question is whether the proceedings had in this case before the city authorities were within the scope of the powers thus limited by the charter; in other words, whether the inchoate acts of the aldermen should now be declared valid, as relating only to a grant for 25 years, in order to make

the injunction order improper. The railroad made no application for such a grant. We cannot say now that the aldermen would have adopted any resolution granting any such right, or that the railroad would have accepted it. What the railroad asked, and what the aldermen voted, was the right in perpetuity. All parties evidently acted upon the assumption that the restrictions of the new charter were in abeyance till the new government went into operation, and to give now a construction to their acts contrary to the intention, and solely on the principle that the greater must include the less, would be straining for reasons to reverse or modify the order. When it is avowed that the appeal is brought in order to lay the foundation for a claim of damages against the sureties on the bond, the railroad has no right to a construction of the consent or resolution different from the intention of all the parties when the application was considered and passed upon. We ought, under the peculiar circumstances of the case, to construe the consent in the same way as the parties themselves did when it was asked and given. We are not dealing with a grant actually made and in form perfected, but with an application that had not reached the final stage of municipal action when the injunction was served. The city authorities had the power to make the grant for 25 years, but that was not the power that the railroad called into action, that the aldermen exercised, or the court restrained, but the unlimited power invoked and claimed independent of the new charter. We should construe the official act which the court restrained according to the spirit and intention with which it was performed, and in the sense in which it was viewed and understood by the court when the injunction was granted. So, we are inclined to hold that the consent, so far as it was given, was not a valid exercise of the power to grant consents for 25 years, and therefore the second question should be answered in the negative.

There is another feature of the case which we think ought to be suggested in view of the abstract character of the questions that have been sent here, and are now becoming quite common. After the case had been passed upon by the court below, no question remained for this court except the jurisdiction of the judge to grant the injunction upon the facts stated in the complaint. The complaint is broad enough to embrace a case of illegal action on the part of the railroad and the aldermen, quite independent of the restrictions of the new charter. The right of a taxpayer to restrain illegal, fraudulent, or corrupt action on the part of the city authorities in such cases has existed for many years, and the complaint does not rest solely upon the restrictions of the new charter, but contains allegations that would warrant an injunction under the law as it had long existed. We have not by the specific ques-

tions been asked to decide the only question that this court can decide in such cases, namely, the power of the court of original jurisdiction to grant the injunction order. The railroad asks a reversal of the order in case it should be held that the restriction in the charter was not in force when it was granted, whatever we may think about the power to grant it on other grounds. The whole case upon which the order may rest is not presented by the specific questions, and yet we are asked to reverse the order should we agree with the learned counsel for the appellant upon one point in the case that ordinarily would not determine the appeal. Certain questions have been sent here which are supposed to be involved, but which, if determined in favor of the contention of the appellant, would not necessarily call for a reversal of the order, since it is clear that, if the allegations of the complaint are sufficient to warrant the exercise of the jurisdiction of the court to grant the injunction under the general law authorizing taxpayers' actions, it is not important whether the aldermen acted in violation of the restrictions of the new charter or not. A complaint containing, as this does, general allegations of waste, illegal, corrupt, or fraudulent official action, is sufficient in this court to sustain the jurisdiction to grant the injunction order, quite independently of the charter provisions referred to. Hence it is apparent that the questions we have been called upon to examine do not necessarily determine the appeal. A judgment or an order may have been given or made upon several grounds, one of which may be incorrect, while all the rest are good. The practice adopted in this case would permit the party defeated in the court below to pick out all the weak propositions involved in the particular ground affected with error, ignoring all the other grounds, present them here for review, and ask us to reverse the judgment or order in case we agree with him in respect to this single ground, although the decision below may stand well upon all the other grounds.

The spirit and purpose of the provisions of the constitution and the Code authorizing the courts below to send appeals here upon special questions do not permit this practice, and it ought not to be sanctioned. When a case is sent here upon special questions that otherwise is not reviewable, the questions should be so framed that the answers may determine the particular controversy involved in the appeal, and not merely a part of it. We have before us an injunction order which might have been made under two different statutes, and, as we think, stands well upon both, so far as the jurisdiction of the court is concerned. But the questions submitted touch only the power to grant it under one of the statutes. Suppose we should agree with the learned counsel for the appellant that the restriction of the new charter does not apply, would we be bound to reverse the order, al-

though the complaint is broad enough to uphold the jurisdiction under the general law? The construction that we have given the charter renders it unnecessary to answer this question, but in view of the form in which appeals are brought here upon certified questions, in many cases, what has been said may serve to call the attention of the profession to the importance of so framing the questions that, when answered, something material and essential to the controversy involved in the appeal shall have been decided by this court. The order appealed from should be affirmed, with costs, and the questions answered as above indicated.

PARKER, C. J., and GRAY and HAIGHT, JJ., concur. MARTIN, J., concurs in result, as per memorandum attached. BARTLETT and VANN, JJ., are for dismissal of appeal.

Order affirmed.

MARTIN, J. I vote for an affirmance of the order, upon the ground that, independently of the charter of Greater New York, the complaint and proceedings in this action were sufficient to justify the court below in granting the order appealed from. But, as the questions certified, if decided in favor of the appellant, would not authorize a reversal of the order, I think they are in effect mere abstract questions, which this court should decline to answer. *Grannan v. Association*, 153 N. Y. 449, 47 N. E. 896; *Baxter v. McDonnell*, 154 N. Y. 432, 48 N. E. 816; *Hearst v. Shea*, 156 N. Y. 169, 50 N. E. 788; *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967; *Coatsworth v. Railroad Co.*, 156 N. Y. 451, 51 N. E. 301.

(156 N. Y. 447)

BROWN et al. v. CRABB.

(Court of Appeals of New York. Oct. 4, 1896.)

APPEAL—VERDICT OF JURY—ACTION TO DETERMINE TITLE—SUFFICIENT POSSESSION.

1. On appeal to court of appeals, a party is concluded by the verdict of the jury on questions of fact.

2. On a verbal agreement for the purchase of land, plaintiff went into possession, paid part of the purchase price and taxes, cultivated it, and erected a house thereon. Held such possession as enabled him to maintain an action to determine a hostile claim, under Code Civ. Proc. § 1638, providing that a person in possession of land, claiming it in fee, may maintain such an action.

Appeal from supreme court, general term, Fourth department.

Action by William Brown and another against Lodema M. Crabb. From a judgment for plaintiffs, defendant appealed to the general term, and, from a judgment of affirmance (33 N. Y. Supp. 1125), appeals. Affirmed.

Lansing & Lansing, for appellant. Purcell, Walker & Burns, for respondents.

O'BRIEN, J. This is an action to compel the determination of a claim to certain real property, brought under section 1638 of the Code. It is alleged, and the jury upon sufficient evidence found, that on March 1, 1887, the plaintiffs, as tenants in common, agreed to purchase the land in dispute from the then owner. The agreement was not in writing, but the plaintiffs, in pursuance of a verbal agreement of sale and purchase, went into actual possession, paid a part of the purchase price, have since paid the taxes, cultivated and improved the land, and erected a house thereon. They have also paid and satisfied a pre-existing mortgage, which they had assumed as part of the purchase price. On the 31st of March, 1890, having fully performed the agreement, they received a deed from the owner, one Philip Brown, in pursuance of the agreement. The defendant claims title under a sheriff's deed executed March 10, 1893, and a sale upon execution May 16, 1891. The deed, judgment, and execution are based upon an attachment in an action against Philip Brown, the plaintiffs' vendor, levied upon the land February 4, 1890, and before the plaintiffs procured their deed, but after the agreement and while they were in possession. The jury found for the plaintiffs on all the issues of fact in the case, and the judgment upon the verdict has been affirmed at the general term.

The defendant's contention in support of the appeal is twofold:

1. That the agreement under which the plaintiffs went into possession of the land, and which is the basis of their title, was not in good faith, but a device contrived between themselves and Philip Brown, the vendor, and their relative, for the purpose of defeating the payment of the claim of the defendant, sought to be enforced by the action in which the attachment was issued, and which subsequently matured into a judgment under which the execution sale was had. With respect to this question it is quite sufficient to say that it was a question of fact which has been determined by the verdict against the defendant. The jury has found that there was no fraud in the transaction, and this finding concludes the defendant upon appeal in this court.

2. The other contention is that the plaintiffs had no such title to the land as the statute requires in order to enable a party to maintain this peculiar form of action. The plaintiffs were bound to show that they were in possession of the land, claiming it in fee or for life or for a term of years. They claimed to be the owners in fee under the deed from the prior owner. This deed, though given subsequent to the levy of the attachment under which the defendant claims, was but the final consummation of the pre-existing verbal agreement under which the plaintiffs went into possession. When this deed was given, the verbal agreement had been performed, and the plaintiffs were en-

titled to the conveyance. It may be true that, when the attachment was levied, the naked legal title was in the defendant named in that process, but he had no real or beneficial interest upon which a legal lien could be based. The plaintiffs had the whole equitable title, with the possession and the right of possession. Their vendor, against whom the attachment issued, was, at most, but a trustee of the legal title for their sole benefit. The legal title was subsequently conveyed to them by the deed, and, when this action was commenced, the plaintiffs had just such a title as the statute requires in order to enable a party in possession to maintain an action to determine a hostile claim. When a party is in possession of land under a contract of sale, verbal or written, which has been fully performed, he is, in every substantial sense, the owner, and may defend and protect his possession and interest in the same way as if he had a deed. He is then entitled to a conveyance from the party holding the nominal title for his benefit; and if, before such conveyance is executed, third parties recover judgment against the trustee, the lien of such judgment does not attach to the land which the party in possession has bought and paid for. When possession is taken, and the contract performed, equity will regard as done what ought to have been done. We think that the plaintiffs had such a title as to enable them to bring and maintain the action, and so it has been held. *Schroeder v. Gurney*, 10 Hun, 413, affirmed 73 N. Y. 430; *Bohn v. Hatch*, 133 N. Y. 64, 30 N. E. 659; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375. The statute of frauds, even had it been pleaded (*Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911), has no application to such a case. The contract was fully executed, and, before the commencement of this action, was merged in a deed which vested the legal title in the plaintiffs. The judgment should be affirmed, with costs. All concur, except MARTIN, J., not sitting. Judgment affirmed.

(156 N. Y. 612)

THOMAS v. GAGE.

(Court of Appeals of New York. Oct. 4, 1898.)

CONTRACTS—PERFORMANCE—RESCISSION.

A contract for a monument on defendant's cemetery lot stipulated that defendant should "have the privilege of inspecting said monument when ready to letter, and, if not as agreed, it shall be made so without additional expense." It also provided that defendant should have the right "to inspect model when made in clay, and it is to be made to his entire satisfaction." When the model in clay was completed, defendant fully inspected it and expressed his satisfaction. After the model had been produced in plaster, and photographed, defendant found fault with the work, and, expressing the opinion that it would be impossible for the contractors to suit him, declared the contract rescinded. In an action by the assignee of the contractors for damages for breach of such contract, the defense was al-

leged failure to perform on the part of the contractors, and a verdict was directed for defendant, though plaintiff produced proof of damages, and requested the submission of the case to the jury. *Held*, that such direction was erroneous, as the contract was satisfied, so far as the work had progressed, by the opportunity given to defendant to examine the model in clay, and, on the expression of his satisfaction therewith, his right to interfere with the performance of the work ceased.

Appeal from supreme court, general term, Third department.

Action by William H. Thomas against William B. Gage. From a judgment of the general term (32 N. Y. Supp. 1150) affirming a judgment on a verdict directed for defendant, plaintiff appeals. Reversed.

John Foley, for appellant. Charles S. Lester, for respondent.

O'BRIEN, J. The plaintiff in this action sought to recover damages for the breach of a written contract made with the defendant on the 20th day of January, 1890, to make and place on the defendant's lot in a cemetery a monument of stone, according to a design and specifications stipulated in the contract. The plaintiff and his partner agreed to do the work and furnish the material for the sum of \$4,485, but the defendant, before the completion of the work, rescinded the contract, and the plaintiff's firm was thus prevented from executing the agreement. The plaintiff is the assignee of the contract, and sues in his own name. The defense is that the contracting firm failed to perform its part of the contract, and the defendant for that reason was justified in rescinding. The trial court directed a verdict for the defendant. The plaintiff, having given proof of damages, requested that the case be submitted to the jury, which request was denied, and to this ruling and the direction of the verdict for the defendant an exception was taken.

The contract provided that the monument should be made to correspond in style and design with one in another cemetery, described as the "Argersinger Monument." It appears that this design was surmounted by a female figure of heroic size, in sitting posture, and it was upon the ground that the contractors were unable to produce this figure, or failed in the attempt, that the defendant claimed and exercised the right to rescind the contract. The written agreement stipulated that the defendant should "have the privilege of inspecting said monument when ready to letter, and, if not as agreed, it shall be made so without additional expense." The defendant also was to have the right "to inspect model when made in clay, and it is to be made to his entire satisfaction." The time for the inspection of the monument itself, as a whole, was after it was completed and on the lot in the cemetery ready for lettering. If it did not then conform substantially to the design and specifications of the contract, the defendant clearly would have the right to refuse

to accept it until it was made to comply with the requirement; but, since the plaintiff was not permitted to advance the work to that stage, it could not be claimed that there was any breach of the contract in this respect.

The right to inspect the model in clay for the female figure was intermediate, and something to take place during the progress of the work. The purpose of that provision was to enable the defendant, while the figure was in the incipient stages of production by the artist, to exercise his judgment and taste, and make any suggestions as to changes that he thought necessary in order to make it conform to the original design for that part of the work which he had selected and embodied in the specifications of the contract. This model was a mere plan or design from which the sculptor or artist was to produce the female figure in stone.

It appears from the proofs that the process of making a statue is first to model it in clay, which may be kept soft and plastic by wetting. While in that form it may be changed by the artist, and made to conform to the taste or fancy of his patron, and for this reason the contract gave the defendant the right to inspect the model while in that form, to make suggestions according to his taste and judgment, and to be satisfied that it fairly represented the original design. He could not annul the contract by an arbitrary, fanciful, or unreasonable objection, or by merely refusing to be satisfied, without a substantial reason. This provision of the contract contemplated substantial performance, and the production of a suitable model in clay on the part of the artist, and reasonable judgment on the part of the defendant. It also appears that the clay model, when molded into the desired shape and form, is covered with plaster of Paris so put on as to be readily taken off in sections when dry. The clay model has then fulfilled its purpose, and is destroyed. The sections so taken off are then put together, making a complete plaster mold, and then plaster of Paris is run into it, making a solid plaster of Paris model.

In this case the artist completed the model in clay, and notified the defendant, who fully inspected it, and expressed his satisfaction with it. At least, the jury could have found these facts from the evidence. But subsequently, after the clay model appeared in plaster, it seems that photographs of it were taken in that form, and sent by the artist to the defendant, who found fault with the proposed figure as thus represented. This led to correspondence between the parties to the contract, in which the contractors and the artist expressed a desire to do everything reasonable to suit the taste or fancy of the defendant with respect to the production of the female figure which was to surmount the monument. It is evident from this correspondence that the defendant's taste and fancy with respect to this figure were somewhat ideal, and beyond the bounds which a reason-

able and practical construction of the contract would indicate; and it ended with an expression of opinion on the part of the defendant that it would be impossible for the artist who had modeled the figure to suit him, and so he declared the contract rescinded.

We think the ruling of the learned trial court that, as matter of law, he was justified in so doing was erroneous. In view of the evidence at the trial and the terms of the contract, the defendant was not entitled to have a verdict directed in his favor. At most, all he was entitled to was to have the case passed upon by the jury as a question of fact. The learned counsel for the defendant does not dispute the fact, which appears from the evidence, that the defendant had full opportunity to inspect the model in clay, or that he then expressed himself substantially as satisfied with it while in that form. What is claimed is that the defendant had the right to object to the model, not only when represented in clay, but subsequently, when it was advanced to the form of a plaster cast, and even when this cast was represented by a photograph. This is not a fair or reasonable construction of the contract. The meaning of the stipulation is that the defendant should have the right to inspect the model in clay, to the end that he might then make any objection or suggestion in regard to it that was reasonable, since it was in such a form as to admit of changes and development, in order to produce something from which the statue was to be copied. The contract was satisfied when the defendant was given full opportunity to examine the model in clay, and at that stage of the work he was concluded by his declaration, in substance, that it was satisfactory.

The contract did not require any photograph to be made or exhibited, or provide for an inspection of the model when it assumed the finished and permanent form of a plaster cast. It was still open to the defendant to object to the figure when placed upon the monument, if it did not conform to the contract, since the model is one thing and the statue itself quite another thing. The right to inspect and object to the model, as such, existed only while it was in clay. The right to object to the figure itself remained to be exercised when the completed monument was placed in the cemetery. The approval by the defendant of the clay model would not preclude him from objecting to the statue itself when produced, if, in fact, it was not substantially according to the original design. He would not, by assenting to the model in clay, waive any right to insist upon performance of the contract, which provided that the figure should correspond with that upon another monument designated.

When he was permitted to inspect the model in clay, and expressed satisfaction with it in that form, his right to interfere with the performance of the contract or arrest the work ceased. His right to make further ob-

jection to the work, or any part of it, was postponed to the time when it was placed upon the lot, and he was asked to accept and pay for it. He could then insist that the contractors had not produced the thing that they agreed to produce, if such was the fact, and refuse to pay the price. But if the monument, including the female figure, was substantially what they agreed to erect, then the defendant would be bound to pay for it, although he may not have been suited with the plaster cast of the figure when in that form, or the photographic representation of it. The model in clay was a mere instrumentality for producing the figure itself, as described and specified in the contract.

The defendant assumed in advance that the contractors either would not or could not perform the contract, and, acting upon this assumption, he repudiated it before performance was possible. There is nothing in the case to warrant the conclusion that, if the contractors had been permitted to go on with the work, they would not have produced the monument contracted for. The only question in the case is whether the contractors had so disregarded the terms of the contract with respect to the production and inspection of the model in clay as to justify the defendant in rescinding on his part, and we think that the evidence in the case would warrant the jury in finding that this provision of the contract was complied with. To hold that the defendant, after inspecting the model in clay, and expressing satisfaction with it, could still defeat the performance of the contract, or rescind by objection to a photographic representation of the model when produced in plaster, would be putting the contractors at the defendant's mercy, and placing a construction upon the contract not warranted by the language or the nature of the transaction. The judgment should be reversed, and a new trial granted, costs to abide the event. All concur. Judgment reversed, etc.

(156 N. Y. 592)

MISSOURI, K. & T. RY. CO. v. UNION TRUST CO. OF NEW YORK et al.

(Court of Appeals of New York. Oct. 4, 1898.)

SUBMISSION OF CONTROVERSY—MORTGAGES—CONSTRUCTION—REDEMPTION—RIGHTS OF BONDHOLDERS.

1. Under Code Civ. Proc. § 1279, allowing parties to a controversy which might be the subject of an action to submit an agreed statement of the facts on which the controversy depends to the court for determination, the court has jurisdiction to decide only such questions as are actually submitted, and as arise out of the facts stated in the record of submission.

2. Mortgage bonds were payable on their face in 30 years, but the mortgage provided for a sinking fund for the redemption of some of the bonds each year, the ones to be redeemed to be determined by lot. The mortgagor acquired 1,810 of the bonds, and, after 3 of the rest had been redeemed, ceased contributing to the sinking fund for about 20 years, and then sought to redeem at one time the out-

standing 187. Had the bonds been redeemed as provided during this period, there would still have remained about 500 outstanding. *Held*, that the holders of the 187 were entitled to have their bonds redeemed according to the mortgage, and hence the trustee was not obliged to accept a tender by the mortgagor of a sum sufficient to redeem the 187, but as to the holders of such bonds the bonds held by the mortgagor could not be considered redeemed, and the drawing by lot to determine what bonds should be redeemed should be from the total number of bonds issued, minus the three already redeemed.

Appeal from supreme court, general term, First department.

Submission of controversy between the Missouri, Kansas & Texas Railway Company and the Union Trust Company of New York and another. From a judgment in favor of defendant company (34 N. Y. Supp. 443), plaintiff appeals. Affirmed.

On the 1st of June, 1870, the Tebo & Neosho Railroad Company of Missouri made a mortgage to the Union Trust Company of New York upon its railroad line extending from Sedalia, Mo., to the western boundary of that state, to secure 2,000 7 per cent. gold bonds, for \$1,000 each, payable on the 1st of June, 1903. By the fifth article of the mortgage, the mortgagor covenanted that it would, on each 1st day of June, commencing in 1873, pay to the Union Trust Company, the trustee for the bondholders, as a sinking fund, "a sum equal to one per cent. of the aggregate principal of the bonds secured hereby, together with interest thereon at the rate of seven per cent. per annum in gold coin as aforesaid, by the operation of which sinking fund the whole principal of said bonds may be redeemed in thirty years from the date of the first annual payment." It was further provided that the trust company should, "in each and every year after said first payment, designate for redemption by lot an amount of said bonds equal to the accumulations in said sinking fund, which shall be redeemed at the par value thereof, due notice of the numbers of the bonds so designated having been previously published by the said party of the second part in two or more of the daily newspapers printed in the city of New York, for sixty days, at the expiration of which, interest on the bonds so designated shall cease, and the premises embraced in this mortgage shall thereafter be discharged from so much of the lien hereby imposed thereon as the bonds amount to thus designated for payment." Further provision was made for the cancellation of the bonds redeemed, and for the return thereof, when canceled, to the mortgagor. After said bonds had been duly issued, and on the 4th of January, 1871, said mortgagor became, by consolidation, a constituent part of the system of the plaintiff, which assumed and became charged with all the obligations of the Tebo & Neosho Railroad Company, and acquired its property and rights. Pursuant to the terms of consolidation, the plaintiff received, in exchange for

its own bonds, 1,651 of the bonds first named, which are now in the possession of the Union Trust Company, the trustee named in each of the mortgages given to secure said issues of bonds respectively, as the financial agent of the plaintiff. There is no controversy as to said 1,651 bonds. The bonds of the plaintiff, issued at about the time of the consolidation, have been paid, and the mortgage given to secure them canceled and satisfied of record. The Union Trust Company also holds in the sinking fund, provided for in the Tebo & Neosho mortgage, three bonds of the series of 2,000 secured thereby; and the Central Trust Company, as the financial agent of the plaintiff, has 159 more of the same series, which were redeemed and paid under a certain plan of reorganization, dated November 27, 1889, made by the plaintiff to retire its then-existing bonded indebtedness. Said 159 bonds are subject to the order of the plaintiff for cancellation, and the Central Trust Company is willing to surrender the same for that purpose, and is made a party to the controversy, in order that all persons interested may be before the court.

There now remain outstanding in the hands of the public, as valid obligations, 187 of the whole issue of 2,000 bonds issued as aforesaid. Since June 19, 1873, no payment to the sinking fund has been made in compliance with the requirements of the clause already quoted; and the plaintiff, the successor of the mortgagor, is in arrears in its indebtedness to said fund to an amount exceeding \$350,000. On the 2d of May, 1894, the directors of the plaintiff resolved to make the sinking fund good to the extent necessary to extinguish its indebtedness thereto, or at least sufficient to pay the bonds outstanding, with accrued interest and the costs and charges of the trustee, in order that said mortgage should be fully satisfied and canceled of record. On the 11th of February, 1895, the plaintiff, pursuant to said resolution, offered to pay to the Union Trust Company the sum of \$198,000, with the request that the same, less the amount necessary to cover the expenses of the trustee, should be put into said sinking fund, and should be applied by the trustee for the redemption of the principal and interest of the outstanding bonds; and that the trustee should proceed to call said bonds for cancellation and redemption in accordance with the provisions of the mortgage; and that when said bonds had been surrendered, or, in the event that all had not been surrendered, when the 60-days publication provided for should have expired, and the bonds in the hands of the Central Trust Company should have been surrendered for cancellation, said trustee should cancel and destroy the total issue of said bonds, amounting to \$2,000,000; and that in case the whole, or less than the whole, of said 187 bonds should be surrendered, the trustee should cancel all the bonds surrendered to it, or already in its possession in the sinking fund; and

that thereupon all the bonds should be canceled, and the trustee should satisfy of record the mortgage given to secure them. The Union Trust Company did not accept said tender or comply with said request, but refused compliance unless ordered by the supreme court.

Upon a statement of facts, of which the foregoing is a synopsis, the controversy was submitted to the general term as to the right of the Union Trust Company to thus refuse; and the court held that the company was right in refusing to accept the amount tendered, coupled with the condition that it should be applied to the paying off of the outstanding bonds, and that the mortgage to secure them should be canceled. Judgment was accordingly directed in favor of the defendant the Union Trust Company, with costs.

Simon Sterne and N. A. Elsberg, for appellant. Wheeler H. Peckham and R. W. Peckham, Jr., for respondent Union Trust Company. Adrian H. Jolline, for respondent Central Trust Company.

VANN, J. (after stating the facts). The question submitted for decision is whether it was the duty of the Union Trust Company, under the facts stated, to receive the money tendered, and apply it to the redemption of the 187 bonds outstanding. Other interesting questions have been argued before us by the learned counsel for the appellant, but they were not raised by the facts stated in the record before us, and were not submitted as a part of the controversy to the general term. That learned court had jurisdiction to decide, and we have jurisdiction to review, only the questions that were actually submitted, and which arose out of the facts stated in the record of submission. The general term could not decide, nor can we consider, what the duty of the Union Trust Company would have been had some other sum been tendered to it, or some other request made for the application of the sum in fact tendered. Only one tender was made, and that was upon the condition that the amount thereof should be applied to the payment of the outstanding bonds, and that thereupon the mortgage should be satisfied. No other theory of duty on the part of the trustee can be considered than whether it ought to accept this sum, and apply it in this way, because the record presents no such question. It may be that if the sum tendered had been accompanied by some other condition, or that the trust company had been requested to take some other action, it would have complied, and no controversy would have arisen.

The sinking-fund clause of the mortgage did not permit the trust company to comply with the condition upon which the tender was made. Neither the mortgagor nor the plaintiff, which stands in its shoes, had performed the contract, so far as the sinking fund was concerned; and, if it had, at the

time the tender and request were made, in February, 1896, about one-half only of the bonds would have been redeemed. This would have left about 1,000 bonds still outstanding, and the holder of each would have been entitled to refuse payment until his bond became due, according to the terms of the mortgage, or by means of the lottery provided by the mortgage.

The claim of the plaintiff that, by its dealings with individual bondholders, 1,810 of the bonds have been so disposed of that they can no longer be considered in connection with the sinking-fund provision, is unsound, for the result would be that the mortgagor and a part of the bondholders could, by agreement between themselves only, change the rights of the remaining bondholders who did not assent to the arrangement. When the bonds in question were issued and negotiated, each bond had an equity represented by the chance that it might not be drawn by lot for redemption until it became payable, in 1903. As the bonds drew a high rate of interest, that equity was valuable, and each bondholder had the right to insist that his bond should not be redeemed except in strict accordance with the contract contained in the mortgage. That contract has not been performed by the mortgagor or the plaintiff, and to now permit all the outstanding bonds to be called in, by suddenly, after the lapse of more than 20 years, enforcing the sinking-clause provision, on the basis suggested, would enable the plaintiff to take advantage of its own wrong. The one who violates a contract habitually, for year after year, should not be allowed, by dealings with some of the bondholders, to reduce the value of the equity of the remaining bondholders. Whatever the plaintiff has done outside of the contract, by way of paying or acquiring bonds, cannot be considered as done under the contract, or in any way credited upon the sinking-fund clause. While we consider that clause as still in force, it cannot be enforced upon any basis less favorable to the outstanding bondholders than if the contract had been performed instead of violated. The plaintiff cannot extinguish the outstanding bonds by commutation, but only by contract, and the bonds paid were not redeemed under the contract. While, if there was a drawing to-day, and all the bonds except the three already in the sinking fund were put into the hat, it would give the present bondholders an advantage, still the plaintiff cannot complain if by its own conduct it has rendered any other method impossible without injuring those bondholders who are without fault. The bondholders are the creditors, and the plaintiff stands for the debtor, and the debtor cannot buy up half of his debts, and affect the rights of those who hold the remainder. We see no basis of treating bonds for redemption, now, under the sinking-fund clause, that will be just to the outstanding bondholders, unless 1,997 bonds are put into the hat; for no dealing by the plaintiff with those bondhold-

ers, who have accepted payment, can change the provision of the sinking-fund clause, or affect the outstanding bondholders. They have the right to have their bonds redeemed only according to the contract, and, unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive. It is only by putting all of the numbers but three in the hat, and making one drawing up to date, and subsequent drawings on the same basis, that the 187 bonds outstanding will have their equities preserved, and suffer only the chance of redemption that the sinking-fund clause provides. The bonds redeemed by private contract cannot be treated as redeemed under the mortgage contract, but must take their chances in the lottery with those still outstanding. In other words, as held in *Barry v. Railway Co.*, 34 Fed. 829, purchased bonds must, for many purposes, and in this case for the purpose of the sinking-fund clause, be considered as still unpaid, so far as the rights of the outstanding bondholders are concerned.

As the only question lawfully presented to the court below was the right of the plaintiff to make the tender and demand as stated, we think that judgment was properly rendered against it; for, if the agreement had been kept by it, at least 479 bonds would be outstanding to-day, of which only a limited number, to be determined by lot, could be redeemed each year. The outstanding bondholders have a right to receive their debt only as provided by the contract. That right is as sacred as to receive it at all. The obligation of the debtor is to pay the principal when it becomes due, and he has no right to compel the creditor to accept payment until it becomes due. At the time the tender was made, many payments and redemptions by lot should have been made, and, treating them as made, all the bonds left would be outstanding. Each of the present bondholders, therefore, has the right to have all subsequent drawings made upon that basis, instead of the basis contended for by the appellant, upon the ground that it had seen fit by private contract to pay and discharge a large number of the bonds, not under the sinking-fund clause, but by arrangements made otherwise than in accordance with the mortgage. The plaintiff cannot proceed upon the theory that it is indebted to the sinking fund to an amount exceeding the aggregate of the outstanding bonds, and that hence it has the right to pay up the sinking fund, and thereby discharge all of said bonds. We are not called upon to decide what the plaintiff might have required if it had asked for it, but simply to decide whether it was right in requiring what it did. That question we decide against it, and this leaves nothing further to be considered. The judgment of the general term should be affirmed, with costs. All concur, except PARKER, C. J., and GRAY, J., not sitting. Judgment affirmed.

(156 N. Y. 570)

PEOPLE ex rel. CITY OF BUFFALO v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Oct. 4, 1898.)

REPEAL OF STATUTE—HIGHWAYS OVER RAILROAD TRACKS—ESTOPPEL—MANDAMUS.

1. Under Laws 1892, c. 677, § 31 (Statutory Construction Act), providing that the repeal of a statute shall not affect or impair rights accrued or acts done before it takes effect, Laws 1897, c. 754, entitled "An act to amend railroad law and the act amendatory thereof relative to grade crossings," and providing proceedings for carrying highways across railroad tracks, does not, by implication, repeal Laws 1853, c. 62, authorizing highways to be carried across the tracks of any railroad, so as to affect proceedings to compel a railroad company to carry a highway across its tracks instituted after passage of the act of 1897, but before it went into effect.

2. Laws 1892, c. 677 (Statutory Construction Act), prescribing rules for the construction of statutes, and providing that they shall apply to every statute except those of which the object or context indicates that a different meaning was intended, applies to all future legislation.

3. Laws 1853, c. 62, authorizing highways to be carried across railroad tracks, does not authorize a street to be constructed across tracks some of which are used only for storage, yard, and depot purposes.

4. On appeal from a peremptory mandamus granted on petition and opposing affidavits, the showing made by defendant in the opposing affidavits will be presumed to be true.

5. A railroad company is not estopped from denying a municipality's right to carry a street across its tracks by paying taxes assessed against it as adjoining owner for the paving of such street.

Appeal from supreme court, appellate division, Fourth department.

Mandamus by the people, on the relation of the city of Buffalo, against the New York Central & Hudson River Railroad Company, to require defendant to cause Ideal street, in the city of Buffalo, to be taken across certain of its tracks. An order awarding a peremptory writ was affirmed by the appellate division (50 N. Y. Supp. 1132), and defendant appeals. Reversed.

Daniel H. McMillan, for appellant. W. H. Cuddeback, for respondent.

BARTLETT, J. The city of Buffalo, proceeding under chapter 62 of the Laws of 1853, entitled "An act to regulate the construction of roads and streets across railroad tracks," procured an order for a writ of peremptory mandamus from the special term, directing the defendant company to cause Ideal street, in that city, to be taken across its tracks, so as to be convenient for public travel, and cause all necessary embankments, excavations, and other work to be done on its road for that purpose. The appellate division unanimously affirmed this order, and an appeal was taken to this court.

The defendant railroad company interposes a preliminary objection to the hearing of the appeal upon the merits, which will be first considered. It is insisted that chapter 62 of the Laws of 1853, under which this pro-

ceeding was instituted, was repealed by implication by chapter 754 of the Laws of 1897, entitled "An act to amend railroad law, and the act amendatory thereof, relative to grade crossings," as the latter act contains no saving clause. The act of 1897 was passed May 22, 1897, and went into effect July 1st of that year. This proceeding was argued at special term after the law of 1897 was passed, but was not decided until September 22, 1897, two months after it went into effect.

It is argued on behalf of the city of Buffalo that the provisions of the statutory construction act (chapter 677 of the Laws of 1892) prevent the repeal of the act of 1853, and that the court below had jurisdiction to issue the writ under review. We are of opinion that this position is well taken. The statutory construction act is entitled "An act relating to the construction of statutes constituting chapter one of the general laws." Section 1 reads: "This chapter shall be known as the statutory construction law, and is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter." We thus have in this chapter general rules laid down by the legislature for the construction of every statute, subject to certain clearly-defined exceptions. Turning to section 31 of the act, we find therein, among other things, this provision: "The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected; and all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed." These provisions are general in character, and apply to all future legislation. The contention that they apply only to the acts reported by the statutory revision commission cannot be maintained, as the legislative intention to the contrary is clear. There is nothing in *People v. Campbell*, 152 N. Y. 51, 46 N. E. 176, that restricts in any way the general application of the statutory construction act. In that case we were considering certain work of the statutory revision commission, and the effect of the statutory construction act thereon, and what was there written was limited to the facts presented. It follows that the act of 1853 was not repealed by the act of 1897, so far as this proceeding is concerned, and the merits of the controversy are open to review on this appeal.

It is necessary to clearly apprehend the undisputed facts presented by the record. The

relator proceeded to argument upon its petition and the opposing affidavits of defendant, and demanded that a peremptory writ of mandamus issue. The right to the writ under these circumstances must be determined upon the assumption that the averments in the opposing affidavits are true. The proceeding in this form is in the nature of a demurrer to the facts set up by the defendant. *People v. Board of Apportionment*, 64 N. Y. 627; *People v. Brush*, 146 N. Y. 60, 40 N. E. 502; *Haebler v. Produce Exchange*, 149 N. Y. 414, 44 N. E. 87; *People v. City of Brooklyn*, 149 N. Y. 215, 43 N. E. 554.

The defendant's contention is that the undisputed facts show that its property across which it is proposed to carry Ideal street is held and used for storage, yard, and depot purposes, and, being thus held and used, it cannot be taken under this proceeding. The opposing papers of the defendant disclose the following facts: In the handling and care of the freight traffic of the defendant, the New York Central & Hudson River Railroad Company, it maintains a freight yard lying northerly of Broadway, and extending easterly into the township of Cheektowaga, containing about 250 acres, and also a freight yard westerly of Bailey avenue, northerly of William street, and southerly of Curtis and Amity streets, containing about 200 acres. In these yards nearly all of the freight business in the city of Buffalo of the Central Hudson and West Shore Railroad Companies is transacted. The yards are continuous from William street easterly to the city line, and embrace the property sought to be crossed by Ideal street. All of this property from William street east to the city line, except the four main tracks of the defendant, is used exclusively for freight yard terminals and depot purposes. At the point where it is proposed to carry Ideal street across there are eight tracks extending from one yard to the other, a distance of about 2,400 feet. The four northerly tracks are used exclusively, in connection with the two yards and as to a portion thereof, for the storing of cars, for the making up of trains, and for the transfer of trains from one yard to the other, and from the West Shore to the Central and from the Central to the West Shore. The four northerly tracks are continually in use night and day during the busy seasons of shipment for the storing, handling, switching, transferring, and assorting the freight of the two yards, and these tracks constitute the throat of the two yards, connecting the one with the other, and are simply a narrowing up of the two yards, and a part thereof. Any congestion of the freight business along these four tracks would tend in a great measure to cripple and paralyze the utility of the freight yards, as they are the only means of transferring, handling, and exchanging the freight and traffic back and forth. The remaining four southerly tracks are main-line tracks,—two used for passenger service, and two for

freight purposes,—and over them passes the entire public traffic of the defendant. It further appears that when a resolution was pending before the common council of relator, requiring defendant to carry the street in question across its property, the expediency of so doing was referred to the grade crossing commissioners of the city of Buffalo, who reported that there appeared to be no real need of it, and it would be one of the most dangerous grade crossings in the city. It is also admitted that, at present, Broadway and Bailey avenue afford sufficient means for crossing the tracks of defendant near the point in question, and that the only proper method of conducting Ideal street across the property of the defendant would be by an undergrade crossing. The defendant has hitherto entered into contracts for the abatement of grade crossings in the city of Buffalo, at an expense of more than \$2,000,000.

We have thus set forth these undisputed facts at length, as they are controlling in leading us to the conclusion we have reached,—that the property across which it is proposed to carry Ideal street is held and used for storage, yard, and depot purposes, and cannot be taken under the act of 1853. The city of Buffalo is before this court, admitting that all of this property from William street east to the city line, except the four main tracks of the defendant, is used exclusively for freight yard terminals and depot purposes. This being so, it follows, as matter of law, that this proceeding cannot be maintained. The act of 1853 (chapter 62) has been repeatedly construed by this court, and its precise meaning is no longer an open question. It permits the laying out of a highway across the tracks of any railroad without compensation to the corporation owning such railroad. In *Railroad Co. v. Brownell*, 24 N. Y. 345, this court held the act of 1853 constitutional, and that it did not violate the provision against taking private property for public use, or impairing the obligation of contracts. The mere crossing of the track by a highway is not regarded as interfering with the vested property rights of the railroad company. In the case cited, the highway was laid out, not only across the track, but upon grounds which the company had acquired as sites for their station house, engine house, turntables, etc., and no provision was made for compensation. It was held that the act of 1853 did not, in language or by implication, extend to the appropriation of such land to the purposes of a highway, and it did not fall within the policy which contemplated that the track of a railroad might be so used; that to run a highway through such grounds was to appropriate the portion covered by it exclusively for a public use. It was also pointed out that such land was improved land, through which a highway cannot be laid out without an obligation to make compensation. 1 Rev. St. p. 514, §§ 58, 64. The act of 1853 was again before this court

in *Boston & A. R. Co. v. Village of Greenbush*, 52 N. Y. 510. Church, C. J., in delivering the opinion, said: "The only debatable question is whether the track proposed to be crossed is such a track as is authorized by the act to be crossed without compensation. The 'track' specified in the act may include one or more single tracks, but should, I think, be limited to the track used for public traffic, whether composed of one or more, including turnouts and switches, or, in other words, what may fairly be regarded as the roadway. Grounds upon which tracks are laid for storing cars, or exclusively for making up trains, are not embraced in the term 'track.'" The learned judge then pointed out that, in the case before him, the finding of fact did not relieve the premises from the operation of the statute. In *re Boston, H. T. & W. Ry. Co.*, 79 N. Y. 64, this court, in construing the provisions of the railroad act of 1850 (chapter 140, § 28, subd. 6), providing for one railroad crossing the tracks of another, approved the doctrine we are now considering, and held that it was not intended by the general language of the act to authorize the invasion of lands or buildings already appropriated to railroad uses which, in their nature, require an exclusive occupation, or which would be materially impaired by subjecting the land to the new use. It was there pointed out that such lands could not, according to the principles of our previous decisions, be condemned for a new and inconsistent public use, at least without express legislative authority for thus changing the use. In *re Boston & A. R. Co.*, 53 N. Y. 574; In *re City of Buffalo*, 64 N. Y. 547, 68 N. Y. 171. In *Railroad Co. v. Williams*, 91 N. Y. 552, this court again considered the act of 1853. The plaintiff's road extends from Brooklyn to a seaside resort at Coney Island, and it was proposed to run a highway through its terminal grounds between the depot building and the beach, about 700 feet in length, on which were constructed railroad tracks extending to high-water mark, plank walks for passengers, and various structures for their accommodation, convenience, and pleasure. In holding that the laying out of the highway was illegal, the doctrine was again announced that lands once taken for public use, pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated, by proceedings in invitum, to a different public use.

It is urged by the respondent that all the facts which are warranted by the evidence, and are necessary to support the order, are presumed to have been found by the trial judge, and, as the appellate division have unanimously affirmed on questions of law, no question of fact is presented in this court. We are of opinion that this rule has no application where, under the demand for the peremptory writ of mandamus, all the allegations contained in the defendant's affida-

vits stand admitted. It is upon the facts as alleged by the defendant that this case must be decided. It is argued by respondent that if the four northern tracks are to be treated as the narrowing up of the two yards, constituting the throat thereof, and a part of the same, that the result of a decision in favor of the defendant would be to enable a railroad company, by indefinitely extending its tracks between distant points, to improperly avail itself of the rule sought to be now applied. The answer is that each case must be decided upon its particular facts. In the case at bar it seems to us very clear that the two freight yards in question, containing 450 acres, are necessarily operated as one yard under the facts disclosed, and that the four northern tracks are neither in fact nor in law a part of the roadway. They are not "turn-outs" or "switches," as those terms are understood by railroad men, and their precise use is made apparent by the facts to which we have already adverted.

The further point is made by the city that the defendant is estopped from questioning relator's rights in the premises by reason of the fact that it has on two occasions paid assessments imposed upon its property for the paving of Ideal street. This was a mere local assessment against adjoining landowners, including the defendant, and necessarily dealt with the street as it then existed. The payment of these assessments did not estop the defendant from invoking any legal remedy open to it when proceedings were subsequently instituted, under the act of 1853, to conduct the street across its property. The order appealed from should be reversed, with costs. All concur. Order reversed.

(156 N. Y. 651)

BINGHAMTON OPERA-HOUSE CO. v. CITY OF BINGHAMTON.

(Court of Appeals of New York. Oct. 4, 1898.)
FINDINGS OF FACT—EJECTMENT—RIGHT TO MAINTAIN ACTION—CORRECTION OF FINDINGS.

1. The allegation of facts in the complaint and their admission in the answer justify the court in finding such facts.

2. Plaintiff having received his award, and placed defendant in possession of property which it had condemned for street purposes, cannot maintain an action in ejectment therefor.

3. Where findings are improperly contained in the case made for the general term and the court of appeals, a motion for their correction should be made in the supreme court.

Appeal from supreme court, general term, Fourth department.

Action by Binghamton Opera-House Company against city of Binghamton. From a judgment of the general term (34 N. Y. Supp. 421) affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. D. Wales, for appellant. Alex. Cumming, for respondent.

PER CURIAM. The plaintiff's action was in ejectment to recover the possession of cer-

tain premises described in the complaint, which the defendant had caused to be taken for street purposes under condemnation proceedings. Those proceedings are attacked as having been illegally conducted, and the claim is that the city gained no rights thereby to the lands affected. The difficulty in the way of maintaining this action consists in certain facts which were found by the trial court. It appears that, after the award had been made for the property in the condemnation proceedings, the award was claimed by the plaintiff, and that its right thereto was disputed by other parties, whereupon the city, pursuant to a resolution of the common council, deposited the amount in the custody of the supreme court to abide the disposition of the adverse claims thereto, as authorized by section 10 of title 7 of its charter (Laws 1888, c. 214). See *Patterson v. City of Binghamton*, 154 N. Y. 391, 48 N. E. 739. It cannot be said that the finding to that effect was not justified, in view of the allegation of the complaint of the facts and the admission in the answer. A further finding is to the effect that soon after the deposit of the amount of the award "the defendant lawfully, and with the assent of the plaintiff, entered upon the land described in the complaint, pursuant to the resolution of the common council declaring their determination to make such improvement and street, and caused the said street to be opened, worked, and used, which was the only possession of the said premises described in the complaint by the defendant." There was enough in the evidence to support this finding. Such was the opinion of the general term, and it is also ours. The plaintiff deeded to the city its own property, which had been taken under the condemnation proceedings, and which next adjoined the property in question, and received the amount awarded therefor, thereby placing the defendant in possession for the purpose of opening the street. They also removed the building from the property in question, electing not to accept the appraised value thereof. These facts referred to appear in the decision of the trial judge as having been "found in pursuance of the stipulation of the respective attorneys in this action upon the agreed facts in the findings of facts." In view of the facts thus established, the plaintiff could not claim to be entitled to maintain an action of ejectment. The plaintiff complains of these findings being in the case, as he does in regard to others, and insists that they should be stricken therefrom, under the terms of a certain stipulation. We can only deal with the case as presented. The case was made by the plaintiff for the general term and for this court, and, if findings are improperly or incorrectly contained therein, it should have moved in the supreme court for the correction of the case. That is something which this court cannot do. If, however, as it may be inferred from the briefs or the argument, the object of the complaint is in this way to

insure the plaintiff's right to the disputed award, a ready way for its accomplishment was provided by the defendant's charter, as it was pointed out in our opinion in the Patterson Case, *supra*. We see no reason for reversing the judgment appealed from, and it must therefore be affirmed, with costs. All concur, except MARTIN, J., not sitting. Judgment affirmed.

(156 N. Y. 491)

COX et al. v. STOKES et al.

(Court of Appeals of New York. Oct. 4, 1898.)

APPEAL—REVIEW—INSOLVENT CORPORATIONS—REORGANIZATION—CONTRACTS—CONSIDERATION—RESCISSION—MODIFICATION—AGENCY—RATIFICATION—LACHES.

1. Where respondents do not appeal, they are bound by the findings of fact.

2. Appellants are bound by all findings to which they did not except.

3. An affirmation by the general term of a question of fact found by the special term on conflicting evidence is conclusive on the court of appeals.

4. The holder of receiver's certificates of an insolvent corporation, the validity of which was being contested in an action by the bondholders of the company, agreed, in consideration that the certificates should be recognized as valid and a decree entered to that effect, to advance money for the purpose of reorganizing the company, taking in return therefor, and for his certificates, first mortgage bonds, the bondholders to receive second mortgage bonds. *Held*, that the performance of the agreement by the bondholders by procuring the decree constituted a valid consideration for the agreement.

5. The bondholders procured the decree declaring the certificates valid. Afterwards, through the act of third persons, the value of the company's property was materially decreased, whereupon the certificate holder told his attorney, in the presence of a member of a reorganization committee appointed by the bondholders, that he could not carry out his agreement, but he did not offer to have the decree in his favor set aside. *Held*, that there had been no valid rescission of the contract.

6. A telegraph company which held stock and securities of several branch lines, so that it controlled them, became insolvent, and a reorganization agreement was made between defendant, who held receiver's certificates of the company, and plaintiffs, bondholders of the company, who appointed a committee to act for them in carrying it into effect. The agreement provided that defendant was to advance money to effect the reorganization, and was to receive therefor, and for his certificates, first mortgage bonds to a certain amount on the property of the company, including the stock and securities of the branch lines. Plaintiffs were to receive second mortgage bonds on the same property. *Held*, that the committee had no authority to modify the agreement, by increasing the amount of the first mortgage bonds, and omitting the stock and securities of the branch lines from the property covered by the mortgages, and, instead, turning over such securities to defendant as additional securities for his advances.

7. Defendant, who held receiver's certificates of an insolvent corporation, and plaintiffs, bondholders of the company, together with other bondholders, entered into a reorganization agreement which the committee appointed by the bondholders to carry it into effect unlawfully modified in favor of defendant and to the prejudice of the bondholders. After the

purchase of the property at foreclosure sale by defendant for the new company under the modified agreement, one of the plaintiffs requested him to get back from the receiver a sum which a third person had advanced to meet receiver's expenses. This sum had been decreed a first lien on the proceeds of the sale, which were sufficient to pay it. Defendant, who under the agreement was to advance the necessary money for the reorganization, thereupon furnished the money to repay such loan, although the receiver was liable for it. Said plaintiff received no benefit from the transaction, and made no promises in consideration of it. *Held*, that his act was not a ratification of the modified agreement.

8. Within 30 days after the sale of the property under foreclosure, and the purchase by defendant in accordance with the modified agreement, an action, which is still pending, was brought by certain bondholders against defendant, attacking the modified agreement, and praying for a performance of the original agreement. Several motions, one of which is still pending, were made to set aside the sale. Notwithstanding the above proceedings, defendant continued, as these plaintiffs were aware, to advance money and carry out the modified agreement. Afterwards, nearly two years after the sale, but only two weeks after the filing of the referee's report of the sale, the present suit was brought to enforce the original agreement. *Held*, that there was no such laches on the part of plaintiffs as would defeat their action.

Appeal from supreme court, general term, First department.

Action by Townsend Cox and others against Edward S. Stokes and others to enforce an agreement for the reorganization of the Bankers' & Merchants' Telegraph Company. Judgment for defendants at special term was affirmed at general term (29 N. Y. Supp. 141), and plaintiffs appeal. Reversed.

This is a representative action brought in behalf of the plaintiffs and all others similarly situated. Upon the trial it appeared that in the spring of 1885 the Bankers' & Merchants' Telegraph Company owned a large number of poles, and many miles of wire thereon; that it had also strung many miles of wire upon poles of the American Rapid Telegraph Company, under a lease, and was in possession and use of the same; that, through the ownership of a controlling interest in the "stocks" of a large number of small telegraph companies, it controlled their lines; and that all these wires, comprising in the aggregate over 45,000 miles, were blended into a single harmonious and extensive system of telegraph communication throughout many different states. Its property and franchises, however, were subject to two mortgages. The first, known as the "divisional mortgage," was executed July 2, 1883, to the Farmers' Loan & Trust Company, as trustee, to secure 300 bonds, of \$1,000 each, all of the principal of which was unpaid, and there was a default in the payment of interest, with a suit pending to foreclose. The second mortgage, known as the "general mortgage," was given November 24, 1883, to the same trustee, to secure 10,000 bonds of \$1,000 each, of which there had been issued over \$7,000,000 in amount

prior to April, 1885. This mortgage was a first lien upon the shares of stock issued by the subsidiary lines, and owned by the parent company. The plaintiffs, since July, 1884, have owned and represented general mortgage bonds to the amount of \$731,000. The company had been embarrassed since July, 1884, by judgments obtained against it and levies made upon its property. In September of that year, an action was begun by one Day, a judgment creditor, with execution returned unsatisfied, to sequester its property; and on the 24th of that month receivers were appointed therein, but without notice to the trustee for the bondholders. On January 6, 1885, at the suit of one De Haven, the same persons were appointed receivers, in an action brought solely for that purpose, of all the property and assets of the company, and authorized to issue receiver's certificates to an amount not exceeding \$1,500,000, which were declared a lien upon all the property, real and personal, prior and paramount to the general mortgage, but subject to the divisional mortgage. No certificates were issued under this judgment, but under separate orders, obtained ex parte, certificates were issued to the amount of \$602,802.08, some for money borrowed in the Day suit, some to pay an old debt of the company to one Sully, and the others for various purposes, including the payment of money borrowed privately by the receivers without the authority of the court. Certificates amounting to \$130,000 were issued in the Day suit, which were claimed to constitute a lien upon certain lines in Ohio, Pennsylvania, and Indiana. The defendant Stokes acquired those certificates and those issued to Mr. Sully and others, to the amount in all of about \$600,000. The issue of these certificates had been questioned in many ways, and an appeal was pending from a determination sustaining their validity.

On the 22d of April, 1885, the Farmers' Loan & Trust Company, at the request of many bondholders, including the plaintiffs, who alone deposited \$1,500 to secure the trustees' costs and expenses, commenced an action to foreclose the general mortgage; and, in May following, John G. Farnsworth was appointed receiver therein, and directed to carry on the business of the company. This receivership was extended over all previous receiverships, without prejudice to the orders and proceedings in the Day and De Haven suits; and Gen. Farnsworth qualified as receiver in the three actions. In June, 1885, judgment of foreclosure and sale was entered in the action last named. At about this time it was discovered that all of the wires strung on poles of the American Rapid Telegraph Company were claimed by it as its absolute property, and that there were liens on the subsidiary lines in several states, including a judgment in the state of Illinois, for about \$85,000. At about this time also a mortgage trustee commenced an action against the

American Rapid Telegraph Company to foreclose a mortgage for \$3,000,000 on its property, claiming that the title to the strung wires and to certain Western lines was in that company, and not in the Bankers' & Merchants'. In this state of confusion and danger, negotiations were commenced by the holders of the general mortgage bonds to protect their interests, the plaintiffs and their counsel taking the leading part. Mr. Stokes, who held receivers' certificates to a large amount and \$500,000 in general mortgage bonds, was frequently interviewed by one of the plaintiffs with reference to such action as might be advisable to protect the interests of all concerned. On the 25th of May, 1885, the negotiations culminated in a contract known as the "reorganization agreement," which was signed by the plaintiffs and many other bondholders. This agreement, which was drawn at the express request of Mr. Stokes, recognized the receivers' certificates as valid, and provided that the holders thereof should advance the money needed for reorganization, and take in return therefor and for their certificates first mortgage bonds of a new company to be formed, dollar for dollar, and that the general mortgage bondholders should receive second mortgage bonds of said company at the rate of 50 per cent. on the principal of their old bonds. Both these issues of bonds were to be secured by mortgages upon all the property of the old company, including the "stocks" held by it in the subsidiary companies. A committee of four was appointed to carry out the agreement, and they were to purchase the property of the company under decree in foreclosure, cause a new company to be incorporated with a capital stock of \$3,000,000, and convey all the property to it in consideration of a first mortgage upon the same property, executed by the successor company to secure an issue of not more than \$1,200,000 of bonds, and a second mortgage on all the property to secure an issue of not more than \$3,600,000 of bonds. The committee was authorized to dispose of the first mortgage bonds, by exchanging them for the purpose of discharging, dollar for dollar, the outstanding receivers' certificates, to raise money to carry out the plan of reorganization, and, if deemed expedient, to discharge the prior divisional mortgage. They were directed to deliver to the general mortgage bondholders, on the surrender of their bonds, one new second of \$500 for an old general mortgage bond of \$1,000. They were authorized to borrow money to carry out the plan, and to secure the loan by the delivery of first mortgage bonds and such a proportion of the capital stock of the successor company as they should deem meet. The stock of the new company was to be exchanged for the stock of the old company at the rate of one dollar of the new for four dollars of the old. Any of the first and second mortgage bonds, or shares of capital stock not thus used, the committee were au-

thorized to sell or dispose of in such manner as they saw fit, and to turn the proceeds, after deducting expenses, over to the successor company for its use and benefit. The committee were constituted attorneys to execute, on behalf of the bondholders, any agreement to enable them to carry out their said trust, and were clothed with "whatever power it may be suitable for them to exercise in order to enable them to legally and efficiently execute their trust," and with full discretion as to all matters not specifically covered by the agreement. Mr. Stokes did not sign this instrument, but on the 3d of June, 1885, he promised the plaintiffs and other bondholders, as well as the committee (one of whom was his own nominee, and another the nominee of Mr. Sully), to carry it out, and to furnish and advance all the money necessary therefor, and accept in consideration thereof first mortgage bonds of the successor company for his receivers' certificates, dollar for dollar, and for the cash furnished, and \$2,250,000 of the stock of the new company. This promise was made by Stokes on the condition that a majority of the general mortgage bondholders should execute the agreement, recognize the validity and prior lien of the receivers' certificates, and procure the same to be made valid in the decree of foreclosure. The attorneys for the plaintiff in the foreclosure suit refused to amend the decree in that respect until requested to do so on behalf of a majority of the bondholders. Prior to June 9, 1885, a majority of the general mortgage bondholders became parties to the reorganization agreement; and at about that date the committee, then representing a majority of the general mortgage bonds, requested the attorneys for the plaintiff in the foreclosure action to so amend the decree as to validate the receivers' certificates; and on the 12th of June the decree was amended by consent accordingly. Thereupon said attorneys withdrew the appeal taken from the decree in the De Haven suit at the request of the reorganization committee, the plaintiffs, and the general bondholders, and the litigation to test the validity of the receivers' certificates was wholly discontinued and terminated. Pursuant to this arrangement, Stokes agreed to buy the property at the foreclosure sale for the reorganization committee, and in accordance with the plan agreed upon, and to furnish all the cash needed for the purpose, and to receive first mortgage bonds of the new company therefor. At all times prior to the sale in foreclosure, it was understood by all parties in interest that Mr. Stokes would purchase the mortgaged property for and on behalf of the reorganization committee, and carry out the reorganization agreement. He orally promised the committee to carry out that agreement, and about the 20th of June he promised to execute an instrument in writing embodying his prior oral agreement; but he failed to do so, although

duly requested by the counsel for the reorganization committee on July 27, 1885.

On the 10th of July, 1885, the telegraph wires of the Bankers' & Merchants' Telegraph Company, throughout many states, were by force cut and disconnected by a rival, known as the Western Union Telegraph Company. In addition to this misfortune, claims were made against it, which, if successful, would have rendered its property of no value. After the wires were cut, Stokes stated to his own counsel, in the presence of the chairman of the reorganization committee, in a very informal manner, that he could not carry out his oral agreement. There was no other effort at rescission, and the committee took no action. Subsequently, a modification was arranged between Stokes and the committee, without the knowledge or consent of the bondholders. Those most interested knew nothing about it until after the sale, when the opportunity to bid had passed by. At the foreclosure sale, which took place July 31, 1885, Mr. Stokes bid in the property for \$500,000, and at once assigned his bid to the United Lines Telegraph Company, with the consent of the reorganization committee. In part payment of his bid, he used \$317,000 of his receivers' certificates. The court found that \$500,000 was an adequate consideration for the property, which Stokes claimed to purchase on his own account; but this claim was at once disputed. His real purpose was to turn over the property to the new company upon the request of the reorganization committee as soon as the details of the modified agreement could be settled. The dismembered condition of the property and the numerous breaks in the lines had much reduced its selling value. Still the court found that the first mortgage bonds of the new company, amounting to \$1,200,000, were worth par. The modified agreement, arranged sometime before, but not formally entered into until August 7th, between the reorganization committee, the United Lines Telegraph Company, and Mr. Stokes, while not signed by said company or by Stokes, was carried out by him, and, as the trial judge found, it "was made in good faith in law." The only actual signers were the members of the committee. After referring to the plan of reorganization, the sale of July 31st, and the purchase by Stokes, and reciting that he had agreed with the committee that if he should purchase the property he would turn it over to the United Lines Telegraph Company, which was the name of the new company organized to take the property, it provided that the referee at the foreclosure sale should convey the property to the United Lines Company, which, in consideration thereof, was to deliver to Stokes \$900,000 in first mortgage bonds to be issued by that company, and \$2,250,000 of its stock. This was an increase of about \$200,000 in the amount of bonds. He was to deliver to the reorganization committee the second mortgage bonds mentioned in the reorganization

agreement, and \$750,000 in stock to be distributed by the committee according to that agreement; and it was also agreed that the United Lines Telegraph Company might "dispose of any stock or bonds of any other company purchased by" Stokes at the sale "upon such terms as it may deem proper, using the proceeds for the benefit of itself." This withdrew the stocks which controlled the subsidiary lines from the security to which the general mortgage bondholders were entitled under the reorganization agreement. These stocks were intended to be used, and were in fact used, to give Mr. Stokes additional collateral for advances made by him. The bondholders were not informed of this action, which seems to have been intentionally kept secret for the time being. Written notice was promptly given to each member of the reorganization committee that the agreement of August 7, 1885, was beyond the powers of the committee, and in violation of the terms of the reorganization agreement; and the fact of such notice, which was in the form of advice through a letter from their own counsel, was at once communicated by the members of the committee to the counsel for Mr. Stokes. After the sale, the committee continued to publish in the newspapers an advertisement stating that the bondholders might continue to deposit their bonds under the reorganization agreement with the same effect as theretofore. The counsel for the reorganization committee opposed the execution of the modified agreement by the committee, and protested against it, but without avail. On the 28th of August, 1885, the Roebling Sons Company, who had signed the reorganization agreement, brought a suit, which was still pending and undetermined when this action was commenced, against the present defendants, to set aside the agreement of August 7th as fraudulent and void, and praying that they be compelled to perform the original agreement. The referee's deed in foreclosure was delivered to the United Lines Telegraph Company, at the request of Mr. Stokes, on the 14th of November, 1885; but it was not until April 4, 1887, that the referee's report of sale was actually filed, and in the meantime several motions had been made to set aside the sale. This action was commenced on the 15th of April, 1887, on the theory that the modification of the original agreement with the reorganization committee was void as against the power of the committee; that Stokes should be deemed to have bought in the property pursuant to the original reorganization agreement; that he should account to the bondholders for his transactions with reference to the same since that time; and that the securities representing the control of the subsidiary companies, which formed the connecting links in the system, should be brought under the lien of the mortgages of the new company in accordance with the first agreement.

Mr. Stokes has complied with the provi-

sions of the modified agreement, and has made advances to preserve the property exceeding the par value of the additional bonds and stock of the United Lines Telegraph Company allotted to him. The first and second mortgages executed by that company through himself, as its president, excepted from the lien thereof the stocks and securities of the subsidiary lines owned by the Bankers' & Merchants' Telegraph Company, as permitted by the modified, but prohibited by the original reorganization agreement. These excepted securities were not worth, when sold separately, as much as the difference in the value between the bonds and stocks issued to Stokes and the aggregate of his receivers' certificates and advances. They were, however, as portions of a complete system of telegraphic communication, worth more when the agreement of August 7th was entered into, and said mortgages were executed by the United Lines Telegraph Company. The latter was without funds, and was operating its system at the loss of \$10,000 a month. It had no available assets to meet the deficit other than said stocks and securities. Both Stokes and the United Lines Telegraph Company, since the deed of August 10, 1885, have so dealt with the property as to materially increase and appreciate its value. About February 13, 1886, bonds of the United Lines Telegraph Company, amounting at par to \$900,000, were delivered to Stokes, and are now held and owned by him; but neither he nor said company have performed the reorganization agreement, and no second mortgage bonds, as therein provided for, have been issued or delivered to the general mortgage bondholders, who thus far have received nothing for their bonds, and their rights seem to have been substantially ignored by the committee.

The trial court found "that, within about three days after the modified agreement of August 7th, the plaintiff Townsend Cox expressed to the defendant Stokes the desire to get back \$2,000, which he (Cox) had advanced to receiver Farnsworth; and that thereupon defendant Stokes sent \$2,000 to receiver Farnsworth, who therewith repaid the said advance of \$2,000 to the plaintiff Townsend Cox; and that thereby the plaintiffs Townsend Cox and Townsend Cox, Jr., actively affirmed each and all of the acts of the reorganization committee in the premises." The trial court also found "that the plaintiff Frederick P. Olcott held four hundred and eighty of the bonds originally held as collateral security by the plaintiffs Townsend Cox and Townsend Cox, Jr., as a substituted pledge and as collateral to \$80,000 of notes which had not actually matured on the 7th of August, 1885, and said Olcott failed to show when he first learned of the settlement of the 7th of August; but it is admitted that he did learn the particulars of said settlement, and there is no evidence tending to show that he, within a reasonable time,

brought any action to set aside or vary the same, although he knew that large sums of money were being advanced by said Stokes and contracts made by reason of said settlement." Upon these and many other facts found by the court at special term, the complaint was dismissed, on the ground of ratification and laches, but without costs. The judgment was affirmed by the general term, upon the ground that the notification by Stokes to the committee that, by reason of the changed condition of the property, he would not carry into effect his oral agreement, was notice to the bondholders, and that they were bound to accept either their pro rata share of the purchase price arising upon the sale in foreclosure, which was more than absorbed by the receivers' certificates, or the terms of the new reorganization agreement. From the judgment of the general term the plaintiffs appeal to this court.

Joseph H. Choate, for appellants. Robert G. Ingersoll and William W. Cook, for respondents.

VANN, J. (after stating the facts). As the respondents do not appeal, they are bound by the findings of fact made by the trial court; while the appellants are bound by all to which they did not except, and, since the affirmance by the general term, by all even of those excepted to that find any reasonable support in the evidence. *White v. Benjamin*, 150 N. Y. 258, 44 N. E. 956. Hence, in reviewing this case, we must start with the assumption that Mr. Stokes promised to perform the reorganization agreement, and was bound thereby; for the evidence is ample to sustain the finding to that effect, and the respondents do not question it by appealing. That promise was founded on the consideration that the receivers' certificates held by him, as to which serious questions existed that were pending in the courts, should be expressly rendered valid by an amendment of the decree in foreclosure. That amendment was promptly made by the consent of the plaintiffs and other bondholders through the reorganization committee; and, through the same agency, the litigation pending at the time to test the validity of the certificates was discontinued and ended. "When a defendant has actually received the consideration of an agreement by a voluntary performance of an act by the other party, upon his proposition or suggestion, such performance constitutes a consideration which will uphold the defendant's promise." *Marie v. Garrison*, 83 N. Y. 14, 26. Moreover, the settlement of a doubtful or disputed claim is a good consideration. *White v. Hoyt*, 73 N. Y. 505. At this point of time, therefore, we have a binding contract, executory on the part of Mr. Stokes, and executed on the part of the committee. It was found and is conceded that he has not performed that contract, and the only question presented, aside

from that relating to the form or extent of the relief, is whether he has in any way been lawfully relieved of his obligation to perform, or from the consequences which would ordinarily follow from his breach of the contract. He agreed to receive, in round numbers, \$700,000 in the first mortgage bonds of the new company, whereas he actually received \$900,000; and he agreed that the second mortgage bonds of the new company should cover all the property on which the mortgage foreclosed was a lien, when in fact the stocks and securities, through which the Bankers' & Merchants' Telegraph Company controlled the connecting links in their system, were omitted from that mortgage, and those stocks and securities were delivered to him as collateral to certain loans and advances that he made. He also agreed to buy in the property at the foreclosure sale for the benefit of the reorganization committee, and in accordance with the plan agreed upon, and for this reason there was no competition in bidding; but, when the auctioneer struck the property off to him, one of the attorneys for the plaintiff in the foreclosure suit said, "For the reorganization committee?" and Mr. Stokes replied, "No, for myself."

Several theories are relied upon to justify the action and nonaction of Mr. Stokes, upon none of which, however, did the courts below unite in pronouncing judgment. Those theories are (1) that there was a rescission of the reorganization agreement; (2) that there was a lawful modification of that agreement; (3) that there was a ratification by the plaintiffs; and (4) that there was such laches on their part as to defeat their cause of action. We will now consider these theories of defense in the order named.

1. Rescission. It is not claimed that Mr. Stokes could rescind his contract upon any ground that existed when it was made, such as fraud, inadequacy of consideration, mistake, or illegality. Nor could he rescind for nonperformance by the reorganization committee representing the bondholders, for the contract was at once performed by them, so far as it related to him personally, by the amendment of the decree so as to declare his certificates valid, and the withdrawal of the appeal brought to test their validity. There was no failure of consideration, and no reservation of the right to rescind. The ground upon which it is now claimed that a rescission could have been made is that through the wrongful act of a third party the property had become of less value than it was when the contract was entered into. There was, however, no rescission upon this ground or upon any other. The only evidence of any attempt to rescind is that Mr. Stokes, on the day after the wires were cut, stated to his own attorney, Mr. Lauterbach, in the presence of Mr. Townsend, the chairman of the reorganization committee, that he could not carry out the agreement. Effective rescission requires a lawful right to rescind, due

notice of an intention to rescind, and the restoration of benefits received by the party attempting to rescind, so that the other party may be placed in statu quo. Even if the most complete right of rescission exists, it cannot be exercised without a return or an offer to return such benefits. The only exception emphasizes the rule. *Kley v. Healy*, 127 N. Y. 555, 561, 28 N. E. 593. Mr. Stokes made no attempt or offer to return the substantial benefits that he had received. He did not procure or offer to procure a reamendment of the decree by striking out the clause recognizing the validity of his certificates, or to revive the appeal. Retaining all that he had received, he simply said that he could not perform. A contract cannot be thus put aside, for one party cannot speak for both, or bind and loose both at his discretion. Even upon the assumption that Mr. Stokes had the right to rescind, and that his notice of intention was sufficient, there was no valid rescission on account of his failure to restore the benefits, and to place the other parties in the same condition that they were when the contract was made. It is, however, very doubtful whether Mr. Stokes intended his declaration to his own counsel, in the presence of a member of the reorganization committee, to be a notice of intent to rescind; for, two months after the alleged rescission, and six weeks after the sale in foreclosure, he made an affidavit in a proceeding commenced by one Bill to have the foreclosure decree amended so as to provide that the receivers' certificates should share in the proceeds of the sale in the order of the equities of the claims underlying them, in which he recognized the reorganization agreement as in existence, made no claim that it had been rescinded, and admitted that he was to buy the property for the committee, and turn the same over to them, or to any corporation to be designated by them. A similar affidavit was made by Mr. Townsend in another legal proceeding, and used in court with the knowledge and consent of the counsel for Mr. Stokes. We think that the oral agreement of Mr. Stokes with the committee was never rescinded or abandoned.

2. Modification. The reorganization committee were, in a broad sense, trustees for the benefit of the bondholders, and were bound to protect their interests in every reasonable way. Their powers were defined and limited by the reorganization agreement. While they had a wide discretion as to all matters not specifically provided for, as to those matters they were bound to compliance with the stipulations of the agreement, which they could neither set aside nor disregard. They had no power to change that agreement without the consent of the bondholders, whose representatives they were. They could not recast it nor surrender rights which it expressly secured to the bondholders. In violation of their duty, they entered into a modification of the reorganization agreement, and

thereby materially increased the amount of first mortgage bonds going to Mr. Stokes, and provided that the stocks and securities of the subsidiary companies should be left out of the new mortgages, and that the new corporation should be authorized to "dispose of them upon such terms as it may deem proper, using the proceeds thereof for the benefit of itself." This subjected these securities to the will of Mr. Stokes, who was to be the owner of \$2,250,000 out of the \$3,000,000 of stock of the successor company. When this property of the bondholders was subsequently used to secure money lent by Stokes to the new company, it virtually went to secure him individually for loans made to himself in a corporate capacity. The reorganization agreement was specific in providing that the new mortgages should cover all the property, including the stocks and securities by which the subsidiary lines were controlled. If they had power to modify or dispense with this stipulation, they had power to disregard the agreement in every particular, and to enter into a new and wholly inconsistent contract without the consent of the bondholders for whom they were acting. They could thus set aside and subvert the very instrument which was the source of all their power. It is idle to claim that they could change or dispense with an express stipulation of the agreement, or that in doing so they acted in good faith. Even if they acted in good faith as matter of fact, they are presumed to have acted in bad faith as matter of law. They, in effect, gave away property which belonged to the bondholders, and which was essential to the control of the auxiliary lines, and without which the new company, whose corporate name expressed the idea of uniting all the lines, would become substantially helpless, because its system would be destroyed. Both of the courts below united in holding that the reorganization committee had no power to thus alter the terms of the reorganization agreement, except by the consent of all the bondholders who had become parties thereto, although the special term held that the increase in the amount of first mortgage bonds of the new company which Mr. Stokes was to receive was within the power conferred by the original agreement. This was put upon the ground that they could use first mortgage bonds to raise money in order to carry out the plan, overlooking the fact that Mr. Stokes had already agreed to provide such money as should be needed for that purpose. Of course, if Stokes' advances, together with his receivers' certificates, should amount to \$900,000, he would be entitled to that sum in the first mortgage bonds of the new company; but the committee modified the agreement so as to give him \$900,000 in such bonds, whether his advances and receivers' certificates amounted to that sum or not. This modification, in view of subsequent events, may not be important, but the attempt to give Mr. Stokes the stocks and

securities in question for any purpose whatever was beyond the power of the committee, and a violation of the trust confided to them. If they had power to give him the auxiliary lines, they could have given him the main line. If, by their own action, they could enlarge their powers in one respect, they could do so in all respects. Their action was beyond their authority, and void. They could not add to their authority by changing the agreement, which was the source and limit of their power, any more than one can add to his stature by taking thought.

3. Ratification. The trial court found that on August 10, 1885, one of the plaintiffs ratified the modification agreement, made three days before, by requesting Mr. Stokes "to get back" from the receiver the sum of \$2,000 that he had advanced to meet his expenses, and accepting repayment accordingly. These expenses, according to the decree in foreclosure, were the first lien on the proceeds of the sale, and the amount paid down in cash to the referee on July 31st, the day of sale, was much more than was necessary to cover them. Moreover, Mr. Stokes had agreed to furnish the receiver with all funds necessary to carry out the plan of reorganization, which included the receiver's expenses. There was no express agreement to ratify, for nothing was said upon the subject. There was no consideration for any implied agreement, for Mr. Cox received nothing but what was due him in any event, and the money for the purpose was at the time, or should have been, in the receiver's hands. No one was misled by the transaction, nor was any action based thereon by any one to his prejudice. Mr. Cox did not agree to do anything if the repayment was made. The facts, however, according to the undisputed evidence, were not precisely as found by the court. The sum of \$2,000 was not advanced by either of the plaintiffs, but by Farley Cox, a brother of Townsend Cox, who asked Mr. Stokes to get the receiver to pay back the money to the one who had lent it to him. Mr. Guthrie, the counsel for the reorganization committee, and Mr. Townsend, its chairman, made the same request. The plaintiffs' firm, which had been dissolved at the time, had nothing to do with the loan or the repayment thereof. Neither of the plaintiffs was shown to be directly or indirectly liable for the loan. While Stokes, in fact, furnished the money with which the receiver repaid Mr. Farley Cox, the receiver was lawfully bound to pay the loan from money that he had received for that purpose. If he had used the money for another purpose, he was not discharged from the obligation of payment on that account. Mr. Stokes was not requested by either plaintiff to furnish the money, and it does not appear that he advanced anything which, under the reorganization agreement, he was not obliged to pay. Neither his position nor that of the receiver was in any way altered by anything said or done

by Mr. Cox. No defense founded on waiver or estoppel was pleaded, and, as we think, none was established, for scarcely one of the essential elements was proved. There was no evidence that the plaintiffs intended to forego any advantage or to surrender any right. Nothing was done by them inconsistent with the existence of the rights now sought to be enforced or with their intention to rely upon those rights. There was no consideration, intent, misleading conduct, change of position, or mutual understanding from which a waiver or estoppel could properly be inferred.

4. Laches. Neither of the opinions written in the courts below gave this point any notice. Whether the equitable doctrine of laches, as distinguished from the statute of limitations, now exists in this state, is open to serious doubt. *Galway v. Railway Co.*, 128 N. Y. 132, 143, 28 N. E. 479; *Derby v. Yale*, 13 Hun, 273; *Throop's* note to section 414, Code Civ. Proc.; *Wood, Lm.* 62; 2 *Perry, Trusts*, § 896. But, whatever the law upon the subject may be, there is no reasonable foundation for the claim that the plaintiffs, by their laches, have forfeited their rights under the reorganization agreement and the violation thereof by certain of the defendants. This action was commenced within two weeks after the referee's report of the sale in foreclosure was filed, and within 30 days after the sale the Roebbling action, which is still undetermined, was brought against these same defendants, attacking the modified agreement, asking that the reorganization agreement should be performed, and that the United Lines Telegraph Company should be directed to execute the first and second mortgage bonds covering all the property sold and purchased at the sale. Several motions to set aside the sale had also been made, and one of them, at least, was pending for a long time. Knowing that their proceedings were thus attacked, Stokes, the committee, and the United Lines Telegraph Company continued, in defiance of the reorganization agreement, to carry on their scheme, as embodied in the modified agreement. Under these circumstances, no one could have been misled, simply because the plaintiffs waited to see whether relief would come through the pending litigation, or whether the sale would be confirmed, before commencing their action. The defendants proceeded at their peril, because they had full notice that some of the bondholders, at least, had not acquiesced in their unlawful acts, but were active in the assertion of their rights. We repeat, as applicable to this case, so far as the question of laches is concerned, the language of the court in *Boardman v. Railway Co.*, 84 N. Y. 157, 183: "It appears that there has been, ever since the expiration of the time when the dividends were due, an active and continuous litigation, and a sharp controversy in the courts with other parties against the old corporation and the defendant, by stock-

holders who are similarly situated with the plaintiffs, to recover dividends upon the preferred stock. * * * The defendant necessarily was acquainted with the character of the litigation, with the questions involved, and the claim of the preferred stockholders to the dividends, and in the face of these facts, with full notice of the nature of the claim, has no ground for insisting that it would have acted otherwise if the plaintiffs had sued at an early day. It was not required that each particular stockholder should sue for his share of the dividends to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that it was advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending without incurring the hazard of losing their rights on account of the lateness of their demand." So, the plaintiffs in this action, under all the circumstances, were not obliged to sue more promptly in order to save their rights. They had a cause of action, and did not lose it by their silence, even if they knew that Mr. Stokes was advancing money on the strength of the modified agreement, because he is presumed to have known that that agreement was made without authority, and he had notice from various legal proceedings against himself and others that the bondholders were attacking it on that ground. There was no estoppel, because he had no right to act in reliance upon the silence of some bondholders, when others were acting in behalf of all. The summons and complaint in the Roebling suit were served on him individually, and as president of the United Lines Telegraph Company, in August, 1885. The object of that action was to restrain the execution of the modified agreement, and to compel performance of the reorganization agreement. The pendency of this representative action was sufficient notice to Mr. Stokes and the other defendants therein that the bondholders were actively resisting the new scheme, and were insisting that he should perform his contract; and neither he nor his company can now claim that their subsequent action was taken in reliance upon the acquiescence of the bondholders. The reorganization agreement was signed by more than 100 different parties, and it was not necessary that each should sue in order to preserve his rights. Suit by one of a class, in behalf of all, relieves all from the imputation of laches.

Without expressing any consideration of incidental points urged by the learned counsel for the respondents, we have reached the conclusion that no absolute defense was established, and that the plaintiffs are entitled to some relief, the extent of which must depend upon the facts found on the new trial, which it is our duty to award. In view of the large advances made by Mr. Stokes, and the doubtful success of the enterprise in any

event, it may be that the relief will prove of slight value to the plaintiffs; but we cannot withhold justice from them because their rights are small. Doubtless, specific performance of the rights of the bondholders cannot now be had in justice to third parties. Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co., 119 N. Y. 15, 23, 23 N. E. 173. We think, however, that, upon the facts as they now appear, the plaintiffs are entitled to an accounting upon an equitable basis, such as the probable value of the new second mortgage bonds if the reorganization agreement had been performed, crediting Mr. Stokes with all moneys properly advanced or expended by him, or to such damages as they can establish for the breach of the agreement. At present they have nothing for their bonds deposited with the committee of the par value of \$731,000, the actual value of which, though much less, was something. They have never received even the second mortgage bonds, and the absolute dismissal of their complaint upon the merits left them helpless. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except PARKER, C. J., not sitting, and GRAY and O'BRIEN, JJ., not voting. Judgment reversed, etc.

(174 Ill. 253)

JOINER et al. v. DUNCAN et al.¹

(Supreme Court of Illinois. June 18, 1898.)

WITNESSES—HUSBAND AND WIFE — VENDOR AND PURCHASER—SPECIFIC PERFORMANCE — MORTGAGES — NOTICE — POSSESSION — FRAUDULENT CONCEALMENTS.

1. A wife's declarations cannot be proved by the husband, in an action not between them.

2. The purchaser of a foreclosure certificate assigned it to his wife, to whom the deed was issued, and then gave the mortgagor a bond for deed, on the back of which the wife indorsed a receipt of the consideration. The husband testified that he acted as the wife's agent in making the contract, and others testified to admissions by the wife that the transaction was a loan to the mortgagor to enable him to redeem, and that it had been repaid. *Held*, that the obligees of the bond were entitled to specific performance against the wife's heirs.

3. To enable a mortgagor to redeem, the certificate of sale was purchased by one, and assigned to his wife, after which he gave the mortgagor a bond for deed, the mortgagor remaining in possession. The holder of the certificate then mortgaged the premises. *Held*, that the mortgagee took with notice of the obligee's rights.

4. Evidence that the purchaser, after paying the consideration of a bond for deed, would not receive the deed because there had been some trouble between his brother and another person, and that he was expecting more trouble, does not show that he kept the property out of his own name to avoid payments of his debts, so as to defeat specific performance, where the premises were his homestead.

Error to circuit court, St. Clair county.

Bill by Daniel Joiner and another against Larkin Duncan and others for specific performance. There was a decree for defendants, and complainants bring error. Reversed.

¹ Rehearing denied October 6, 1898.

John B. Hay and Wm. Winkelmann, for plaintiffs in error. Roplequet, Perrin & Baker, for defendants in error.

CRAIG, J. This was a bill in equity, brought by the plaintiffs in error to enforce the specific performance of a contract for the conveyance of a tract of land in St. Clair county consisting of 15 acres, described as lot 10, being a part of the N. W. $\frac{1}{4}$ of section 2, township 2 N., range 7 W., and also to remove as a cloud on the title a certain mortgage executed by Hannah Duncan to Anthony Pfeiffer for the sum of \$500. The cause proceeded to a hearing on the pleadings and evidence, and the court entered a decree dismissing the bill, and also entered a decree of foreclosure in the cross bill of Anthony Pfeiffer, decreeing the premises to be sold in payment of the \$500 mortgage held by him. To reverse the decree the complainants sued out this writ of error.

It is averred in the bill and admitted in the answers that on July 7, 1885, Daniel and Mary Joiner were the owners in fee of the premises in controversy. They then resided on the land, and had resided upon it for a number of years before. On the date last mentioned, as appears from the evidence, plaintiffs in error mortgaged the land to James Waugh to secure the sum of \$175. In 1886, Waugh died, and Joseph M. Dill, administrator of his estate, foreclosed the mortgage. The premises were sold, and bid off by Dill for \$273.80, and a certificate of purchase was issued to him bearing date June 28, 1886. On the 27th day of June, 1887, Dill assigned the certificate to Larkin Duncan, and on the 22d day of November, 1887, Duncan assigned the certificate to his wife, Hannah Duncan, and on the 7th day of February, 1888, she obtained a deed. It also appears from the evidence that after the Duncans had procured an assignment of the certificate of purchase a contract was executed and delivered to the Joiners, which read as follows:

"Know all men by these presents, that I, Larkin Duncan, of St. Clair county, Illinois, am held and firmly bound unto Mary Joiner and Daniel Joiner in the sum of \$300, for the payment well and truly to be made I bind myself, my heirs, executors, administrators, and each and every of them. The condition of the obligation is such that if the said Mary and Daniel Joiner shall well and truly pay, or cause to be paid, unto said Duncan, her executors, administrators, or assigns, the sum of \$50 on the first day of August, 1888; \$50 on the first day of August, 1889; \$50 on the first day of August, 1890; \$50 on the first day of August, 1891; \$50 on the first day of August, 1892; and the balance on the first day of August, 1893,—out of said several payments when made the interest, at the rate of eight per cent., is to be taken out on the sum of \$295.65, and balance of said \$50 payment to be credited on the sum of \$295.65, until the full sum is paid. Upon the payment

of said last-named sum of money, together with the interest thereon as herein specified, said Duncan hereby agrees to convey to said Mary and Daniel Joiner lot No. ten (10), being part of the south-west quarter of the north-west quarter of section 2, township 2 north, range 7 W., containing fifteen acres, as will more fully and at large appear on a plat of said section No. 2 recorded in the recorder's office of St. Clair county, Illinois, in Book A of plats, at page 246. But, if default shall be made in the payment of any or either of said several sums of money on the days and times mentioned and appointed herein, then this bond to be void; otherwise to be in full force and virtue.

his
"Larkin X Duncan. [Seal.]
mark.

"Attest: William Winkelmann."

Respecting this contract, Larkin Duncan testified, as appears from the abstract, as follows: "The contract was made to her. I was acting as her agent. She furnished the money. The money she furnished was paid back. Joiner sent money several times. I won't say exactly how much, but many times I would go there, and Joiner would say, 'There is some money for you;' and I said, 'Joiner, I will take it to her, and let her keep the books. I don't know anything about that. You and her made the contract, and I don't know anything about it, but I will carry it to her, and she shall keep an account.' She kept the account, and kept it all settled up with Joiner. I was right there when that piece of paper was made with her name on the back of it." Witness was shown the writing on the back of the contract, and said: "That is her handwriting. She acknowledged payment in full, but Joiner wouldn't receive the deed. He told her he did not want a deed just now. There appeared some other trouble that he was afraid he might get into, and he didn't want the deed." Counsel read in evidence the receipt on the back of said contract above set forth, as follows: "Bond for a Deed. L. Duncan to Mary and Daniel Joiner. Received of Daniel Joiner and Mary E. Joiner on sed note \$300. 16th of October, 1893 Hannah Duncan." Duncan further testified: "Before she died she told her heirs to deed this property back to the Joiners; that the Joiners had paid her all they owed her. She wrote that on the back, right before the Joiners. I had no interest in that thing. The money was advanced by her entirely. She got the money that she advanced to the Joiners from Mr. Fischer." In connection with this evidence, the complainants called as a witness Gustave Vincent, who testified as follows: "Mrs. Duncan told me that Daniel Joiner was an honest man; that he had paid her every dollar that he owed her. She was sick at the time, and was talking about her business. She said she had stood for him, and he had paid her every dollar that he owed her. This was about two years before her

death." Mrs. Townsend, another witness, testified: "In a conversation I had with Mrs. Duncan I said, 'Mr. Joiner is a very nice man.' She said, 'Yes; and a very honest man. He owed me \$300, and he paid me in full for all of it.' I think she said she held his notes. She said she furnished this money for a mortgage on his land, and he had paid her up for it. I think this was in 1894."

The statute of frauds was not pleaded or relied upon as a defense in this case, and the only question to be determined is whether the evidence introduced on the hearing was sufficient to entitle complainants to the relief prayed for in the bill. In passing upon that question it will be necessary to exclude from consideration that portion of Larkin Duncan's evidence wherein he testified to the declarations of his wife, Hannah Duncan, as such evidence was not admissible at common law or under the statute. *Goelz v. Goelz*, 157 Ill. 41, 41 N. E. 756. If this action had been one between husband and wife, the evidence might have been competent; but the action was not between husband and wife, and the declarations of the wife could not be proven by her husband. Excluding, therefore, that part of Duncan's evidence in regard to the declarations of the wife, we think there remains ample evidence to authorize a decree in favor of the complainants. The land in controversy had been sold in satisfaction of a mortgage given by Daniel and Mary Joiner to Waugh. They were desirous of making an arrangement with some person to advance the money to redeem the land and give them time to pay off the incumbrance. A contract was made under which the money necessary to pay off the mortgage was advanced, and the certificate was assigned to Larkin Duncan, and he assigned it to his wife. They never bought the land. There is no evidence in the record tending to prove that Duncan or his wife purchased this land from any person. The form the transaction assumed, in the absence of other evidence, might indicate that Hannah Duncan was a purchaser, but that is all. Larkin Duncan testified that he acted as agent for his wife, and she furnished the money to take up the certificate of purchase; and the money she furnished was paid back. In addition to this evidence, the receipt of Hannah Duncan on the back of the contract shows that she received the money. Moreover, the evidence of Mrs. Townsend shows that Mrs. Duncan held the land as security for the money she advanced to pay off the Waugh mortgage, and that she had been repaid. If, then, Hannah Duncan took an assignment of the certificate of purchase, and held the title as security for the repayment of the money she advanced with interest, under an agreement made by her husband as her agent that the title should be reconveyed to Daniel and Mary Joiner upon the payment of \$295.65, and interest thereon, when the money was paid, as the evidence shows it was, on the 16th day of October,

1893, she was bound to make a deed to them at any time they might require it.

One other feature of the case remains to be considered. It appears that on the 10th day of October, 1894, Hannah Duncan executed a mortgage on the premises to one Anthony Pfeiffer to secure the payment of \$500, which was acknowledged and duly recorded in the recorder's office in St. Clair county. At the time this mortgage was executed Daniel and Mary Joiner were in the actual possession of the premises, residing thereon. Their possession was notice to all persons of the title they held on the premises. Actual possession of land is notice equal to the record of a deed under which the party in possession claims, and a purchaser is bound to inquire by what right or title the party in possession holds, and he will take subject to that title, whatever it may be. *Coari v. Olson*, 91 Ill. 273; *Morrison v. Morrison*, 140 Ill. 575, 30 N. E. 768. When Pfeiffer took his mortgage, as the Joiners were in possession of the premises, it was his duty to inquire of them under what right or title they occupied. Had he observed this duty, he would have learned that Hannah Duncan had no title which she could mortgage. Having failed to make inquiry when it was his duty to do so, he occupies no better position than he would have occupied if he had made inquiry and learned the truth in regard to the title to the premises.

It is, however, claimed in the argument that the title to the premises was placed and kept in the name of Hannah Duncan to enable Daniel Joiner to avoid the payment of certain indebtedness which creditors were endeavoring to collect from him. We find no evidence in the record upon which this position is predicated. The only evidence found in the record which is relied upon by counsel is the following, testified to by Larkin Duncan: "Joiner's brother was claimed to be dead, and he was not, and so this property was bought with the money, don't you see, and he did not know but what he might get into some trouble yet about it, and therefore he would not take the deed. The trouble was with Charles Thomas at that time. The trouble existed a long time before this arrangement was made." Conceding the truth of the statement made by the witness, it falls far short of establishing the fact that Duncan was keeping the property out of his own name to avoid the payment of his debts. Moreover, the premises were the homestead of the Joiners, worth not exceeding \$1,000, and hence was not liable to be taken and sold on judgment; and hence, if there had been judgments against them, it is unreasonable to suppose they would have resorted to any scheme to keep the property out of their names to defeat the collection of debts which could not be collected. After a careful consideration of the evidence, we are satisfied complainants were entitled to the relief prayed for in the bill. The decree of the cir-

cult court will therefore be reversed, and the cause will be remanded, with directions to enter a decree in favor of the complainants, as prayed for in the bill. Reversed and remanded.

(152 Ind. 27)

PEERLESS STONE CO. v. WRAY.¹

(Supreme Court of Indiana. Oct. 11, 1898.)

MASTER AND SERVANT — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE — COMPLAINT — AMENDMENT — LIMITATIONS — SPECIAL VERDICT — APPEAL — REVIEW — HARMLESS ERROR.

1. A complaint alleged that plaintiff, while engaged in defendant's quarry, was struck by a bank of clay dirt, of original deposit, and stone, about seven feet in length and eight feet high and one foot wide, which had been loosened by the removal of stone, and left unsupported; that the bank was of a brownish gray color, and plaintiff considered it a ledge of stone, and it was not so exposed to ordinary view as to indicate anything else than a ledge of stone, or a dry, and the fact that it was a bank of clay dirt and stone was wholly unknown to plaintiff; that such banks were unusual in the quarry; that plaintiff when injured was in the line of his duty in the service of defendant, and had no knowledge that said bank had been loosened and left unsupported, and was in danger of falling, or that there was any danger in passing close to it; that plaintiff in no way contributed to his injuries; that defendant well knew that the bank was not a ledge of stone, but was a bank of clay dirt and stone, loose and unsupported, and in danger of falling, but negligently failed to notify plaintiff of that fact, and that there was danger in passing close to the bank, although defendant well knew that the duties of plaintiff required him to pass close to it; and that the superintendent of the quarry was near the bank, and saw that the same was a mud seam, and had been loosened, and was liable to slide down at any time. *Held*, on demurrer, that the complaint sufficiently showed negligence of defendant, and plaintiff's freedom from contributory negligence.

2. Where an amended complaint does not set up a new claim, a plea of limitation will be determined with reference to the date the action was commenced.

3. The jury found that mud seams and dry seams were usual in defendant's quarry, of which plaintiff was aware; that he had worked in the quarry for over a year; that it covered about one-half an acre; that plaintiff received no specific command on the day of his injury to go to the place where he was at work; that, when he went beneath a mud bank which afterwards fell on him, he examined it with the eye; that he was prevented by sand and mineral deposit from seeing the exact character of the bank; that the stone which had supported the bank had been removed about five minutes before it fell; that defendant's superintendent had one foot on the upper edge of the bank when it fell; that, by so standing, he aided in causing it to fall; that, for two or three days before, he knew that the bank was a mud seam, and could have known before this that it would probably fall when the stone in front of it was removed; that he knew that the bank was dangerous to plaintiff long enough before his injury to have warned him, and prevented the same; and that there was no mud seam on the floor on which plaintiff was working except the one that fell on him. *Held*, in an action for the injuries, in which a general verdict was rendered for plaintiff, that a refusal to enter judgment non obstante was proper.

¹ Rehearing denied.

4. The supreme court will not weigh the evidence where there is sufficient evidence to support the verdict.

5. Error in permitting counsel to comment on certain evidence was harmless, where the evidence was admitted without objection, and the remarks were by way of recital and description, and were withdrawn when objected to.

Appeal from circuit court, Monroe county; J. B. Wilson, Special Judge.

Action by Granville Wray against the Peerless Stone Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

M. F. Dunn, for appellant. Loudon & Loudon and J. R. East, for appellee.

HOWARD, J. This is the third appeal in this case. *Stone Co. v. Wray*, 10 Ind. App. 324, 37 N. E. 1058; *Id.*, 143 Ind. 574, 42 N. E. 927. The judgment in favor of appellee was reversed on each of the former appeals, by reason of the insufficiency of the complaint. The record before us shows that an amended complaint, in two paragraphs, was filed by appellee on March 31, 1897. It is alleged in the first paragraph of this complaint that on June 8, 1892, appellee and other employees were engaged at work in appellant's stone quarry, near Bedford, in Lawrence county, and that, while appellee was then and there engaged in his duties, "a large bank of clay dirt, of original deposit, and stone, about seven feet in length and eight feet high and one foot wide, and weighing about five tons, that had been loosened by the removal of stone, and left unsupported, fell on, upon, and against said plaintiff with great force and weight, and bruised and crushed said plaintiff to the ground, and broke several bones in his body, and cut and bruised him so that said plaintiff was unable to move, and was completely disabled and permanently injured; that said bank, from where said plaintiff and other employees of said defendant were at work, was of a brownish gray color, and appeared to said employees to be a ledge of stone; that said plaintiff considered it a ledge of stone, and the same was not so exposed to ordinary view before it fell as to indicate anything else than a ledge of stone or a dry, and the fact that it was a bank of clay dirt and stone was wholly unknown to said plaintiff; that they were unusual in said quarry; that said plaintiff, when so injured, was in the line of his duty in the service of the defendant, in performing the duties required of him by said defendant, and had no knowledge that said bank of clay dirt and stone had been loosened and left unsupported, and was in danger of falling, and had no knowledge whatever that there was any danger in passing close to said bank of clay dirt and stone, but was in entire ignorance of the unsafe condition of said bank." General allegations are also made showing entire absence of fault on the part of appellee in causing his own injuries, and that he "in no

way whatever contributed to the same." It is further alleged: "That said defendant well knew that said bank was not a ledge of stone, but was a bank of clay dirt and stone, loose and unsupported, and was in danger of falling, but carelessly and negligently failed to notify said plaintiff or call his attention to the fact that said bank of clay dirt and stone was loose and unsupported, and was in danger of falling, or that there was danger in passing close to said bank of clay dirt and stone, although said defendant well knew that the duties of said plaintiff required him to pass beneath and close to said bank; * * * that the superintendent of the quarry was up on the bank, near said bank of clay dirt and stone, and saw that the same was a mud seam, and had been loosened, and was liable to slide down at any time; that said plaintiff, by reason of said injuries, * * * was totally disabled from manual labor during his natural life." Counsel for appellee, in contending that this complaint was good upon demurrer, as containing at least an imperfect statement of all that was necessary to be alleged to show negligence by appellant in causing the injuries sustained by appellee, and freedom from fault on his part in contributing to these injuries, yet admits that the complaint might, perhaps, have been "more specific in some particulars." With this view we are inclined to agree. There is a vagueness of statement as to some essential allegations that is quite objectionable; but the necessary facts are, at least imperfectly, as we think, set out. The faults indicated on the former appeal seem to have been corrected.

The chief objection now made to the complaint must, in our view, be held untenable. It is that the action is shown to be barred by the statute of limitations. This objection is based on the circumstance that it appears that the amended complaint was filed more than two years after the cause of action accrued. There is nothing shown in the pleading itself, or in appellant's brief in relation thereto, that should take this case out of the general rule, namely, that an amended complaint, as well as an amendment to a complaint, if it does not introduce a new cause of action, has reference to the time of the filing of the original complaint. As stated by Judge Mitchell, in *Railroad Co. v. Bills*, 118 Ind. 222, 20 N. E. 775: "An amended complaint has relation ordinarily to the date of the commencement of the action, and is regarded as a matter occurring in the continuation or progress of the original cause. Unless, therefore, some new claim or title not previously asserted is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced." In the case at bar it is not contended that any cause of action is set up in the amended complaint different from that alleged in the original complaint. There was

a trial by a jury, resulting in a verdict and judgment in favor of appellee. Afterwards a new trial was granted, and the venue was changed from the regular judge to the special judge below. The second trial resulted also in a verdict and judgment in favor of appellee.

The next ruling of the court discussed in appellant's brief is the refusal to render judgment in favor of appellant on the answers of the jury to special interrogatories, notwithstanding the general verdict. In answer to appellant's interrogatories the jury found: That, at the time of appellee's injury, mud seams and dry seams were usual in appellant's quarry; that appellee had then worked in the quarry for over a year; that the quarry covered about one-half an acre; that appellee received no specific command on the day of his injury to go to the place where he was at work; that at the time appellee went beneath the embankment, and before it fell upon him, he examined the embankment "with the eye"; that appellee was prevented by "sand and mineral deposit" from seeing the exact character of the mud bank; that he was aware of the fact that mud banks and seams were usual in appellant's quarry; that he could not discover at any distance from the bank that it was of clay; that he went beneath the bank without touching it; that he could not "by sight, by touch by his hands, or by examination" discover why the bank was not solid stone, or of an original deposit; that the stone which had supported the bank had been removed about five minutes before the bank fell upon appellee; and that appellee, as he approached the embankment and original deposit which fell upon him, could not have seen the character of the same had he looked and observed. In answer to interrogatories submitted by appellee, the jury further found: That one Robert McKinley was appellant's superintendent, and in full charge of the quarry on the day of the accident; that the superintendent had one of his feet upon the upper edge of the bank of clay and dirt at the time it fell and injured appellee, and that, by so standing on the bank, he aided in causing it to fall upon appellee; that for two or three days prior to appellee's injury the superintendent knew that the bank was what was known as a "mud seam," and could have known for this time that it would probably fall when the stone in front of it was removed; that said superintendent knew that said bank without being propped was dangerous and unsafe to appellee, long enough before appellee's injury to have warned him and prevented the same; and that there was no mud seam on the floor on which appellee was working except the one that fell upon him. The general verdict of the jury was for the appellee, and against the appellant; and it seems very clear that there is nothing in the answers to the special interrogatories which is in irreconcilable conflict with this general verdict.

Counsel for appellant assumes many facts as found by the jury which the answers themselves fail to bear him out in. The rule is that the answers must be in irreconcilable conflict with the general verdict in order to justify the court in giving judgment upon the interrogatories against the verdict; but counsel would seem to argue as if the rule were that the answers must not be reconciled with the general verdict if it be possible to interpret them otherwise. In this case, however, even without resorting to the rule that all intendments are to be taken in favor of the general verdict, but taking the natural and ordinary meaning of the language used, there appears to be no conflict whatever between the answers to interrogatories and the general verdict of the jury. The answers themselves show that the judgment should be in favor of the appellee. While mud seams and drys (the former dangerous, the latter harmless) were usual,—that is, liable to be discovered in the quarry,—yet it is found that there was no mud seam on the floor where appellee worked except the one that injured him. This he examined as he approached it, and it had all the appearance of solid rock, being covered with a coat of sand and mineral matter, and he could not discover that it was anything different from the rest of the ledge. He was not required to make particular inspection with pick or other tool every time he approached the face of the stone wall. Obvious dangers, open to ordinary observation, he was bound to guard against, but not latent defects, to be discovered only on particular inspection. It is not to be expected that appellee should have received a specific command to go up to the face of the quarry every time he went there in the performance of his daily duties. It would be a dilatory workman who should wait for such specific orders every time he picked up a lot of tools, or engaged in any other task required by the duties of his employment. The superintendent, on the other hand, whose duty it was to make inspection, and who knew the condition of the bank, was up above the bank long enough to have warned appellee of the danger. He there saw the character of this mud bank, which was wholly unknown to appellee. The jury find that the superintendent knew for two or three days before the accident that the bank was a mud seam, and not a part of the solid rock, and ought to have known that it was liable to slide down the moment the rock in front of it was removed; yet he placed his foot upon this treacherous mass a little before it came down, and thus aided in causing it to fall upon appellee.

In arguing that the evidence does not support the verdict, counsel for appellant indulges in extended verbal criticism. It is not, however, seriously contended that there was not evidence adduced to support the verdict, but, rather, that the preponderance of the evidence was in favor of the appellant. In-

deed, counsel goes so far, notwithstanding the well-settled practice in this jurisdiction, as to ask this court to weigh the evidence. "It was the duty of the lower court," says counsel, "after the jury had returned its verdict, to decide, by weighing the evidence, whether or not the preponderance of the evidence was with the plaintiff or with the defendant. If the court below—and courts below sometimes so do—failed legally, under the evidence now before this court in the bill of exceptions, to weigh the preponderance of evidence, will this court not weigh it?" The court below saw and heard the witnesses; and the law, in authorizing the granting of a new trial, concedes that the trial judge may determine whether the jury have failed to properly weigh the evidence or not. This court, however, has not had the opportunity of either hearing or seeing the witnesses, and can determine from the cold writing alone whether there was competent and sufficient evidence adduced to sustain the verdict returned by the jury. Having decided that question, our jurisdiction as to the evidence is exhausted. It is, besides, to be noted in this case, that the court below did grant a new trial after the reversal by this court, at appellant's request, and also that there was a change of venue from the judge who presided at the first trial. There ought to be some end to litigation.

Some objection was made to comments by counsel for appellee upon certain evidence as to appellee's family. The evidence was admitted without objection, a part of it, indeed, being evidence introduced by appellant. The remarks of counsel were by way of recital and description, and were, in effect, withdrawn when objected to. We cannot conceive of any harm thereby done to appellant. The objection, if any, should have been made to the evidence itself. Judgment affirmed.

(151 Ind. 200)

BUFFINGTON v. BUFFINGTON.

(Supreme Court of Indiana. Oct. 7, 1898.)

HUSBAND AND WIFE—ANTENUPTIAL CONTRACTS—
VALIDITY—CONSTRUCTION—SUPPORT OF WIFE—
ADMINISTRATION—WIDOW'S ALLOWANCE—
WAIVER—PLEADING.

1. An antenuptial contract provided that the wife released all claims to the husband's property; that the husband would maintain the wife, and release all interest in her property; that she could maintain the control of her own property; and that each could dispose of his or her property by will. *Held*, that the parties intended a permanent adjustment of their property rights, and not one during wedlock only.

2. Where the purpose was to adjust all the property rights, a provision in an antenuptial contract that the husband "will release" his interest in the wife's property is not executory in the sense that some act remains to be done on his part.

3. The \$500 allowed to the widow of a decedent by Rev. St. 1894, § 2424 (Rev. St. 1881, § 2269), may be waived by her.

4. A provision in an antenuptial contract that the intended wife "hereby relinquishes any and

all claims" to the husband's property, where the intention was to adjust rights following the death of the husband, includes the \$500 allowed to the widow from his estate by Rev. St. 1894, § 2424.

5. An allegation that an antenuptial contract was made and signed after marriage is not a sufficient denial of the validity of the contract, since an antenuptial oral agreement may be confirmed in writing after marriage.

6. In an antenuptial contract providing that each released all claim in the property of the other, and might dispose of his or her own property by will, and that the wife should retain control of her own personality, a provision that the husband would maintain the wife is not a condition on which the validity of the contract depended.

7. The expenditure of money by the wife for the support of herself and husband is no defense, nor basis of cross complaint, to proceedings by her husband's executor to enforce an antenuptial contract in which the husband agreed to support the wife, and this though the expenditure constituted an enforceable claim against the husband's estate.

Appeal from circuit court, Dearborn county; N. S. Given, Judge.

Action by Lewis C. Buffington, executor of the will of William C. Buffington, deceased, against Martha J. Buffington. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Samuel H. Stenart and Omar F. Roberts, for appellant. Chas. F. Hayes and Thompson & Colt, for appellee.

HACKNEY, C. J. This was an action to quiet the title to certain real estate, and to subject the same to sale for the payment of the debts of the estate represented by the appellee. The appellant, the widow of the decedent, William C. Buffington, was alleged to have entered, prior to her marriage with the decedent, into an antenuptial contract with him, which contract, in order to complete the same, was, after said marriage, acknowledged before a notary public. Said contract is as follows: "Know all men by these presents that whereas, William C. Buffington, of Dearborn county, Ind., and Martha J. Higbee, of Ohio county, Ind., are about entering into marriage, and that in view of such marriage the following contract and antenuptial agreement is entered into by and between the said parties, to wit: The said William C. Buffington, on his part, agrees to maintain his said wife, Martha J. Higbee, in a manner suitable to his means and station in life, and he further agrees that he will release any and all interest in property owned by her, and that she can hold any and all personal property that she may bring to the house of said William C. Buffington, and that she have control of her said property without restraint; and the said Martha J. Higbee on her part agrees and contracts, in consideration of the foregoing, that she hereby releases any and all claims to the property of the said William C. Buffington, her intended husband; and, further, that they each reserve the power and right to dispose of and control their separate property, respectively,

during marriage, and that the right of each is reserved to make wills, if they see proper, of their estate. In witness whereof, the said William C. Buffington and Martha J. Higbee have hereunto set their hands and seals on November 9, 1878. William C. Buffington. [Seal.] Martha J. Higbee. [Seal.]" The instrument was acknowledged, the date not appearing, by William C. and Martha J. Buffington. The effect of this contract upon any interest which the widow would otherwise have had in the real estate of the decedent and upon her claim to the statutory allowance of \$500 are questions for decision, as presented in various forms.

The appellant's learned counsel insist upon a strict and narrow construction of the contract, so as to limit it to the control of property during wedlock, and so that any concessions in this respect, made by the appellant, were upon the consideration of the executory promise of the decedent to thereafter relinquish any interest in or control over her property for such period, such executory promise never having been complied with. It is the firmly-established rule in this state that antenuptial contracts are not in such disfavor as to require rigid construction. On the contrary, they are favored by the law as promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation. No formality is required, and the rule of construction is to ascertain and give effect to the intention of the parties. See *Kennedy v. Kennedy* (Ind. Sup.) 50 N. E. 756; *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, and authorities there cited. Looking to the contract with reference alone to the custody, control, and disposition of the property during wedlock, there was no occasion for the contract. In this respect the rights and duties of the parties were, by the law, as the contract would have made them. This conclusion is, of itself, strongly influential in determining that the parties were intending to contract with reference to the disposition of their property, respectively, upon the death of either. As far as may be, parties are presumed to contract with reference to ends which do not necessarily occur without contract. The clause in the contract whereby the appellant "releases any and all claims to the property of" her intended husband could not reasonably have spoken an intention to affect existing interests, for there were no present interests in her favor in his property. The clause in which each reserved the right to dispose of his or her property by will very clearly had in view the adjustment of property rights after the death of either. Nor do we believe it to have been intended that the contract on the part of the decedent was executory as to the relinquishment of his rights in the property of the appellant. Ordinarily, the phrase "will release," without qualifying words, would express a future purpose, but, considering the fact that they

were engaged in executing an antenuptial agreement or marriage settlement, and that many other features of the instrument indicated a purpose to adjust all property interests in their respective estates, we are satisfied that the obligation upon his part was not executory in the sense that another act was contemplated to make it effective. We do not consider whether the obligation upon her part is not sufficient to preclude her, even if her construction that his obligation was executory were correct. As to the claim for the \$500, allowed by statute (Rev. St. 1894, § 2424; Rev. St. 1881, § 2269), we need not dissent from the proposition that it is a special and preferred claim, analogous to dower, and payable from the personal and real estate of a deceased husband. The essential inquiries are, can it be waived by antenuptial contract, and was it so waived by the appellant? That it may be waived by the acceptance of testamentary provision inconsistent with its allowance has often been decided. *Shafer v. Shafer*, 129 Ind. 394, 28 N. E. 867; *Hurley v. McIver*, 119 Ind. 53, 21 N. E. 325; *Langley v. Mayhew*, 107 Ind. 198, 6 N. E. 317, and 8 N. E. 157. This question depends upon the intention of the parties. In the case of *Houghton v. Houghton*, 14 Ind. 505, involving an antenuptial agreement, and a claim for the statutory allowance, it was said to be "undoubted law that it was always competent for the husband, by an antenuptial contract, to purchase the wife's personal fortune. * * * If he could buy hers, it would surely be competent for him to buy out her interest in his own." It follows from these conclusions that the claim may be waived by stipulations which are valid, and in lieu of the legal interest of the prospective wife in the estate of the husband. It only remains to be determined whether the contract in question is broad enough to comprehend this claim, and we do not hesitate to say that it is. The language is that "she hereby releases any and all claims." This is broad and comprehensive, and, when read in the light of an intention to adjust rights following the death of the husband, it precludes her. The appellant alleged that the instrument purporting to be an antenuptial contract was made and signed after the marriage; that the same was made to enable the parties to manage and control their separate estates, respectively, during the marriage, and no longer; that he agreed to maintain her in a manner suitable to his means and station in life, but failed to do so; that he failed to release all interest in her property and estate as agreed; that she expended her separate means for the support of herself and the decedent; and she asks an accounting, and the protection of her rights under the contract. The denial of the execution of the contract is not broad enough to avail. It is conceded that parties contemplating marriage may orally agree as to the disposition of property, and may confirm

such agreement in writing after marriage. *Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285. Under this concession the allegation does not deny the validity of the contract, for the mere signing, subsequent to the marriage, would not defeat it as the ratification of the original agreement. It may be doubted, also, whether the unverified denial of the execution of the agreement is sufficient, under section 367, Rev. St. 1894 (section 364, Rev. St. 1881). Allegations depending upon the mere construction of the agreement, such as to the intention to contract for control during wedlock, and as to the agreement to release, on the part of the decedent, are in contradiction of the legal effect of the instrument, and are not statements of facts. The stipulation as to support was not a condition upon which the validity of the contract was made to depend, and the allegation of a breach would not support a claim of forfeiture. Nor would the expenditure of money for which she was not liable, even if it constituted an enforceable claim against the estate, be a defense to the proceedings, or so far germane to the complaint as to supply the basis of a cross complaint. The property of decedent is not subject to a life estate, or to the statutory allowance in appellant's favor, but passes, under the will, to the devisees therein named. There is no error in the record, and the judgment is affirmed.

(151 Ind. 206)

HART v. O'ROURKE et al.

(Supreme Court of Indiana. Oct. 11, 1898.)

JUDGMENT—VALIDITY—GROUND FOR INJUNCTION—GARNISHMENT—AFFIDAVIT—EXEMPTION OF WAGES—RESIDENT HOUSEHOLDERS.

1. Mere irregularity or error is no ground for enjoining execution of a judgment.

2. Code Civ. Proc. § 216, as amended by Acts 1897, p. 233 (Horner's Rev. St. 1897, § 931), providing that in all personal actions on a contract or judgment, at the commencement of the action or afterwards, whether attachment had been issued or not, if plaintiff file an affidavit that he has good reason to believe that any other person is indebted to defendant, etc., plaintiff shall have garnishee process against said person, does not dispense with the necessity that the affidavit state the existence of one of the grounds of attachment recited in Burns' Rev. St. 1894, § 925 (Horner's Rev. St. 1897, § 913), as was expressly required by the statute before amendment.

3. Code Civ. Proc. § 243, as amended by Acts 1897, p. 234 (Horner's Rev. St. 1897, § 959), limiting the exemption of the wages of householders against garnishment to \$25, and providing that no exemption as against garnishment shall be allowed save as therein provided, does not apply to resident householders, who are entitled under Burns' Rev. St. 1894, § 715 (Horner's Rev. St. 1897, § 703), to an exemption of \$600.

4. The fact that a judgment rendered against a garnishee is erroneous by reason of no affidavit in attachment being filed as prescribed by Acts 1897, p. 233, and also by reason of the amount due from the garnishee being exempt under said act, does not render it void.

Appeal from superior court. Tippecanoe county; W. Dewitt Wallace, Judge.

Action by William S. Hart against Patrick O'Rourke and others to enjoin the enforcement of a judgment. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Everett & Eubank, for appellant. Hanley & Wood, for appellees.

MONKS, J. On March 30, 1897, appellee O'Rourke commenced an action against appellant before a justice of the peace of Tippecanoe county to recover for merchandise sold and delivered to appellant by said appellee, and also filed an affidavit and undertaking for a writ of garnishment against the receiver of the Monon Railway Company. The affidavit and undertaking were filed under the provisions of the act of 1897 (Acts 1897, p. 233). No affidavit showing any grounds of attachment, as required by section 925, Burns' Rev. St. 1894 (section 913, Horner's Rev. St. 1897), was filed. A summons was served on appellant, and a writ of garnishment was served on the garnishee defendant. Appellant appeared to said action, and filed an answer to the proceedings in garnishment, together with a proper affidavit and schedule, and asked an exemption of \$600 as a resident householder. The garnishee also filed an answer that the Monon Railway Company was indebted to appellant in the sum of \$51.60 for wages, and that said amount was exempt from garnishment. The justice of the peace tried said cause, found for appellee O'Rourke, the plaintiff in said action, and that the railway company was indebted to appellant, the defendant in said action, in the sum of \$51.60, and that appellant was a resident householder of Tippecanoe county, Ind., and that as such householder he was entitled to an exemption of \$25 of the amount due him from said garnishee, and rendered judgment against appellant for the amount of the claim sued upon and costs, and that the garnishee pay into said justice's court the sum of \$15.30, being the amount of the judgment and costs. Appellant brought this action to enjoin the enforcement of that part of said judgment which required the garnishee defendant to pay into said justice's court the sum of \$15.30, on the ground that the same is null and void. The court below sustained a demurrer to the complaint for want of facts, and, appellant refusing to plead further, judgment was rendered against appellant on demurrer.

It is settled law in this state that a void judgment may be enjoined, but, if the judgment is merely irregular or erroneous, though reversible on appeal, it is not subject to collateral attack, and cannot be enjoined. *Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455, and cases cited; *Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056, and cases cited; *Hume v. Con-*

duitt, 76 Ind. 598; *Johnson v. Ramsay*, 91 Ind. 189, 195, and cases cited. The justice tried and determined said cause upon the theory that under the act of 1897 (Acts 1897, pp. 233, 234, amending Code Civ. Proc. §§ 216, 243) appellee O'Rourke was authorized to commence proceedings in garnishment, and obtain a garnishee summons, and prosecute the same to final judgment, without filing an affidavit containing any of the grounds of attachment, as required by section 925, Burns' Rev. St. 1894 (section 913, Horner's Rev. St. 1897); and that the wages of appellant, although he was a resident householder of the state, were only exempt from garnishment to the amount of \$25. This view of the law was clearly erroneous, as held by this court in *Pomeroy v. Beach*, 149 Ind. 511, 49 N. E. 370. It does not follow, however, that the judgment of said justice against said garnishee was void for this reason. It will be observed that appellee appeared to said action before the justice of the peace, and that a judgment was rendered against him for the amount of his indebtedness to appellee O'Rourke, who was the plaintiff in said action. Said justice, therefore, had jurisdiction of the subject-matter of the action, and of the person of appellant and the garnishee. The proceedings in garnishment were not the foundation of that action, but they were merely ancillary thereto. The judgment against the garnishee in that case, although erroneous, was not null and void. *Earl v. Matheney*, 60 Ind. 202, and cases cited; *Williams v. Hitzle*, 83 Ind. 303, 307, 308; *Johnson v. Ramsay*, 91 Ind. 189, 195; *Brown v. Goble*, 97 Ind. 86, 89; 8 Am. & Eng. Enc. Law, 1245. In *Earl v. Matheney*, supra, it was held by this court that in an action before a justice of the peace against a defendant, duly served with process, for the collection of a debt within the jurisdiction of the justice, and in which a third party was served with process to answer as garnishee, and judgment rendered against the debtor for the amount of the debt, and also against the garnishee as such, said judgment against the garnishee was not void, and could not be attacked collaterally, although no attachment proceedings were had against the debtor. It is clear, therefore, that said judgment was not void for the reason that no affidavit in attachment was filed in said proceedings. For the same reason the error of the court in holding that appellant, a resident householder of this state, was not entitled to an exemption of his wages in excess of \$25 as against the proceedings in garnishment, although erroneous (*Pomeroy v. Beach*, supra), did not render said judgment, or any part thereof, void. *Rountree v. Walker*, 46 Tex. 200, 203; *Ex parte McCullough*, 35 Cal. 97. Finding no error in the record, the judgment is affirmed.

(151 Ind. 579)

NOERR v. SCHMIDT et al.¹

(Supreme Court of Indiana. Oct. 6, 1898.)

FORECLOSURE OF MORTGAGES—APPEAL AND ERROR—BILL OF EXCEPTIONS—EVIDENCE—NEW TRIAL—COURTS—JURISDICTION—EXECUTORS AND ADMINISTRATORS—FILING OF CLAIMS—PLEADING.

1. The evidence cannot be considered in determining alleged error in overruling a motion for a new trial, on the grounds that the assessment of the amount of the recovery is too large, that the decision is not sustained by sufficient evidence, and that the decision is contrary to law, where the bill of exceptions, though reciting that "this was all the evidence given in the cause," affirmatively shows that evidence was given which was not included therein.

2. Where the court, in an action to foreclose a mortgage, found in favor of plaintiff, and also in favor of certain defendants on a counterclaim, a motion by an unsuccessful defendant for a new trial was properly overruled if such finding for plaintiff was correct, though the evidence was not sufficient to sustain such finding on the counterclaim, as the motion should, in such case, have asked for a new trial of the issues joined on the counterclaim.

3. Under Horner's Rev. St. 1897, § 1331 (Burns' Rev. St. 1894, § 1404), providing that the superior court, in any county in which it may be organized, "shall have original concurrent jurisdiction with the circuit court in all civil causes except slander," and section 1314, conferring on the circuit court in each county "original exclusive jurisdiction in all cases at law and in equity whatsoever," * * * provided, however, that in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by law," the superior court has jurisdiction of actions to foreclose mortgages on real estate in such county, notwithstanding the provision in section 1095 that such actions may be brought "in the circuit court of the county where the land lies," as the several sections referred to are in pari materia, and must be construed together.

4. Though no court may have jurisdiction to foreclose a mortgage against the real estate of a decedent before final settlement of the estate, until after the claim therefor has been filed against the estate, even where more than one year has elapsed since the death of the decedent, under Horner's Rev. St. 1897, § 2331 (Burns' Rev. St. 1894, § 2484), construed with the "decedents' act," yet a complaint to foreclose a mortgage in the superior court in such case need not aver that the claim has been filed against the estate, as such court is one of general jurisdiction, whose authority to proceed need not affirmatively appear in the complaint.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by Lorenz Schmidt, trustee, against Louisa Noerr, administratrix, and others, to foreclose a mortgage. From a judgment in favor of plaintiff, and in favor of defendants George and Frederick Noerr on a counterclaim, the administratrix appeals. Affirmed.

John B. Sherwood, for appellant. S. M. Shephard, for appellees.

MONKS, J. Appellee Schmidt, as trustee, brought this action against his co-appellees and appellant to foreclose a mortgage executed by appellant's intestate in his lifetime. Appellant's demurrer to the complaint was

overruled. Appellees George and Frederick Noerr filed a counterclaim, by which they sought to be subrogated to the rights of the mortgagee under a prior mortgage on the same real estate, and to foreclose the same. The court found in favor of Schmidt, trustee, and in favor of George and Frederick Noerr upon their counterclaim, and, over appellant's motion for a new trial, rendered judgment foreclosing the mortgages sued upon in complaint and counterclaim, respectively.

It is insisted by appellant that the trial court erred in overruling the motion for a new trial. The causes for a new trial not waived by a failure to argue the same are: (1) That the court erred in assessing the amount of recovery in favor of Frederick and George Noerr on the issues raised on their counterclaim, in this: that the assessment is too large; (2) that the decision of the court is not sustained by sufficient evidence; (3) that the decision of the court is contrary to law. These causes for a new trial require a consideration of all the evidence given in the cause. Appellees insist that the court cannot consider the evidence, for the reason that it affirmatively appears from the bill of exceptions that it does not contain all the evidence. The bill of exceptions, although reciting that "this was all the evidence given in the cause," shows affirmatively that evidence was given at the trial which was not copied into the bill of exceptions. In such case the settled rule is that the court cannot consider the evidence in determining any of the foregoing causes assigned for a new trial. *Weaver v. Kennedy*, 142 Ind. 440, 41 N. E. 810, and cases cited. It follows that the court cannot consider the evidence, and without it there is nothing from which we can determine that the court erred in overruling the motion for a new trial. Moreover, if the bill of exceptions contained all the evidence given in the cause, we could not disturb the action of the trial court in overruling the motion for a new trial. Appellant does not claim that the finding of the court in favor of Schmidt, as trustee, was not sustained by sufficient evidence, or was contrary to law, or that the amount of recovery assessed in his favor was too large. Such a claim is only made as to the finding in favor of Frederick and George Noerr on the counterclaim. If the finding of the court in favor of Schmidt, trustee, upon the issues joined upon his complaint was correct, the motion was properly overruled, even though the evidence was not sufficient to sustain the finding in favor of Frederick and George Noerr upon their counterclaim. In such case the motion should ask for a new trial of the issues joined on the counterclaim. *Land Co. v. Ginn*, 144 Ind. 434, 439, 43 N. E. 443, and authorities cited.

The following questions are, however, presented by the record: (1) Has the Marion superior court jurisdiction of actions to foreclose mortgages upon real estate in said coun-

¹ Rehearing denied.

ty? (2) Is it necessary, in an action against an administrator and the heirs of a decedent to foreclose a real-estate mortgage executed by such decedent in his lifetime, to allege in the complaint that a claim therefor had been filed against the estate? If both of these questions may be answered in the affirmative, the case is to be affirmed. Section 10 of the act of 1871 creating superior courts, being section 1404, Burns' Rev. St. 1894 (section 1351, Horner's Rev. St. 1897; Acts 1871, p. 50), provides that "said court in the counties in which it may be organized shall have original concurrent jurisdiction with the circuit court in all civil cases except slander." Section 3 of "An act concerning circuit courts," approved April 7, 1881, being section 1366, Burns' Rev. St. 1894 (section 1314, Horner's Rev. St. 1897; Acts 1881, p. 102), provides that "circuit courts shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships, provided however that, in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by law." It is clear that under said section the superior court of Marion county has jurisdiction of actions to foreclose mortgages upon real estate in said county. Appellant contends, however, that by section 712 of "An act concerning civil proceedings," approved April 7, 1881, being section 1109, Burns' Rev. St. 1894 (section 1095, Horner's Rev. St. 1897; Acts 1881, p. 364), the exclusive jurisdiction of actions to foreclose mortgages on real estate was vested in the circuit court. We cannot agree with this contention of appellant. Said section reads as follows: "When default is made in the performance of any condition contained in a mortgage the mortgagee, or his assignees, may proceed, in the circuit court of the county where the land lies, to foreclose the equity of redemption contained in the mortgage." It will be observed that the act containing said section, and the act "concerning the circuit courts," which provided that the same should not be construed to deprive criminal and superior courts of the jurisdiction conferred upon them by law, were approved the same day,—April 7, 1881. The rule is that laws in pari materia must be construed together. Black, *Interp. Law*, 204. So construed, we think it clear that section 712 of the act "concerning proceedings in civil cases," being section 1109 (1095) *supra*, providing that actions to foreclose mortgages on real estate may be brought in the circuit court of the county where the land lies, does not deprive the superior courts of the concurrent jurisdiction over such an action, ex-

pressly conferred by statute. *Browning v. Smith*, 139 Ind. 280, 37 N. E. 540; *Meikel v. Meikel*, 119 Ind. 421, 20 N. E. 720.

It is insisted by appellees that section 2484, Burns' Rev. St. 1894 (section 2331, Horner's Rev. St. 1897), expressly provides that the holder of a mortgage upon a decedent's real estate, for the payment of which the personal estate of such decedent is liable, may, after the end of one year from the death of such decedent, maintain an action against the heirs and executor or administrator for the foreclosure thereof, without first filing against the estate a claim for the indebtedness secured by such mortgage. It was held by this court in *Beach v. Bell*, 139 Ind. 167, 38 N. E. 819, and in *Whetstone v. Baker*, 140 Ind. 213, 39 N. E. 868, "that a person holding a specific lien on the real estate of a decedent may enforce such lien against such land after final settlement of the estate, although no claim therefor was filed against said estate before final settlement." It does not follow, however, that such a lien may be enforced before the final settlement of said estate without having filed a claim therefor against the estate, under the provisions of the decedents' act. Construing the sections of the decedents' act forbidding the commencement of actions by complaint and summons against executors and administrators, and concerning the filing and allowance of claims against decedents' estates, the sale of real estate to pay the debts, and the order in which the debts and liabilities of a decedent are to be paid, together with said section 2484 (2331) *supra*, concerning the foreclosure of mortgages, and the enforcement of liens against the lands of a decedent, it may be true, as insisted by appellant, that no court would have jurisdiction to foreclose such mortgage or enforce such lien, before the final settlement of said estate, until after the claim therefor had been filed against the estate, even though more than one year had elapsed since the death of the decedent. Conceding, without deciding as to the correctness of this contention of appellant, it does not follow that the complaint to foreclose a mortgage in such case must contain an averment that such claim had been filed against the estate before the commencement of the action. Superior courts in this state are courts of general jurisdiction, and therefore their authority to proceed with a cause need not affirmatively appear in the complaint. *Eel River R. Co. v. State*, 143 Ind. 231, 234, 42 N. E. 617; *Chappel v. Shuee*, 117 Ind. 481, 484, 485, 20 N. E. 417, and cases cited; 1 *Work, Prac.* § 474. In *Eel River R. Co. v. State*, *supra*, this court said: "The rule is thus stated by this court in *Bass Foundry & Mach. Works v. Board Com'r's Farke Co.*, 115 Ind. 234, 17 N. E. 593: 'The rule is universal as applied to courts of general jurisdiction, and especially in matters which proceed according to the course of common law, that the facts which give jurisdiction of the subject of the

action need not affirmatively appear on the face of the complaint. *Kinnaman v. Kinnaman*, 71 Ind. 417. It follows, from the very language of the statute which prescribes the cause of demurrer, as well as from the general rules of the common law, that a demurrer for want of jurisdiction, either in respect to the person of the defendant or the subject-matter of the action, will only lie where the defect appears upon the face of the complaint. The difference between want of jurisdiction because the court is wholly without power or authority to take cognizance of and adjudicate upon the particular subject-matter involved in the suit, and the want of jurisdiction on account of the nonexistence of some extraneous fact which may or may not exist in that case, is not to be disregarded. When the court is incompetent and without the faculty to deal with the subject-matter before it, its proceedings and judgment without regard to the question of waiver or consent by the parties would be *coram non iudice*. In such a case the want of jurisdiction would necessarily appear upon the face of the complaint, and objection could be taken by demurrer or motion to dismiss. Where, however, the subject-matter before the court is within its ordinary jurisdiction, so that its judgment would be binding unless the facts going to defeat its jurisdiction in that particular case were brought forward, a court of general jurisdiction may proceed until the facts showing the want of jurisdiction are made to affirmatively appear. This is so because the parties may, in such a case, waive any question concerning the jurisdiction of the court. Where facts exist which would deprive the court of jurisdiction, or arrest the proceedings for the time being, the complaint being silent in that regard, objection cannot be taken by demurrer, but the facts must be brought forward by answer or plea. If no objection be thus taken, the defect is deemed to be waived." See, also, 6 Enc. Pl. & Prac. 323, and cases cited in note 4; *Henry*, Prob. Law, § 287; *Harden v. Crest*, 7 Ind. 167. We have already shown that the Marion superior court has the same jurisdiction to foreclose mortgages as the circuit courts have, and it is expressly provided by statute that said superior court "shall also have concurrent jurisdiction in all actions by or against executors and administrators." Section 1404, *Burns' Rev. St. 1894* (section 1351, *Horner's Rev. St. 1897*). Where, therefore, it does not appear from the averments of the complaint that a claim for the indebtedness secured by such mortgage has not been filed against the estate, such fact, if it exists, and would bar or abate the action in any way, must be pleaded; whether in bar or abatement we need not determine in this case. See, however, 12 Am. & Eng. Enc. Law (1st Ed.) 309, 310. The case of *Lovering v. King*, 97 Ind. 130, is not in conflict with, but sustains, the conclusion reached in this case. It appeared in said case, in

the complaint for the foreclosure of a mortgage, that the personal estate of the decedent was liable for the payment of the mortgage debt, and that the action was brought before the expiration of the year within which the statute provided it could not be instituted, and the court held that the objection could be raised by demurrer because it appeared upon the face of the complaint. It follows that each of the questions presented in this case must be answered in the affirmative. The judgment is therefore affirmed.

(153 Ind. 46)

BALDWIN v. BOYCE.¹

(Supreme Court of Indiana. Oct. 6, 1898.)

CHATEL MORTGAGES—PAROL EVIDENCE—DESCRIPTION OF PROPERTY—RECORD—MATURITY OF DEBT—PAYMENT.

1. Parol evidence is admissible to aid in identifying the property described in a chattel mortgage.

2. A chattel mortgage described property consisting of restaurant furniture and fixtures as situated at a certain number on a certain street, without stating the town or city where the street was located. It stated, however, that mortgagor was of a certain county in the state; that the property was in her possession, where it was to remain until the maturity of the note; and that the security was executed at M., and payable at a bank in that city. The instrument showed it was acknowledged in said county, of which M. was the county seat. The mortgage was recorded within 10 days after its execution, and before the sale of the property to defendant. *Held*, that the property was bound by the mortgage, in the hands of defendant, since the description was sufficient to have put him on inquiry as to its location.

3. A purchaser is bound by a prior recorded chattel mortgage to the same extent as though he had actual notice of its existence at the time of his purchase.

4. A complaint to foreclose a chattel mortgage, averring that the mortgage was duly recorded in a certain county, and containing a copy of the mortgage, made a part of the complaint as an exhibit, which stated that mortgagor resided in said county at the time of its execution, is not demurrable as not showing that the mortgage was recorded in the county in which mortgagor resided.

5. The failure of a complaint to foreclose a mortgage to expressly allege that the mortgage debt is due is cured by a copy of the mortgage being filed as an exhibit, and made a part of the complaint, which shows that the note had matured before suit.

6. A complaint to foreclose a mortgage alleged, in regard to the nonpayment of the debt, merely that mortgagee had a lien on the property by reason of the mortgage, and that the lien was superior to the rights of defendant, who was a subsequent purchaser. *Held* that, though loose pleading, it inferentially showed that the debt was unpaid, and was hence not demurrable on that ground.

Appeal from circuit court, Delaware county; G. H. Koons, Judge.

Action by Mary Baldwin against James Boyce. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Wagner, Bingham & Long, for appellant. Chas. L. Medsker, for appellee.

¹ Rehearing denied.

JORDAN, J. This action was originally commenced by appellant against the appellee and Sarah Herman, to recover a judgment against the latter upon a promissory note, and to foreclose a chattel mortgage, securing the payment of said note against appellee, Boyce. The cause of the action was subsequently dismissed as to the defendant Herman; and, the court having sustained a separate demurrer of appellee to the complaint for insufficiency of facts, judgment was rendered upon demurrer against appellant, and the ruling of the court in sustaining this demurrer is the only error assigned.

The complaint, among other things, alleges the execution of the note by the defendant Herman to plaintiff on February 20, 1896, for the sum of \$300; and to secure the payment of this note, with the interest thereon, when due, it is averred that the said defendant, Herman, on March 27, 1896, executed to plaintiff a chattel mortgage on her stock of furniture and restaurant fixtures then situated in the restaurant and hotel rooms, being located at No. 313 East Main street, in the city of Muncie, Delaware county, Ind. It is further alleged that this mortgage was duly recorded in the recorder's office of Delaware county, Ind., within 10 days after its execution. It is also averred that on the — day of —, 1896, the defendant Boyce purchased from said Herman the said property. At the time of the execution of the chattel mortgage in question, and for many years prior thereto, and ever since said time, it is averred that the defendant Boyce "was, has been, and is now the owner of said restaurant and hotel room, and the building in which the same are situated"; that, at the time the mortgage was executed by Sarah Herman, the latter was the tenant of Boyce, and occupied these rooms, at No. 313 East Main street, in the said city of Muncie; that these rooms, at the time of the purchase of the property by Boyce, were well known to him, and he also at that time knew that said property consisted of hotel and restaurant furniture and fixtures, and was situated in the said rooms and building, and he also knew, it is averred, that said rooms were numbered 313 East Main street, in the said city of Muncie, and that they had been so numbered long prior thereto. It is further alleged in the complaint that, in drafting the mortgage in suit, the name of the city and county in which the chattels were situated was by inadvertence and unintentionally omitted. A copy of the mortgage is filed with the complaint, and made a part thereof, and what also purports to be a copy of the note, secured by the mortgage, is filed as an exhibit with the complaint. The prayer of the complaint, as far as it applies to appellee, is for a foreclosure of the chattel mortgage and the sale of the mortgaged property in payment and satisfaction of the mortgage debt. The mortgage, among other things, as the copy thereof discloses, recites

that Sarah Herman, of Delaware county, in the state of Indiana, mortgages to Mary Baldwin, etc., the following described personal property, to wit: "All and singular the restaurant and hotel furniture and fixtures located in and situated in and about the 1st, 2nd, and 3rd stories of No. 313 East Main street, consisting of the following articles, to wit: 1 large folding lunch counter, 1 large wall case, set shelving, 1 ten gallon coffee urn, 1 glass top cigar case, 1 wall mirror, 1 bank mirror, 6 folding tables, 10 side tables, 6 tray stands, 10 lunch counter chairs, 50 dining chairs, 1 sideboard, 80 yards linoleum, 1 small refrigerator, 1 large refrigerator, 1 linen and dish safe, 1 ten-hole range, 1 steam table, 1 charcoal broiler and utensils, 1 thirty-gallon hot-water boiler, 1 gas stove, 24 bedsteads with the bedding for the same, 21 washstands with bowls and pitchers, carpeting in 22 rooms, and hall carpeting, 7 heating stoves for upstairs rooms, 24 mirrors, 9 dressers, 50 chairs, 1 piano,—to secure the payment of a certain promissory note, dated at Muncie, Indiana, February 20th, 1896, for the sum of \$300, and due in sixty days from date, and payable at the Merchants' National Bank of Muncie, Indiana, with 8 per cent. interest per annum, executed by the said Sarah Herman to the said Mary Baldwin." The mortgage also discloses that the mortgagor was in possession of the mortgaged property at the time of its execution, and that under its terms she was to retain the possession and use of the property until the note secured thereby became due. It appears from the exhibit that the mortgage was duly acknowledged and filed for record on the same day that it was executed, and that it was recorded in the Chattel Mortgage Record No. 8, in the recorder's office of Delaware county. We are informed by the brief of appellant's counsel that the lower court held, upon the demurrer of appellee, the description of the mortgaged property insufficient. The contention of appellant's counsel is that the description of the mortgaged chattels is sufficient, and that the complaint, when aided by the facts which a copy of the mortgage discloses, is substantially sufficient to withstand the demurrer of appellee.

The principal question discussed, pro and con, by counsel for the respective parties, relates to the sufficiency of the description of the property as described in the mortgage. It is insisted by appellee that the description of the chattels covered by the mortgage is not so sufficiently definite or certain as to authorize the enforcement of the lien against the property in the hands of appellee, who, it is said, is a purchaser thereof in good faith. Appellee virtually concedes that, if the instrument contained anything by which the property might be identified, then, in that event, it might be held sufficient. The insistence is that the instrument states but one thing that would, if certain, afford means of identification, and that is that the mortgaged goods are

situated at "No. 313 East Main St."; but as to where "East Main St." is located, it is asserted, is left wholly indefinite by the mortgage. The rule is well settled in this jurisdiction, as well as elsewhere, that the description in a chattel mortgage must be reasonably certain; and a description of the property which will enable third persons, aided by the inquiries which the instrument itself indicates or suggests, to identify the mortgaged property, is sufficient. The rule asserted by the ancient maxim of the law, "Certum est quod reddi potest,"—"That is certain which can be rendered certain,"—is applicable to the description in a chattel mortgage. The law properly permits parol evidence to be employed, not to furnish the description, but to aid, if possible, the description given in the mortgage, in the identification of the mortgaged property. In support of the doctrine above asserted, see *Burns v. Harris*, 66 Ind. 536; *Tindall v. Wasson*, 74 Ind. 495; *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Bank v. Brown*, 112 Ind. 474, 14 N. E. 358; *Buck v. Young*, 1 Ind. App. 558, 27 N. E. 1106; *Koehring v. Aultman, Miller & Co.*, 7 Ind. App. 475, 34 N. E. 30; 5 Am. & Eng. Enc. Law (2d Ed.) 956. *Cobbey, Chat. Mortg. § 188*, states the rule as follows: "The general rule seems to be that, as between the parties, any description is good if the parties at the time knew and understood what the mortgage covered; that as to third parties, where the property intended to be mortgaged was identified at the time, any description which points out the particular property, or suggests inquiries by which it can be identified outside of the instrument, is good against the world. If part or all of the description is erroneous, it is only to be rejected, as invalidating the mortgage, when it is so misleading as not even to suggest the property intended to be mortgaged; and, if part of the property can still be identified, it is good as to that part." Applying the principles to which we have referred to the mortgage in the case at bar, and testing it thereby, we are of the opinion that the description therein must be held sufficient. The description of the property is mainly assailed by the appellee upon the ground that the location thereof is rendered uncertain or indefinite, for the reason that the instrument omits the name of the place where the designated street is situated. As a general rule, it is true that the location of the mortgaged chattels ought to be given in the mortgage; still, as location serves only as an element or feature of identification, its omission is not necessarily fatal, if the property is otherwise sufficiently described.

We cannot concur, however, in the contention of counsel for the appellee that the omission in the mortgage of the particular town or city, wherein the designated street is situated, renders the description of the property, as otherwise furnished by the instrument, insufficient. The claim of the appellee, that

the failure to give the name of the town or city in which East Main street may be found leaves the instrument without any other circumstances or means to identify the property, is not supported by the facts. The mortgage, as heretofore said, states that the chattels mortgaged consisted of restaurant and hotel furniture and fixtures, located in and about the first, second, and third stories at No. 313 East Main street. It further discloses that the mortgagor was of Delaware county, Ind., and that the property was in her possession, and that she was to retain the possession and use of the same until the maturity of the note secured. It was further recited therein that the note secured thereby was executed by the mortgagor to the mortgagee at Muncie, Ind., and was made payable at a designated bank in that city. It was further shown by the instrument that it was acknowledged before a notary of Delaware county, Ind., of which, as it is well known, the city of Muncie is the county seat; and an examination of the public records would have shown that it was recorded in the recorder's office of that county. It must be evident that all of these circumstances and means, which the instrument itself discloses, and which, at least, may be said to be suggestive of the place where the property, at the time of the execution of the mortgage, was located, were sufficient to have put an ordinarily prudent person upon inquiry relative to the particular situs of the chattels mentioned and embraced in the mortgage. It is manifest, also, we think, that, aided by such inquiry, the situation of such chattels could have been easily ascertained. Certainly, a proper inquiry, under the facts, would have developed that the street mentioned in the instrument was in the city of Muncie, Delaware county, Ind. The rule is elementary that, where a person has knowledge of facts sufficient to put him upon inquiry, he is chargeable with the knowledge of all matters which he could have learned by reasonable inquiry. Viewed in any light presented by the facts and circumstances of the case, it must be evident that the description of the property in question was sufficient to have identified it upon reasonable inquiry. The mortgage was duly recorded, and was notice to all; and the appellee is bound by it, regardless of the fact that he may not have had actual knowledge of its existence at the time he purchased the property. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545; *Koehring v. Aultman, Miller & Co.*, supra. When the other facts alleged in the complaint, relative to the mortgagor being a tenant of the appellee, and occupying the building at 313 East Main street, in the city of Muncie (which, it is averred, was owned by appellee, and wherein, it seems, the property in controversy was situated at the time of the execution of the mortgage), are considered in connection with the facts which the mortgage itself reveals, it is clear, we think, that a very little investigation or inquiry upon

his part would have led to the discovery that the goods which he was about to purchase were the identical property incumbered by the mortgage.

It is insisted by counsel for the appellee that the complaint is also insufficient for the following reasons: First, it does not show that the mortgage was recorded in the county in which the mortgagor resided; second, that it does not expressly allege that the debt secured by the mortgage lien is due and unpaid.

In answer to the first objection, it may be said that the pleading expressly avers that the mortgage was duly recorded within 10 days after its execution in the recorder's office of Delaware county, Ind.; and a copy thereof, which is a proper exhibit, and made a part of the complaint as such, discloses that the mortgagor resided in that county at the time she executed the mortgage. This was sufficient. *Brown v. Corbin*, 121 Ind. 455, 23 N. E. 276.

Relative to the second objection, it may be said that it is true that the law requires that the cause of action must have accrued before it is commenced, and that a pleading founded on a contract is not complete unless it alleges a breach of such contract. This rule is well recognized and affirmed. *Lawson v. Sherra*, 21 Ind. 363; *Brickey v. Irwin*, 122 Ind. 51, 23 N. E. 694. It is true in this case that the complaint does not, as it should, expressly allege that the mortgage debt is due and unpaid. The record, however, shows that the complaint was filed on the 25th day of May, 1896; and it is shown, by the copy of the mortgage filed therewith, that the note secured had fully matured before the action was instituted. Therefore the omission of the complaint to allege the maturity of the debt is supplied by the facts which the exhibit discloses, and the infirmity of the pleading in this respect is thereby cured. *Green v. Louthain*, 49 Ind. 139; *Hardin v. Helton*, 50 Ind. 319; *West v. Hayes*, 104 Ind. 251, 3 N. E. 932; *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201.

The complaint was also required to allege facts which would either expressly or inferentially disclose the nonpayment of the mortgage debt. *Manufacturing Co. v. Worrall*, 80 Ind. 297; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19, and cases there cited. The pleading itself, however, substantially alleges that the plaintiff holds a claim or lien on the mortgaged chattels, by reason and virtue of her said mortgage, and that the interest in the property, held by the defendant Boyce is inferior and junior to her said lien. These averments fairly show that the plaintiff, at the time she commenced this action, still held a lien upon the property, by reason and virtue of the mortgage in suit, and that this lien was superior to the interest which the defendant held in said property. Such facts may be said to at least inferentially show that the debt which such lien secured was unpaid; for it is evident, if the plaintiff's lien on the property, under the mortgage, still existed at the time the action was instituted, that the

debt had not been satisfied by payment or otherwise. Considering, then, the facts alleged in the complaint, in connection with those which the exhibit supplies, it may be said, at least, that it is inferentially disclosed that the mortgage debt was due and unpaid at the commencement of the action, and the pleading in this respect, is sufficient to put appellee upon his answer.

While we are constrained, under the liberal rules of pleading, as settled by the decisions of this court, to uphold the sufficiency of this complaint, we may, however, with propriety, say that it is loosely drafted, and we cannot commend it as a model pleading. The judgment is reversed, and the cause remanded to the lower court for further proceedings.

(149 Ind. 30)

PUTT et al. v. PUTT et al.

(Supreme Court of Indiana. Nov. 23, 1897.)

Dissenting opinion.

For majority opinion, see 48 N. E. 356.

HACKNEY, J. I do not concur in the holding that a will may be contested upon a cross complaint, in an action to quiet title, without the statutory bond. The holding that the statutory condition as to the time of waging a contest applies, while that of the filing of a bond does not apply, seems to me to be inconsistent. The right to contest is purely statutory, and, as has often been held, can only be waged by complying with the conditions upon which the right is given. These holdings may not be obviated, and the statute evaded, by waging the contest by cross complaint instead of complaint, and without compliance with the conditions as to time and bond.

(21 Ind. App. 675)

HADLEY v. LAKE ERIE & W. R. CO.¹

(Appellate Court of Indiana. Oct. 7, 1898.)

RAILROADS—PERSONAL INJURIES—CONSIGNEE UNLOADING FREIGHT—CONTRIBUTORY NEGLIGENCE—TRIAL—SPECIAL VERDICT—VENIRE DE NOVO—NEW TRIAL—TIME OF APPLICATION.

1. Plaintiff backed his wagon up to a freight car on a side track to unload goods. There was a freight train on the side track, to which this car was coupled. The freight train was cut, and the engine was switching, and the time when it would couple up was uncertain. Plaintiff knew these facts, and was familiar with the tracks. The station agent told him he had time to get his goods out of the car, and he had unloaded them, and was on his wagon, when the train started. The wagon, without apparent necessity therefor, was placed so close to the car that a step on the latter caught and upset the wagon, injuring plaintiff. *Held*, that he was guilty of contributory negligence.

2. Interrogatories calling for findings that personal injuries sustained by plaintiff were received without his contributory negligence, and that they were caused by defendant's negligence, are improper, and the findings will be disregarded.

3. Under *Burns' Rev. St. 1894, § 570* (*Horner's Rev. St. 1897, § 561*), providing that an

application for new trial may be made at any time during term, or, if the verdict is rendered on the last day of the term, then on the first day of the succeeding term, where a special judge tried the case, and the verdict was rendered while the regular judge was sitting during the term, and the record did not show that the latter was disqualified to hear the case, a motion should have been filed at the term, and the court properly refused to permit the filing of it at the succeeding term.

4. On rendition of a special verdict a venire de novo will not be awarded unless the verdict is so ambiguous and uncertain on its face that judgment cannot be rendered on it.

Comstock, J., dissenting.

Appeal from circuit court, Tipton county; M. B. Lairy, Special Judge.

Action by Merit Hadley against the Lake Erie & Western Railroad Company. From judgment for defendant, plaintiff appealed. Affirmed.

John F. Neal and Waugh, Kemp & Waugh, for appellant. W. E. Hackedom, Shirts & Kilbourne, John B. Cockrum, and Miller & Elam, for appellee.

ROBINSON, J. Appellant sued appellee to recover damages alleged to have been sustained by him while unloading goods from one of appellee's cars. Upon a special verdict returned by the jury the trial court rendered judgment in appellee's favor. The errors assigned call in question the action of the court in rendering judgment in appellee's favor on the special verdict, in overruling appellant's motion for a venire de novo, and in refusing to permit appellant to file a motion for a new trial.

Whether appellant was guiltless of negligence proximately contributing to his injury depends upon the law applicable to the following facts, as found in the special verdict: A stock of merchandise and groceries was shipped to appellant, at Cicero, Ind., on appellee's road, arriving in the forenoon of the 31st day of March, 1894, in a car which was placed on a side track, the usual place of unloading freight at said station. At the time of the accident there was a passenger train and a freight train on the side track containing said car, both of said trains bound south, and about the time of the accident a train was due from the south. Said side track was the passing point for two or more trains at or near the time of the accident, which fact was known to appellant at the time. Appellant had been familiar with the location of the tracks at said place for 10 years prior to the time of the accident. Appellant knew that the car containing his goods was coupled to a freight train which was cut in two, the locomotive being engaged in switching, and he knew that the time when the train would couple up was uncertain. In the afternoon of said day appellant drove to the car, and backed his wagon up to the car in such close contact therewith that any ordinary movement of the train in coupling up was liable to upset the wagon. There was an

iron step or ladder on the side of the car next to the wagon. After appellant had finished unloading his goods, and had gotten out into the wagon, the train was coupled up, and the car moved so that the iron step or ladder or some part of the car caught the wagon, and upset it, throwing appellant to the ground, and injuring him. Certain interrogatories were submitted to the jury, and answered by them, to the effect that appellant's injuries were received without any fault or negligence on his part contributing thereto, and also that appellant's injuries were caused by the negligence and carelessness of appellee. Such interrogatories and answers are not proper in a special verdict, and are to be disregarded in considering the verdict. Board v. Bonebrake, 146 Ind. 311, 45 N. E. 470. The verdict shows that appellant was directed by appellee's agent to the car containing his goods. The verdict does not show that the agent told appellant that he would have plenty of time to get his goods out of the car before any train or cars would move upon said side tracks; and in answer to a direct question to this effect the jury refused to answer the question directly, but said that the agent told appellant "that he had time to get his goods out of the car." The jury simply answered that the agent told appellant that the car was on a certain track, and that he would have time to unload it, and by the above answer they, in effect, negatived the proposition that the agent said appellant would have time to unload the car before any train or car would move it, because they refused to answer that question directly. In this connection the fact must be borne in mind that appellant knew that the car was coupled to a freight train, and that the time when the train would couple up was uncertain. The extent to which appellant could rely upon this opinion of the agent must be determined from the facts and circumstances at the time surrounding him, and of which he had notice. The facts which he was bound to observe indicated the proper line of conduct, and he had no right to ignore such facts, and rely wholly upon the assurances of the agent. But, even if we should admit that he had the right to and did rely upon this opinion of the agent, it appears from the verdict that the agent was right, and that appellant did have time to unload his goods, and that he had actually unloaded them, and had left the car, when injured. He was not injured while in the car, or while leaving it, and would not have been injured at all had he not had his wagon in contact with the car. The jury found it was necessary for appellant to place his wagon near the car, but appellant has not shown that it was at all necessary for him to place his wagon as he did place it in order to unload his goods. He knew the conditions surrounding him, that the time when the cars would be coupled up was uncertain, and that when coupled up this particular car was liable to be moved. With

knowledge of these facts, he placed his wagon—whether necessarily or not he has not shown—in such contact with the car that any slight movement of the car was liable to upset the wagon. Such act, unexplained in any way on his part, was negligence which proximately contributed to his injury, and precludes a recovery.

Counsel for appellant cite the case of *Railway Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923. But in that case there was a general verdict, and it does not appear what the facts were. The discussion in that case is wholly as to whether answers to interrogatories necessarily destroyed the general verdict. It does not appear what the evidence in that case disclosed. No one doubts the general principles of law declared in that opinion. There having been a general verdict in that case, and it not appearing what the facts were, the case gives no assistance in determining the questions involved in the case at bar. Counsel also cite the case of *Railroad Co. v. Hauck*, 8 Ind. App. 367, 35 N. E. 573. The opinion in that case contains quite a full statement of the facts, and we have no fault to find with the law applied to the facts therein stated. But a comparison of the facts bearing upon the question of contributory negligence in that case with the facts upon the same question in the case at bar will show many points of dissimilarity. The conditions existing at the time, the circumstances under which the accidents occurred, the knowledge of such conditions and circumstances possessed by the parties injured, are clearly distinguishable in the two cases. The law applicable to one is not necessarily controlling in the other. The two cases present an essentially different state of facts. The case cited was correctly decided upon the facts, and the case at bar must be determined by its own facts, and decided upon them.

Appellant has also assigned as error the refusal of the court to permit him to file a motion for a new trial. The case was tried at the September term, 1895, of the Tipton circuit court, and the verdict was not returned on the last day of that term of the court. The motion for a new trial was not offered to be filed until the next succeeding term of court. The case was tried by a special judge, but the record does not show that this was because the regular judge was disqualified to sit in the case. The motion for a new trial could have been filed at any time before the close of the term, while the regular judge was presiding, and could have been passed upon at a subsequent term by the special judge. No excuse is shown for not having so filed the motion. *Burns' Rev. St.* 1894, § 570 (*Horner's Rev. St.* 1897, § 561); *Jacquay v. Hartzell*, 1 Ind. App. 500, 27 N. E. 1105; *Shaffer v. Insurance Co.*, 17 Ind. App. 204, 46 N. E. 557.

There was no error in overruling the motion for a venire de novo. The special verdict is not ambiguous nor uncertain. It contains

a full and fair statement of every fact submitted to the jury. It is well settled that a venire de novo will not be awarded unless the verdict is so defective and uncertain upon its face that no judgment can be rendered upon it. *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134, and cases there cited; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388. There is no error in the record for which the judgment should be reversed, and it is therefore affirmed.

WILEY, J. I concur in the majority opinion of the court in holding that the facts found by the special verdict clearly show that appellant was guilty of negligence contributing to his injury, and for this reason cannot recover. *ROBINSON, J.*, speaking for the majority, says that this case is clearly distinguishable from the case of *Railway Co. v. Hauck*, 8 Ind. App. 367, 35 N. E. 573, but he does not, at any length, point out the difference between the two cases; and, as there is such a wide distinction between them, and as appellant relies largely on the *Hauck Case* for a reversal, I desire to express my personal views in relation thereto. First, however, I want to point out the material facts which distinguish the two cases. In the case at bar there is no finding that any one of appellee's agents or servants knew that appellant was at or in the car unloading his goods, at the time of the accident. In the *Hauck Case*, it was known that appellee was in the car, and there at the express direction of appellant's agent. In that case a car had been placed on the side track at a way station, for the use of appellee, in which she was going to ship some household goods. She was directed to the car by the station agent, and was told to hurry, and get her goods loaded. At the time she went to the car to load her goods there was no other car on the side or main track, and no train in or about the premises. She was unfamiliar with the surroundings and the time trains passed the station. While she was loading her goods, a freight train passed on the main track, the side door of her car next to the main track being closed. The jury found as a fact that when said freight train passed the car in which appellee was at the time, it passed on and out of her hearing, and that "she had reason to believe, and in good faith did believe, and, so believing, did rely thereon, that said train, after its movement beyond her hearing, continued on its way eastward, and, being wholly ignorant that said train would be backed upon said track and against said car, thereby endangering her life and limb, she remained in said car," etc. It will be observed from these findings that there is a total absence of any fact that she had any knowledge of approaching or impending danger, while, on the contrary, there is an express finding that she believed, and had good reason to believe, and, so believing, did rely

thereon, that the train, after it had moved beyond her hearing, had continued eastward on its way, and that she was wholly ignorant that it would be backed on the side track, and against her car. After such a finding of facts, it was a correct announcement of the law to hold that she was thus lulled into danger, and the appellant was bound to protect her while she was so situated. But how materially different are the facts in the case in hand. The appellant here knew of the danger he was in. He saw the freight and passenger trains on the tracks. He saw the process of switching as it was being done, and knew that it was uncertain when the train would back up and couple onto the car from which he was unloading his goods. Thus it affirmatively appears that he was fully aware of the impending danger, and yet he took no precautions to avert it. The jury found that after reaching the car, and being in full possession of all the facts constituting the danger, he did not even take the precaution to look up and down the track at the moving train. Then another broad distinction between this and the Hauck Case is this: In the latter case the station agent knew that Mrs. Hauck was in the car, loading her goods, while in the case at hand there is an express finding that neither the appellee's station agent, conductor, or any other servant had any knowledge that appellant was in the car when the train was being backed up against said car. In *Railroad Co. v. Hauck*, supra, Reinhard, J., speaking for the court said: "The mere knowledge of the fact that a freight train had arrived and passed the box car on the main track was no notice to her that such train would enter the side track, and endanger her safety by being pushed violently against the car in which she was lawfully engaged in her work of putting away the goods. *She was not bound, under such circumstances, to leave the car, and watch the movements of the freight train.*" (The italicizing in the above quotation is my own.) Mark the guarded and well-measured language of the learned judge who wrote the opinion: "She was not bound, under such circumstances," he says, "to * * * watch the movements of the train." What circumstances? Unquestionably the circumstances that all the facts and surroundings presented to her mind and view. Such facts presented to her mind a state of circumstances that clothed her with perfect safety, while she was engaged in her duties. Suppose, when she went to the car on the side track, under the direction of the station agent, there had been a live freight train on the track, engaged in switching; that a passenger train was also at the station, waiting for another passenger train to pass, which was then due; that it was uncertain when the freight train would back up against her car, and she had full knowledge of all such facts, then the "circumstances" surrounding her would have

been radically different from what they were, and the language I have just quoted would not have been applicable to the case, and, I dare say, would not have been used. The rule for which appellant contends, carried to its logical conclusion, would lead to confusion, and in many instances become the tool for working manifest injustice and great hardship. If the rule for which appellant contends is a correct one, then a person may place himself in eminent peril, with a full knowledge of impending danger, and in case of injury resulting from the negligence of another he may recover therefor, notwithstanding the wholesome and long-established doctrine that contributory negligence is a complete defense to such recovery. In other words, if appellant had gone to the car to unload his goods, under the exact facts as they are presented in this case, with the exception that, instead of the switching of the train at the far end of the switch, it had then been backing down, and was rapidly approaching the car, yet applying the rule as contended for, he could still recover. To so declare the law would be in a measure to abrogate the rule governing contributory negligence, and be a reproach upon courts. The rule that has so long obtained should not be relaxed. Granting that appellee's station agent told appellant that he would have plenty of time to remove his goods from the car, before the freight train would back down against it (and yet I insist there is no express finding of such fact), and by reason of such direction he had a right to rely upon protection from injury, still the facts found are insufficient to support a judgment for appellant. The jury found that some of the articles of merchandise in the car were heavy, and that it was necessary for him to drive his wagon close to the car, so as to unload them. There is no finding that it was necessary for him to place his wagon in such close proximity to the car that any movement of the car would upset it. Yet this is just what he did, and the jury so find. Had he not done this, no injury would have resulted; for it appears from the finding of the jury that he had removed all of his goods from the car to the wagon, and had left the car, and entered the wagon, before the train backed against the car. So, as a matter of fact, he had removed the goods, and his injury resulted from the upsetting of the wagon, and that occurred on account of his own negligence in placing his wagon in a dangerous position. There is another distinguishing feature between this and the Hauck Case. In that case, at the time of the injury, appellee was alone in the car. No one was outside of the car, in her employ, to warn her of approaching danger. While in this case appellant's servant was in the wagon all the time the goods were being unloaded, and was in full view of the approaching train, for, as the jury found, there were no obstructions to ob-

scure the view. In such case the knowledge of the servant will be imputed to the principal.

There is another well-grounded rule of law that should not be lost sight of in a case of this character, and that is the knowledge of appellant of the apparent danger surrounding him. Mr. Beach, in his excellent work on Contributory Negligence, says: "Knowledge on the part of the plaintiff as to the danger to which he is exposed, or, what is the same thing in law, a legal obligation to know of it, is an essential element in the case when contributory negligence is the issue. The law holds no one responsible for exposing himself to a danger of which he knew nothing, and of which he was under no obligation to inform himself. We must use ordinary care and prudence to avoid the ordinary perils that beset us, but we are not bound to guard against those which we have no reason to suspect. Hence knowledge of the probable danger, or a sufficient reason to apprehend it, is essential to constitute contributory negligence." Beach, *Contrib. Neg.* § 38. There is a long line of authorities in harmony with this doctrine, of which we cite the following: *Wall v. Town of Highland*, 72 Wis. 435, 39 N. W. 560; *Telephone Co. v. Varnan* (Pa. Sup.) 15 Atl. 624; *Moomsey v. Peak*, 57 Mich. 259, 23 N. W. 804; *Jeffrey v. Railroad Co.*, 56 Iowa, 546, 9 N. W. 884; *Langan v. Railroad Co.*, 72 Mo. 392; *Gray v. Scott*, 66 Pa. St. 345. Again, Mr. Beach says: "While it is unquestionably true that one may voluntarily expose himself or his property to danger, without thereby becoming guilty of contributory negligence as a matter of law, it is nevertheless an established rule that, where one does knowingly put himself or his property in danger, there is a presumption that he ipso facto assumes all the risks reasonably to be apprehended from such a course of conduct." Beach, *Contrib. Neg.* § 37. The rule that one cannot place himself in a position of danger, and recover for an injury resulting therefrom, is firmly established and strongly intrenched by the authorities. *Railroad Co. v. Murphy*, 17 Ill. App. 444; *Schoenfeld v. Railway Co.*, 74 Wis. 433, 43 N. W. 162; *Allen v. Johnston*, 76 Mich. 31, 42 N. W. 1075; *Goldstein v. Railroad Co.*, 46 Wis. 404, 1 N. W. 37. It has been held, and, I think, correctly, that a party cannot knowingly expose himself to danger, and then recover damages for an injury which he might have avoided by use of a reasonable precaution. *Railroad Co. v. Clemens*, 5 Ill. App. 77, 80; *Palmer v. Deering*, 17 N. Y. Wkly. Dig. 145; 4 Am. & Eng. Enc. Law, p. 56; *Morrison v. Board*, 116 Ind. 431, 19 N. E. 316; *Travis v. Town of Carrollton* (Sup.) 7 N. Y. Supp. 231; *Spittorf v. State*, 108 N. Y. 205, 15 N. E. 322. In *Clark v. Wright*, 25 C. C. A. 190, 79 Fed. 744, it was held that one whose negligence is one of the proximate causes of his injury cannot recover damages

from another, even though the negligence of the latter also contributed to it, and was the more proximate cause. See, also, *Railway Co. v. Davis*, 10 U. S. App. 422, 3 C. C. A. 429, and 53 Fed. 61; *Railway Co. v. Moseley*, 12 U. S. App. 601, 6 C. C. A. 641, and 57 Fed. 921; *Reynolds v. Railway Co.*, 32 U. S. App. 577, 16 C. C. A. 435, and 69 Fed. 808; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Hayden v. Railway Co.*, 124 Mo. 566, 28 S. W. 74. The case of *Wherry v. Railroad Co.* (Minn.) 67 N. W. 223, is in point here. In that case appellant approached a street crossing, and found it blocked by a freight train. It was apparent to him that the train was liable to start at any moment, and, after waiting some time, he attempted to cross by climbing up between the cars, about 250 feet from the engine, and was injured by the train suddenly backing up without giving any signal or warning. It was held that he could not recover. The court, in speaking of the facts as stated, said that: "It was apparent that it [the train] might start at any time, and, if it should, the risk and danger were open and notorious. On these facts it must be declared that there was a want of ordinary care upon plaintiff's part contributing to the injuries received, as a proximate cause thereof, without which the injuries would not have been received." The court further said: "The fact that a danger is known will preclude a recovery, in case of injury, when it is apparent and imminent. * * * One has no right to cast himself upon a known danger where the act subjects him to imminent and great peril." If, in the case from which I have just quoted, the appellant had been directed by an agent of appellee to do just what he did do, and had been assured that he could do so in safety, the case would have been parallel to the one in hand. Yet would it be contended by any one that upon such direction and upon such assurance appellant would have been relieved from responsibility? I think not. In the case at bar appellant was fully aware that the freight train, to a part of which the car from which he was unloading his goods was attached, was likely to back up and couple to his car at any moment; and in the case of *Wherry v. Railroad Co.*, supra, it was apparent to appellant that the train might start at any time. In this respect the two cases are analogous. It has been held in many cases that a railroad is a menace of danger. See *Wherry v. Railroad Co.*, supra, and cases there cited. And, being a place of danger, a person who is mentally accountable cannot voluntarily place himself within its dangerous environments and perilous surroundings, and, in case of injury resulting from the negligence of its servants, recover for damages sustained.

Recurring again to the Hauck Case, supra, there was an allegation in the complaint and a finding by the jury that appellee had no

knowledge or notice of the approaching train so backed in upon the side track, and that no means were afforded her to learn or know of its approach. So in these material and essential facts this case is clearly distinguishable from that. Here appellant did have the means of knowing, and in fact the jury found that he did know, that the train was liable to move at any moment, and back up and couple onto his car. Under the authorities and upon sound reasoning the facts found are, in my opinion, wholly insufficient to support a judgment in favor of the appellant, and the conclusion reached by the majority of my associates is correct.

COMSTOCK, J. (dissenting). Believing that the majority opinion in this cause does not correctly express the law as heretofore announced by the supreme and this court, I deem it proper to briefly express my dissent to the action of the majority of the court. The special verdict clearly shows that the defendant corporation was guilty of negligence. It remains only to consider whether the plaintiff was himself guilty of negligence approximately contributing to his injury. In the opinion of the writer, the facts found by the jury affirmatively show that he was free from fault. Upon the authority of Railroad Co. v. Hauck, 8 Ind. App. 367, 85 N. E. 573, and cases there cited, appellant is entitled to judgment. The facts found decisive of the question are in answer to the following interrogatories: "Was the car containing said articles of merchandise and groceries side tracked by defendant upon the principal switch of said town of Cicero? Answer. Yes." "Did the plaintiff drive to said defendant's local office and station at said town of Cicero in the afternoon of said day of the 31st of March, 1894, and inquire of defendant's agent at said office concerning said goods and merchandise? Answer. Yes." "Did defendant's agent, in answer to such inquiry of the plaintiff, inform the plaintiff that the same was in the car of the defendant standing on the side track or switch? Answer. Yes." "Was the side track or switch the usual place of unloading freight at said station or town? Answer. Yes." "Did said agent direct the plaintiff to drive around to said car, and unload said articles and groceries therefrom into his wagon? Answer. Yes." "Did said agent further state to the plaintiff at the time that he would have ample or plenty of time to get the same before any train or cars were moved upon said side track? Answer. We, the jury, find from the evidence that the agent told the plaintiff that he had time to get his goods out of the car." "Did the plaintiff follow such instructions, and rely upon the same, and immediately drive around to said car for the purpose of unloading said goods? Answer. Yes." "When the plaintiff first started from the freight station to the car containing his goods, did the defendant, or any of the agents, direct him so to do? Answer. The evidence shows that the plaintiff

received information, when said plaintiff paid the freight, that said plaintiff's goods were in the car on the defendant's side track, and when said plaintiff got around to Jackson street that the freight agent directed the said plaintiff to the car in which plaintiff's goods were." The jury further found that the plaintiff and his assistant drove their wagon immediately to the car designated, and worked as diligently and rapidly as possible to remove the goods, and just as the work of transferring the goods from the car to the wagon had been completed, and before the plaintiff had time to drive away from the car, the employes of the defendant in charge of the locomotive of defendant carelessly, without any warning to appellant, ran a train of freight cars against the car from which he had removed his goods, resulting in the injury for which he sues. The facts thus found show that a consignee of freight paid the charges thereon of the common carrier at the place of delivery, and is directed by its proper agent to the car side tracked at the usual place for unloading goods, and is informed by said agent that he would have time to get his goods out before the car would be moved; that, relying upon this information, he went to work immediately, with his assistant, with all possible diligence, and did remove the goods from the car to his wagon, but, before he had time to drive away, was, by the fault of the defendant's employes, injured. The learned judge who wrote the opinion attaches importance to the fact that the jury did not say that plaintiff was told that he had ample or plenty of time in which to get out his goods, but that he was only told that he had time. We submit that plaintiff could only have understood by this statement, under the circumstances, that he had time to accomplish his work. If plaintiff had time to remove his goods by the exercise of ordinary diligence, it was all the time he required, and he was informed that he had this time by one upon whom he had the right to rely, and upon whose instructions he acted. We think that it cannot be reasonably held that the statement made by appellee's agent to appellant that he would have time to remove his goods meant that he would have time to put them in his wagon, but not to get away with the wagon before the train moved. The majority opinion holds that the fact that appellant had the end of his wagon against the car, unexplained, was negligence. The jury found that it was necessary to place the wagon near the car. That it was necessary to put the end of the wagon against the car could have no better explanation than the finding that among the articles to be unloaded was a barrel of sugar and a barrel of vinegar. The defendant company was under special obligations to protect the appellant from injury. Its employes had induced him to enter into a place of danger. The case is not distinguishable in principle from that of Railroad Co. v. Hauck, *supra*. Appellant had

been lulled into a feeling of security by the agent of the company, as had been the plaintiff in the case last named, in which the court said it was the duty of the railroad to furnish to persons lawfully upon its tracks, "engaged in loading or unloading freight, protection from injury by approaching trains or locomotives. In such cases a person having business with the company of the character indicated had the right to occupy a position designated by the company, even if such position be hazardous, and to rely upon the diligence of the company to protect him from danger." See *Howe v. Ohmart*, 7 Ind. App. 32, 33 N. E. 466; *Railway Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 801; *Railroad Co. v. Schmidt* (Ind. Sup.) 46 N. E. 344; *Railroad Co. v. Keely*, 138 Ind. 600, 37 N. E. 406. The judgment of the trial court should be reversed.

BLACK, J., took no part in this decision.

(21 Ind. App. 23)

CHICAGO & E. R. CO. v. HARSHMAN.

(Appellate Court of Indiana. Oct. 6, 1898.)

EXECUTORS AND ADMINISTRATORS—ACTION FOR INTESTATE'S DEATH—LIABILITY OF ESTATE FOR COSTS—CLAIMS—JUDGMENTS—COLLATERAL ATTACK—VACATION.

1. Where an administrator sues for the death of his intestate, and a judgment for costs is obtained against him, the general fund of the estate is liable to pay such judgment, if the rights of creditors do not intervene.

2. The liability of an estate to pay a judgment recovered against the administrator as such cannot be attacked in a proceeding to enforce the same against the estate.

3. Where, after the final report of an administrator is approved, and the administrator discharged, the court, on the administrator's petition, sets aside the order of confirmation and discharge to enable him to prosecute a pending suit, the estate is left as if no report had been filed. Hence a claim subsequently filed against the estate is not barred because not filed before the filing of the vacated report.

Appeal from circuit court, Delaware county; G. H. Koons, Judge.

Claim by the Chicago & Erie Railroad Company against Jonathan Harshman, as administrator of the estate of James W. Harshman, deceased. From a judgment for the estate, claimant appeals. Reversed.

W. O. Johnson, Kenner & Lesh, W. W. Mann, and L. Lesh, for appellant. N. N. Spence, for appellee.

WILEY, J. James W. Harshman, appellee's decedent, lost his life by being thrown from a wagon in which he was riding. The accident resulting in his death was alleged to have resulted from the negligence of appellant. Jonathan Harshman was appointed administrator of his estate, gave bond, and assumed the duties of the trust. The decedent's estate consisted of personal property

and a half interest in a gas well. The record shows that the estate was solvent, and, after payment of all debts, there remained over \$300 for distribution to the heirs. On February 7, 1895, the administrator filed his final report, showing that the debts of the estate had all been paid, and the estate settled, which report was approved by the court, and the administrator discharged. May 31, 1895, the administrator filed his petition, and prayed the court to set aside the final report, reopen the estate, and continue him as such administrator for the purpose of enabling him to prosecute to a final determination a suit then pending in the Huntington circuit court against appellant, to recover damages for the alleged wrongful killing of decedent. The prayer of this petition was granted, and the order previously made declaring said estate fully settled, and discharging the administrator, was vacated and in all things set aside. The action against appellant was finally determined in the Huntington circuit court, and resulted in a judgment against appellee for costs. March 10, 1897, appellant filed in the clerk's office of the Delaware circuit court an itemized statement of the costs for which judgment had been rendered in its favor, which statement was accompanied by a certificate of the clerk, and duly verified. This statement of costs was filed as a claim against the estate, was passed to the allowance docket, where it was disallowed by the administrator, and was subsequently transferred to the issue docket for trial. Trial was by the court, resulting in a finding and judgment for appellee. Appellant's motion for a new trial was overruled, and such ruling is assigned as error.

Some technical questions are urged to the sufficiency of the motion for a new trial; but, waiving such objections, we think the motion fairly presents the question of the sufficiency of the evidence to support the judgment. There is no conflict whatever in the evidence, and this is conceded by appellee; hence no question is presented as to the weight of the evidence, or as to this court weighing the evidence where there is a conflict.

The one pertinent question presented for our decision is this: Is the appellee, in his fiduciary capacity, liable for the costs of prosecuting his action against appellant for the death of his decedent, where he failed in such action, and the costs were adjudged against him? We are not aware that this exact question has ever been decided in this state, but we think the principle involved has been clearly settled. In all litigation the law contemplates that costs accruing shall be chargeable to some one connected with such litigation. In this state the liability for and payment of costs are regulated by statute, and the general rule is that the losing party is chargeable with its payment. If the decedent had survived the accident which resulted in his death, and prosecuted an action for his

injury, and such action had resulted adversely to him, he would have been liable to appellant for all costs incident to the suit. Here the administrator brought the action as his personal representative for the benefit of his next of kin. True, under the statute, if a recovery had been had, the amount recovered would not have gone into the general fund for the payment of debts, etc., but would have been distributed to the heirs or next of kin, according to their interests, upon the final settlement of the estate. The fund thus derived, although for the benefit of the next of kin, would have been chargeable with the necessary expense incurred by the administrator on account of his services, attorney's fees, and expenses of administration. *Yelton v. Railroad Co.*, 134 Ind. 414, 33 N. E. 629. In that case, Yelton was the administrator, and brought an action for the death of his decedent. The decedent in that case left no children, but a widow, who was his sole heir, and whatever damages were recovered would, under the statute, inure to her exclusive benefit. Pending the action, she compromised with the railroad company, which compromise was pleaded as a defense by way of a supplemental answer. A demurrer to this answer was overruled in the court below, and on appeal such ruling was reversed. In that case the court said: "The fund is evidently chargeable with the necessary expense incurred for his services and attorneys' fees and expense of administration, at least. This would be true in the absence of any other estate of the decedent out of which the same could be paid; and it is questionable whether any other estate could be applied to such expense, to the exclusion of creditors of the estate." "It is evident that no part of this fund could be diverted from the source the statute provides it shall go, except that it would, under some circumstances at least, be chargeable with a lien for the necessary expense in collecting the same," etc. "But certainly the funds derived from an action of this character are liable for the necessary costs and expense of the collection of the damages recovered." From the principles announced, and from the language used in the above quotation, it seems plain, and is a reasonable inference, that, where the rights of creditors do not intervene, the general fund of the estate may be resorted to in paying the costs of such an action, where such costs are adjudged against the estate. Such actions are brought for the benefit of the widow and the children, for in this case the widow and children survived, and would have been entitled, under the statute, upon final settlement, to receive their respective interests, if a recovery had been had. The estate here was solvent. All debts have been paid, and there remained funds for distribution. The law contemplates a liability for costs upon one party or the other. The appellant here is evidently not primarily liable for any costs in the original action, except

such as made by it. But, aside from this, the status of the parties was fixed by the judgment of the Huntington circuit court, wherein the appellant recovered a judgment against the appellee for the costs. In New York it has been held that a judgment against executors in their fiduciary capacity, in an action in tort, is binding on the estate. *Syms v. Mayor, etc.*, 105 N. Y. 153, 11 N. E. 369; *Hone v. De Peyster*, 106 N. Y. 645, 13 N. E. 778. And in this state it has been held that where costs are incurred by an administrator in the proper defense of claims filed against the estate, or in prosecuting claims in favor of the estate against others, such costs pertain to the expenses of administration, and their payment has preference over other claims. *Taylor v. Wright*, 93 Ind. 123; *Hillenberg v. Bennett*, 88 Ind. 543. In the case last cited, the court say: "Executors and administrators might sue in that court (common pleas) upon any claim, debt, or demand of any kind accruing to them in their fiduciary capacity, without regard to the amount of such demand, and that, in all such cases, costs would follow the judgment." It seems to us, also, that the question of appellee's liability cannot be raised in this action, and that the objection urged comes too late. The question of liability is fixed by the judgment, and is conclusive as against a collateral attack. *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, and 10 N. E. 581; *Cassady v. Miller*, 106 Ind. 69, 5 N. E. 713; *Mott v. State*, 145 Ind. 353, 44 N. E. 548. The attack made against the judgment for costs in this case is collateral, and the above authorities control.

It is further urged by appellee that appellant's judgment for costs is barred, because it was not filed before the filing of the final report of the administrator. We have already said that, pending the original action against appellant, the appellee administrator filed a final report, which was approved. After this, however, on the administrator's petition and application, the order approving the report, and discharging the administrator, was set aside and in all things vacated. After this order, the suit then pending was prosecuted to final determination, and, so far as the record shows, no final report has since been filed. The order setting aside the report, etc., leaves the estate as if no final report had ever been filed. Subsequent to setting aside the report and vacating the order of its approval, etc., this judgment for costs was recovered and duly filed as a claim against the estate. Under these facts, there is no merit in appellee's contention upon this point.

Appellee further insists that there was no final judgment rendered below, and hence the appeal will not lie. We have carefully examined this question, and are satisfied that the judgment from which the appeal is prosecuted is amply sufficient. Looking at the whole record, we have reached the conclusion that the merits of the case demand a

new trial. The judgment is therefore reversed, with instructions to the court below to sustain appellant's motion for a new trial.

(20 Ind. App. 664)

DENMAN v. WARFIELD.

(Appellate Court of Indiana. Oct. 6, 1898.)

APPEAL—RECORD—BILL OF EXCEPTIONS—FILING.

1. Under Acts 1897, p. 244, § 1, requiring it to appear from the record that the bill of exceptions was filed with the clerk of the trial court, the record on appeal must affirmatively show such filing, independent of any recital in the bill itself.

2. An entry in the transcript, substantially as follows, to be varied to conform to the facts in each case, may be properly employed to show the filing in vacation of the bill of exceptions and the date of filing, viz.: "Be it remembered that afterward, to wit, on the _____ day of _____, 18—, plaintiff (or defendant, as the case may be) filed in the clerk's office the following bill of exceptions, in the words and figures as follows," etc.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by James G. Warfield, as administrator, against Samuel S. Denman. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Livengood, Livengood & Dice, for appellant. Nebeker & Simms, for appellee.

HENLEY, C. J. Appellee brought this action in the lower court against appellant by a complaint in three paragraphs upon three separate promissory notes, which are described in the complaint, and copies of the same filed therewith. To this complaint appellant filed an answer containing four paragraphs, the first of which is a general denial, the second a plea of payment, the third that the notes in suit were given without any consideration, and the fourth paragraph of answer sets up in detail a settlement between appellant and appellee's decedent, by which the notes in suit were canceled. Appellee's demurrer to the fourth paragraph of answer was overruled, and he filed a reply denying the material allegations of appellant's answer. Upon the issues thus formed, the same was submitted to the court for trial without the intervention of a jury. By request of appellant the court found the facts specially, and stated its conclusions of law thereon, and rendered judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled. The errors assigned to this court are: (1) That the court erred in overruling appellant's motion for a new trial; (2) that the court erred in the conclusions of law stated upon the special findings of fact.

The special findings made by the court were as follows: "(1) The court finds that on the 5th day of November, 1872, the defendant executed to the plaintiff's intestate his note for ninety dollars; that the same was given for a valuable consideration, and has never

been paid, and that there is now due on the same the sum of two hundred and nine dollars and twenty-five cents. (2) The court further finds that on the 19th day of January, 1884, the defendant executed his note to the plaintiff's intestate for the sum of two hundred and six dollars; that the same was given for a valuable consideration, which remains unpaid; and that there is now due on the same the sum of four hundred and eighteen dollars and fifty cents of principal and interest and fifty dollars attorney's fees. (3) The court further finds that on the 10th day of February, 1883, the defendant executed his note to Nancy Denman for the sum of eighteen dollars; that Nancy Denman was the wife of plaintiff's intestate, Absalom J. Denman; and that she died in April, 1884, intestate, and that no letters of administration were taken out on the estate of said Nancy J. Denman. (4) The court further finds that the plaintiff's intestate died on the 28th day of June, 1896, and that the plaintiff was, in the month of August, 1896, duly appointed as administrator of his estate by this court, and that at the time of the bringing of this action the defendant was a non-resident of the state of Indiana, and was a resident of the state of Illinois. [Signed] Joseph M. Rabb, Judge." Upon the facts so found the court stated as its conclusions of law that appellee was entitled to recover upon the two notes found to have been executed by appellant to appellee's intestate in the sum of \$667.70, but that appellee was not entitled to recover on the note executed by appellant to Nancy Denman.

Appellant, in his argument for the reversal of the judgment in this cause, depends entirely on the first specification of the assignment of errors, which raises the correctness of the ruling of the lower court in overruling appellant's motion for a new trial, and all questions discussed by counsel for appellant in their brief would require for their solution the presence of the evidence. Incorporated into the transcript is what purports to be a bill of exceptions containing the evidence, but there is no entry in the record indicating that the bill of exceptions was filed with the clerk. The cases in this state have uniformly held that the record must affirmatively show the filing of the bill of exceptions in the clerk's office, and that the recital of the filing in the bill itself is not sufficient. The simple manner in which it shall be done is also pointed out by statute. Acts 1897, p. 244. In the case of *Miller v. Railway Co.*, 143 Ind. 570, 41 N. E. 801, and 42 N. E. 806, it was said by Jordan, J.: "Upon an examination we find that the record presents none of the questions discussed by counsel for appellant. Incorporated into the transcript are what purport to be two bills of exceptions, one embracing the evidence and the other the instructions. Neither of these bills is properly before this court, for the reason that there is no entry, independent of the bills

themselves, to indicate that either was filed. Section 629, Rev. St. 1881 (section 641, Burns' Rev. St. 1894) renders it necessary to file the bill with the clerk of the trial court after it has been approved and signed by the judge. It is firmly settled by the decisions of this court that the transcript of the proceedings which comes to this court must affirmatively show, independent of the bill, that the latter was filed in the office of the clerk, and also the date of filing the same. *Board v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Mason v. Brody*, 135 Ind. 582, 35 N. E. 903; *Prather v. Prather*, 139 Ind. 570, 39 N. E. 310; *Drake v. State*, 145 Ind. 210, 41 N. E. 799; *Elliott*, App. Proc. § 805. An entry or recital in the transcript at the proper place, substantially as follows (to be varied to conform to the facts in each particular case), is most generally, and may be properly, employed to show the filing in vacation of the bill of exceptions and the date of filing thereof, to wit: 'Be it remembered that afterward, to wit, on the 30th day of October, 1895, the plaintiff (or defendant, as the case may be) filed in the clerk's office the following bill of exceptions, in words and figures as follows.' The bill should then follow or appear as near as practicable immediately after this recital. We merely suggest this, in the hope that litigants who prosecute appeals to this court will at least endeavor to see that the record is so prepared as will enable us to consider and decide upon their merits the questions involved." Also see, to the same effect, *Downey v. Head*, 138 Ind. 504, 38 N. E. 169; *Railway Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528. The question here involved was also thoroughly discussed in strong and pertinent language by Justice McCabe in the case of *Stone Co. v. Hobbs*, 144 Ind. 146, 42 N. E. 1022. It is also argued by appellee's counsel that the motion for a new trial presents no question to this court, but, as the bill of exceptions is not in the record, for the reasons given the judgment will have to be affirmed, and it is unnecessary to prolong this opinion by a discussion of other questions. Judgment affirmed.

(21 Ind. App. 330)

CITY OF NEW ALBANY v. LINES et al.¹
(Appellate Court of Indiana. Oct. 7, 1898.)

HUSBAND AND WIFE—RIGHT TO SUE—SEPARATE CAUSES OF ACTION—DEMURRER—MUNICIPAL CORPORATIONS—LIABILITY—DEFECTIVE SEWERS—PERMANENT INJURIES—APPEAL—BILL OF EXCEPTIONS.

1. A husband may join with his wife in an action concerning her separate property, as at common law, notwithstanding she may sue alone in such cases, under Horner's Rev. St. 1897, § 254 (Burns' Rev. St. 1894, § 255).

2. Where a complaint wherein a husband and wife are properly joined as plaintiffs states a cause of action in favor of both of them, the statement therein of facts constituting a cause of action in favor of the husband alone, while proper, does not make the complaint demurrable as not stating a cause of action.

shearing denied.

3. A municipal corporation engaged in the authorized improvement of its streets is liable to adjacent landowners for diverting surface water from its natural channels, and negligently providing inadequate and improperly constructed sewers to carry away the water thus collected.

4. A sewer was constructed by defendant city before plaintiff purchased adjacent property. After his purchase the city unsuccessfully undertook to remedy the defectiveness of the sewerage by removing and relaying the pipe. Plaintiff's land was flooded by the continual backing up of the surface waters, which produced an unhealthy condition. *Held*, that plaintiff might recover his damages, since the sewer as constructed would not be considered permanent, within the rule that in such cases the owner of the premises at the time of the making of the improvement is the only person entitled to recover.

5. Acts 1897, p. 244 (Horner's Rev. St. 1897, § 650a; 4 Burns' Rev. St. § 638a), provides that in order to make the evidence, and all of the rulings thereon, and the competency of witnesses and the objections thereto, a part of the record on appeal, it is sufficient if the transcript contain the original bill of exceptions embracing all such evidence, etc. *Held*, that the mere presence in the bill of matters other than those which may be presented on appeal by an original bill does not render the bill insufficient as an original bill containing the evidence, where, aside from the incorporation therein of such other matters, there has been a full compliance with the statutory provisions.

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by James H. and Etta Lines against the city of New Albany for damages caused by the maintenance of a defective sewer. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. H. Hester, for appellant. Jewett & Jewett, for appellees.

BLACK, J. The appellees, James Lines and Etta Lines, sued the appellant, the complaint containing two paragraphs, a demurrer to each of which for want of sufficient facts was overruled. Issues of fact were formed, the trial of which by jury resulted in a general verdict for the appellees for \$500. Answers of the jury to interrogatories indicate that the trial of the cause proceeded upon the second paragraph of the complaint. This paragraph showed that the appellees were husband and wife; that the latter was the owner in fee simple of a house and lot in the city of New Albany, bounded on the east by Thomas street and on the south by an alley; that she had owned said premises since 1893, and from that time had been in possession thereof, and for the greater part of the time had occupied the same with her said husband as her dwelling house; that said house faced on said street, and extended back along said alley, the windows on the south side of the building opening upon the alley, and the house being in part ventilated by these openings; that in 1890 the city, under ordinance and resolutions of its common council duly enacted and passed, improved said alley along the south line of said premises; that in said improvement the appellant dug out and re-

moved the earth therefrom, thereby reducing the grade of the alley two feet below the surface of said street at the point where the alley intersected the street; that, under the plan as adopted and carried out in the making of said improvement by the grading and paving of the alley, the surface water accumulating in the alley, in draining off the lots abutting on the alley along the line thereof, was carried eastward along the alley to said street, and was drained upon and held in check by said street at said intersection by reason of the fact that the street was higher than the surface of the alley; that, for the purpose of draining the alley and carrying off such water, a sewer pipe about eight inches in diameter was laid in and across said street, after the making of the improvement, but it was insufficient, and did not properly drain the alley; that when, in 1893, the appellee Etta Lines purchased said premises, she had no notice or knowledge that said drain was insufficient, or that it would not carry off said surface water and keep said alley clean and wholesome, but believing, in good faith, that the alley was properly constructed, and that a proper plan had been adopted by the common council for the drainage thereof, she purchased the property and went into possession thereof; that after her said purchase the appellant, by its agents and servants, undertook to alter and improve such drainage, and for that purpose took up and removed said sewer pipe in said street, and relaid it, carrying it from said intersection in a northeasterly direction, across and in front of said premises, to Culbertson avenue; that the appellees, believing, in good faith, that said pipe was being properly laid and would properly drain the alley, made no objection to the relaying thereof; that the appellant did not properly relay said pipe for the drainage of the alley, but adopted and carried out a defective, unskillful, and negligent plan in laying down said pipe, in this: that in laying it, and for the purpose of making a sufficient fall to allow the water to pass through it from the alley to said avenue, the appellant raised the mouth or opening of said pipe where it entered the alley from Thomas street at said intersection four inches above the surface of the alley as so improved; that, by reason of the fact that it was so raised above the grade and surface of the alley, the surface water and drainage in the alley accumulated and backed to the depth of four inches in the center of said alley before it would pass out through said pipe, thus keeping said water and drainage standing to that depth at all times; that such water became stagnant and offensive, and that noxious odors and vapors arose from it; that the appellant was negligent and unskillful in the construction of said sewer and drainage pipes, in this: that said pipe was not of sufficient size to carry off the water accumulating during rains and storms in said alley, and that, by reason of the smallness of the pipe

and its lack of capacity to carry off surface water, the same was gathered upon, held in check, and thrown back in and upon the real estate and premises of the appellees, thereby covering the same with water, and making the same damp and unwholesome, and rendering said premises less desirable as a place of residence; that by reason of the accumulation of unwholesome animal and vegetable matter in said alley at the mouth of said sewer, and the holding of the same in check there as aforesaid, unwholesome stenches, odors, and vapors were created and arose therefrom, and flowed in and upon said house, making the air of the same impure and unwholesome; that the appellee James H. Lines had been made sick from the same, and had been unable to follow his trade and occupation for four months, and had been put to great expense in and about curing himself by the purchase of medicines and procuring the services of a physician, to wit, in the sum of \$100; that, for the purpose of curing himself of such illness, the appellees were compelled to move out of said premises until he regained his health, and during such period, to wit, six months, the appellees were unable to rent said premises because of such unwholesome and noxious vapors and odors, and wholly lost the rent thereof, amounting to \$50; that the value of said real estate had been greatly reduced by such noxious odors and vapors coming in and upon said premises, and by the surface water in said alley being thrown back in and upon said premises, to wit, in the sum of \$500. It was further alleged that said injuries were suffered without any fault or negligence on the part of the appellees, or either of them, but solely through the fault and negligence of the appellant, in this: that the appellant was negligent, careless, and unskillful in the formation and adoption of the plan for the drainage of said alley, placing the opening of the sewer pipe above the grade and surface of the alley, thus allowing the water to accumulate, etc., and in laying the pipe in such manner as to hold such surface water in check, and accumulate it in said alley, thereby causing it to become stagnant and offensive, and in laying said pipe of an insufficient size and inadequate to carry off said surface water, thereby causing it to be gathered up, held in check, and thrown back upon said premises; that, by reason of such negligent and unskillful acts on the part of the appellant, the appellees had been damaged in the sum of \$1,000; "wherefore plaintiffs demand judgment," etc.

In this complaint the appellees sought to recover for injury suffered by the wife and by the husband separately, from the same cause, and it is contended on behalf of the appellant that for this reason the complaint was bad on demurrer. It is a familiar general rule that, to withstand a demurrer for want of sufficient facts, a complaint must state a cause of action in favor of all the

plaintiffs. *Berkshire v. Shultz*, 25 Ind. 523; *Neal v. State*, 49 Ind. 51; *Goodnight v. Goar*, 30 Ind. 418; *Debolt v. Carter*, 31 Ind. 355; *Parker v. Small*, 58 Ind. 349; *Railroad Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373; *Insurance Co. v. Newman*, 120 Ind. 554, 22 N. E. 428. It is quite certain that, for a cause of action in the husband alone, the wife could not properly be joined as a co-plaintiff, and that, if the complaint by husband and wife stated only such cause of action, it would be bad on demurrer for want of facts sufficient to constitute a cause of action. A married woman may sue as sole plaintiff, under section 254, *Horner's Rev. St. 1897* (section 255, *Burns' Rev. St. 1894*), where the action concerns her separate property, or her husband may be joined with her as her co-plaintiff. *Welch v. Bunce*, 83 Ind. 382. See *Martindale v. Tibbetts*, 16 Ind. 200; *Hollingsworth v. State*, 8 Ind. 257; *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217; *Roller v. Blair*, 96 Ind. 203. In the various changes made by the legislature in the law concerning husband and wife, our courts, clinging to the common law, adjective as well as substantive, except as changed by statute, have sanctioned the joinder of the husband as a plaintiff, when perhaps it may be said no substantial reason exists for retaining the practice even as a permissive one; but, however this may be, the practice is allowable, as the authorities we have cited and many others show. In an action wherein husband and wife may properly be joined as plaintiffs, facts which would constitute a cause of action in favor of the husband alone cannot properly be stated in the complaint; but, if a complaint in which two or more are joined as plaintiffs state a cause of action in which all the plaintiffs may join, the statement therein of other facts constituting a cause of action in favor of one of the plaintiffs alone, while improper, is a fault of pleading which cannot be reached by demurrer for want of sufficient facts, for in such case the complaint does state facts sufficient to authorize the joinder of all the plaintiffs. The additional facts which do not conduce to create a cause of action for which all the plaintiffs may unite in suit may be struck out on motion, or may be excluded in various ways, in connection with the trial. See *Scotton v. Mann*, 89 Ind. 404; *Hamm v. Romine*, 98 Ind. 77.

In considering the question as to the sufficiency of the complaint on demurrer, the statement of facts which relates alone to injury to the husband cannot be considered as adding anything of value to the complaint, and, to hold the complaint good, it must be decided that it states a cause of action in favor of the wife. While it appears from the complaint that the improvement of the alley was made, and the tile pipe was laid, before Mrs. Lines became the owner of the premises in question, it is shown that the injuries of which complaint is made accrued

while she was the owner, and after the tile pipe was relaid, in 1894. It appears that the tile pipe, as originally laid before she purchased the premises, was insufficient, and did not properly drain the alley, though it is not further shown in what the insufficiency then consisted, except in the want of sufficient capacity. There is indefiniteness and obscurity in the complaint, but it is made to appear that the city undertook to remedy the defectiveness of the drainage, but so planned and did the work that the insufficiency was not obviated, and thereafter conditions described existed which caused the injuries indicated. It would seem to have been intended to allege that the opening into the sewer pipe was raised four inches above the grade and surface of the alley at the time of the attempt to repair the drainage, but it is not stated what was the height of the opening before, and it appears that the conditions which caused the injuries complained of were the same in kind before and after the repairs were undertaken. The water was collected, and was not carried off. The improvement of the alley is shown to have been lawfully ordered, and the only complaint made is that when the work was completed the surface water which was collected and caused to flow eastward could not escape because of the elevation of the street at the east end of the alley, and because of the insufficiency of the sewer-pipe drainage rendered necessary by this elevation of the street, and because of the failure of the city to properly repair the drainage when it attempted to do so, and that thereby the water was thrown back upon the premises of Mrs. Lines, and became stagnant, etc. It is established that, where a municipal corporation has made a lawfully authorized improvement of its street or alley with reasonable care and skill, there can be no recovery for consequent injury to the property of adjacent proprietors. In such case there has been no legal wrong. *Cummins v. City of Seymour*, 79 Ind. 497. It is a reasonable rule, authoritatively settled in this state, that where such a lawful improvement has been made, and injuries accrue to owners of adjacent property through negligence in the planning of the improvement or in the work of construction, or both, there may be a recovery therefor. In such case there has been wrong and damage consequent thereon. *City of Indianapolis v. Huffer*, 30 Ind. 235; *Wels v. City of Madison*, 75 Ind. 241; *Cummins v. City of Seymour*, supra. Where the injury to property caused by a municipal corporation in the exercise of its authority over its streets is the result merely of negligence in the making of an improvement of a permanent character, as the grading of a street, such injury must be regarded as accruing to the person owning the property at the time the wrong is done,—that is, when the improvement is made,—and the right of action in him for such wrong does not pass by his deed of conveyance of the land, and a subse-

quent owner of the land cannot by virtue of his ownership recover for such injury. *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Stein v. City of Lafayette*, 6 Ind. App. 414, 33 N. E. 912. Such cases are distinguishable from those where the condition which causes the injury may reasonably be regarded as temporary, and it may be presumed that the wrongdoer can and will remove the cause of injury. If the case can be regarded as one wherein the matter of complaint constitutes a nuisance which may be remedied and for the continuance of which successive actions will lie, then, in an action by one who has become the owner since the original creation of the condition of things from which the damage arises, it cannot be said that damages which he seeks were recoverable only by the former owner. See *Stein v. City of Lafayette*, supra. While a municipal corporation is not ordinarily liable for a mere failure to undertake the making of a public improvement, as a sewer, it may by some act of its own, in its exercise of its authority over its streets, produce a condition which places it under liability for such failure. *Cummins v. City of Seymour*, supra, and cases cited. A municipal corporation, in the lawfully authorized improvement of its streets, cannot without liability divert surface water from its natural courses by an artificial channel, and thereby cause it to flow in a body upon adjacent property. *Wels v. City of Madison*, 75 Ind. 241. If a city, in the improvement of a street or alley, thereby causes an accumulation of surface water upon the street or alley, it must provide reasonable means whereby it will not remain there for an unreasonable time, to the injury of adjoining proprietors, and it must make and keep the means of escape of such capacity and in such repair that the surface water so collected by its own act may not injure the adjoining proprietor. *City of Indianapolis v. Lawyer*, 38 Ind. 348. "Having created the necessity, the duty devolves upon it to make reasonable provisions for the escape of the water without injury to the adjacent proprietors." *City of Evansville v. Decker*, 84 Ind. 325, 330.

The complaint before us showed the failure of the city to provide a reasonably adequate means of escape for surface water which it had collected and caused to flow in a body. It showed an attempt to provide such means by a sewer pipe which failed to answer the purpose sufficiently, and a subsequent relaying of the sewer pipe, with a like failure, through appellant's negligence. The water so collected and confined was offensive and unwholesome, and it flowed back upon the adjoining premises.

It seems to us to be immaterial whether or not the condition, through appellant's fault, was as bad before the attempted repairs as afterwards, or whether or not the mouth of the sewer pipe was as high above the surface of the alley before the relaying of the pipe as

afterwards. It was at all times the duty of the city to provide reasonably sufficient means of escape for the water, for the escape of which it had created the necessity, and its failure to perform that duty would give right to successive actions for recurring injuries to the adjacent proprietor without regard to the time of his purchase of the premises. The presence and condition of the water, as described in the complaint, at any time, was a nuisance, to remove which it was the duty of the city to exercise reasonable diligence and skill. The failure to perform such duty was shown to have injured the adjacent resident proprietor. In *Mellor v. Pilgrim*, 3 Ill. App. 476, it was held that where drains are so constructed as to collect surface water upon one's land, and to discharge it in a body upon a neighbor's land, the wrong is a continuing nuisance, and successive actions may be sustained. The conditions produced by the appellant which resulted in the alleged injuries cannot be regarded as an effect accomplished by a permanent lawful improvement, negligently constructed, for which all damages must be recovered by the person owning the adjacent property at the time of the improvement of the alley. It is not to be presumed that the city will continue indefinitely to maintain such a condition, injurious not merely to property owners immediately adjacent, but also to all residing within reach of the offensive and unwholesome vapors so produced, or that it will not provide means whereby the water so collected will cease to be thrown back upon adjacent private property; nor can the plaintiff, by bringing such an action as this, be regarded as accepting such a condition as permanent, and agreeing that it is never to be remedied by the city.

A motion for judgment in favor of the appellant upon the answers of the jury to the interrogatories, notwithstanding the general verdict, was overruled. If what we have in discussing the complaint be correct, there was no error in this ruling.

A motion for a new trial was overruled. The record before us embraces a bill of exceptions which contains the evidence and instructions. It is an original bill, as signed by the judge, inserted by the clerk without copying. Under the statute of 1897, a bill of exceptions containing the evidence may thus be brought before this court. The statute (Acts 1897, p. 244; *Horner's Rev. St. 1897*, § 650a; *Burns' Rev. St.* § 638a) provides that, "to make the evidence and all the rulings of the court in respect to the admission and rejection of evidence and the competency of witnesses and the objections and exceptions thereto in any civil or criminal cause a part of the record upon appeal to the supreme or appellate court, it shall be sufficient if the transcript contain the original bill of exceptions embracing all such evidence," etc. The statute does not provide that the transcript may contain an original bill embracing instructions to the jury, and, to bring them be-

fore this court by bill of exceptions, the bill must be copied into the transcript. *Leach v. Mattix* (Ind. Sup.) 48 N. E. 791. We think, however, that the mere presence in the bill of matters other than those which may be presented here by an original bill ought not to render the bill insufficient as an original bill containing the evidence, where, aside from the incorporation therein of such other matters, there has been in all respects a compliance with the provisions of the statute.

One of the reasons assigned in the motion for a new trial to which counsel have called attention was that the damages were excessive. The argument of counsel proceeds upon the erroneous assumption that no ground of recovery in favor of Mrs. Lines was shown in the complaint, except loss of rent. We are unable to determine from anything pointed out in argument that the court erred in refusing a new trial. The judgment is affirmed.

(21 Ind. App. 30)

VIGO REAL-ESTATE CO. et al. v. REESE et al.

(Appellate Court of Indiana. Oct. 5, 1898.)

ASSIGNMENTS OF ERROR.

1. Assignment of error that the complaint in an action against a receiver and another does not show leave to sue the receiver is unavailing, being joint as to both defendants, and good only as to the receiver.

2. An assignment of error that the court erred in its conclusions of law on the findings is not well taken where no request was made for special findings, the statement of facts found is not signed by the court, and no conclusion of law is stated; so that the finding must be held a general one, and no exception is taken to the judgment.

3. A joint assignment of error by defendants in a mechanic's lien suit against a company and its receiver, claiming that appointment of a receiver divested creditors of right to lien, is not good, as such defense cannot avail the company at least.

Appeal from circuit court, Vigo county; James E. Piety, Judge.

Suit by Samuel T. Reese and others against the Vigo Real-Estate Company and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

W. H. Soale, for appellants. E. F. Williams, for appellees.

COMSTOCK, J. Suit brought by appellees to enforce a material man's lien against the property of appellant the Vigo Real-Estate Company for lumber furnished said real-estate company for a building on lot 379, Highland Place, city of Terre Haute, at the request of said company, and used by it in the construction of said building. The complaint alleges that appellant Andrew Grimes is receiver of said company, and asks leave to sue said receiver jointly with said company. The receiver demurred separately to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled; the cause put at issue; a trial by the court without the intervention of a jury resulted in a

judgment in favor of plaintiffs against the real-estate company for the sum of \$239.08, and a decree for the sale of said real estate, and barring the equity of redemption of the defendants. The evidence clearly shows that the lumber was purchased by said real-estate company, went into the building for which it was purchased, and that the balance for which judgment was rendered is unpaid. The joint and several motions of the appellants for a new trial were overruled, and exceptions taken. The errors assigned are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling the demurrer to the complaint; (3) the court erred in its conclusions of law on the findings; (4) the court erred in overruling the motion for a new trial.

In support of the first and second errors assigned, appellants' counsel contend that the complaint is insufficient, because it does not aver that leave of the court was first obtained to sue the receiver before bringing suit. It is the law that a receiver cannot sue nor be sued without leave of the court making the appointment being first obtained, and the point for which appellants contend is correct. The assignment of errors, however, is joint. Unless good as to both, it is unavailing as to either. We have mentioned the only defect pointed out to the complaint. No defect is shown as against the Vigo Real-Estate Company. The assignment must, therefore, fail. *Board v. Fraser* (Ind. App.) 49 N. E. 42; *Earheart v. Creamery* (Ind. Sup.) 47 N. E. 226; *Sibert v. Copeland*, 146 Ind. 387, 44 N. E. 305; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540; *Carr v. Carr*, 137 Ind. 232, 36 N. E. 899; *Hubbard v. Bell*, 4 Ind. App. 180, 30 N. E. 906. While the court states in narrative form the facts found, it does not appear that either party requested a special finding of facts. It is not signed by the court. No conclusion of law is stated by the court, no exception taken to the judgment. The finding must be held to be a general one. The third specification of the assignment is, therefore, not well taken. In discussing the remaining error assigned (the overruling of the motion for a new trial) appellants' learned counsel claim that the court erred in its ruling, for the reason that the evidence shows: (1) That the Vigo Real-Estate Company did not own said lot 379 at the date of the purchasing of the lumber and the perfecting of the lien, and that no lien could attach thereto; that it was the property of another, not a party to this suit. (2) That the appellant receiver was appointed June 17, 1893, and that the notice of intention to hold a lien on the real estate in question was not filed until the 25th of July, 1893, and that the lien would not, therefore, attach to property in his hands. The reasons for a new trial set out in the motion are (1) that the verdict of the court is not sustained by sufficient evidence; (2) the verdict of the court is contrary to law; (3) the court erred in overruling the demurrer to plaintiffs' complaint filed in this cause. It

is apparent that counsel made a clerical error in using the word "verdict" in the motions, instead of "judgment," and we will consider it as corrected. The motion for a new trial was joint and several. The assignment very properly may be said to be indefinite as to the motion upon which it is predicated; but, holding it to apply to the joint motion, it still cannot avail for both appellants, and must, therefore, fail as to both. If the Vigo Real-Estate Company had no interest in said lot 879 to which said lien could attach, it could not be prejudiced by its sale. If the appointment of the receiver divested the creditors of the Vigo Real-Estate Company of all rights to acquire a lien (a point which we do not decide), it would not be a defense available to said Vigo Real-Estate Company. It is not necessary to add anything concerning the sufficiency of the complaint, which is again questioned in the third ground for a new trial. Judgment affirmed.

(21 Ind. App. 1)

PENNVILLE NATURAL GAS & OIL CO. v. THOMAS et al.

(Appellate Court of Indiana. Oct. 4, 1898.)

CONTRACT—ACTION FOR BREACH—PARTNERSHIP—PARTNERSHIP.

Where plaintiffs formed a partnership to bore a gas well in a town, agreeing that each should put in \$10, and thereby be entitled to a share in the partnership, and that gas in the well should be furnished the members at \$10 a year for a dwelling, and that in a year each one should transfer his share to any company which would pipe the town, provided it would not charge more for gas; and thereafter the partnership sold the well, at defendant's request, to a third party; and thereupon defendant agreed to furnish each member of the partnership gas at certain prices, the members to make payments at specified times,—right of action for defendant's failure to furnish at said prices inures to plaintiffs not jointly, as partners or otherwise, but severally, so that they cannot join as plaintiffs for said breach.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by John W. Thomas and others against the Pennville Natural Gas & Oil Company and others. Judgment for plaintiffs against said company, and it appeals. Reversed.

La Follette & Adair, J. H. Sell, David T. Taylor, and R. H. Hartford, for appellant. W. H. Williamson, for appellees.

WILEY, J. This was an action brought by the appellees against the appellant and others. The complaint was in two paragraphs. In the first paragraph it was averred: That appellant was a corporation organized and existing under the laws of Indiana, and that its business was mining for gas and oil. That it had drilled, and then owned, several gas wells in and near Camden, Jay county. That its principal office and place of business was at Camden. That said wells produced sufficient gas to supply all of its customers,

and still produces such supply. That it laid pipe lines and mains in the streets and alleys of said town, and connected same with its wells, and commenced to furnish the people and residents of said town with natural gas for machinery, heating and lighting purposes, and is still engaged in said business. That in February, 1888, the plaintiffs and all of the defendants, except the defendant (appellant) company, formed a partnership for the purpose of raising money with which to drill, pack, and anchor a gas well in said town. That it was agreed that each member of said partnership should pay \$10, and thereby be entitled to a share in said partnership, and that the gas in said well should be furnished to the members thereof at \$10 for a dwelling house per year, to be furnished free to churches and for street lighting, and each shareholder agreed to use the gas from said well to the exclusion of all others. That such subscriptions should be paid when the work on the well was begun, and that, after gas had been furnished for a year, each shareholder was to transfer his or her share to any person or company who would pipe said town, provided such company should not charge in excess of above rates; and that gas should be furnished to business rooms in said town in the same ratio as for dwellings. That said co-partnership adopted the name of the Citizens' Natural Gas Company of Jay County, Ind. That in March, 1888, said company commenced a well, and completed the same April 2d following, and obtained a plentiful supply of gas, and said well was named "Pauper Well." That in July, 1888, said co-partnership sold said well, at the request of appellant, to the Portland Natural Gas & Oil Company. That thereupon appellant agreed to furnish each of the members of said co-partnership, their heirs and assigns, natural gas for heating and lighting at and for the following prices, to wit: For one share of said stock in said co-partnership a member thereof was to have in his dwelling house three stoves and three lights, for \$10 per year; in each business house one stove and six lights, for \$10 per year; in each office one stove and one light, for \$5 per year. That appellant agreed to furnish the same at said schedule prices for 50 years, provided gas should continue to flow in paying quantities for that time. That it was also agreed that members of said co-partnership were to pay appellant for gas quarterly in advance after the first year. That appellant also agreed to furnish free gas for a flouring mill, free gas for lighting streets, and free gas for all the churches in the said town. This paragraph then sets out the names of the shareholders, and the number of shares they each owned. It is then averred that all the defendants below, naming them, except appellant, were members of said co-partnership, and made defendants, because they refused to join as plaintiffs. It is further alleged that appellant furnished gas un-

der said contract and schedule of prices until January 1, 1895, at which time it gave notice to each of said members that after February 11, 1895, it would not furnish any more gas for lights and fuel according to the terms of said contract; that since said time it has failed and refused to comply with the terms of said contract; that each member of said co-partnership has performed all the stipulations on his and her part to be performed. It is further alleged that natural gas continues to flow in paying quantities, and that appellant has sufficient gas to furnish each member of said firm the gas to which he is entitled under said contract, etc. The second paragraph is substantially like the first, and differs from it only in minor details. In the second paragraph are averred with greater particularity the purposes for which appellees formed said co-partnership,—that the object thereof was to bore for or otherwise procure a gas well, and to put in a plant to supply themselves and others with gas; that for the purpose of indicating the interest of the several partners in the funds, property, and rights of the co-partnership it was agreed that for each \$10 paid by a member into the capital a certificate should be issued entitling him or her to certain quantities of gas; that the houses and places of business of each of such members have been, and still are, accessible to the mains of appellant, and that they are each entitled to receive gas as provided by said contract; that they are willing to provide, and will provide, the necessary pipes and fittings to carry the gas from the curbstone to their several places of business and houses. This paragraph concludes with the averment that the appellees and all the defendants below, except appellant, are all the persons entitled to the benefits of said contract. The appellant addressed a demurrer to each paragraph of the complaint. The reasons assigned for the demurrer were: (1) Neither the complaint, nor any paragraph thereof, stated facts sufficient to constitute a cause of action; and (2) that there was an improper joinder of parties plaintiff. This demurrer was overruled, to which ruling appellant excepted. The case was put at issue by the general denial, trial by jury resulting in a verdict and judgment for \$1,750. Appellant's motion for a new trial was overruled.

There are six specifications in the assignment of errors, but we will notice only the first two, which are: "(1) The court erred in overruling the demurrer to the first paragraph of the complaint; (2) the court erred in overruling the demurrer to the second paragraph of the complaint." It is apparent that appellees proceeded upon the theory that they and the defendants below, other than appellant, were co-partners, and that the contract made by them with appellant inured to them jointly as such co-partners. If this theory is maintainable, then the complaint must be

held good, for it avers a breach of the contract by appellant, and the performance of all its stipulations on the part of appellees. This would give them a right of action, if, indeed, they can jointly prosecute that right. If, however, appellees' liability for a breach of the contract created a right of action by each individual member of the co-partnership, and not to them as co-partners, then the action was improperly brought, and it was error to overrule the demurrer. It seems to us that the questions as to the sufficiency of the complaint must be arrived at by first determining whether or not the facts alleged therein show that at the time the action was commenced the appellees were in fact partners in the legal sense of that term. It is averred in the complaint that the purpose of forming said partnership was to drill a gas well to supply themselves and others with natural gas, and the rights of the individual partners therein fully described, and the conditions upon which they were to receive gas were fully set forth. It is then shown by the averments that seven years before the bringing of the action they sold said gas well which they had bored or drilled, and, while there is no direct averment of the fact, it abundantly appears that they wholly abandoned the purpose for which the partnership was formed by the sale of such well. The sole business of said co-partnership was to furnish its individual members and others with gas. Its sole property, so far as the averments of the complaint show, was a gas well. It did not lay or own mains or pipe lines, and did not possess a franchise of any character. "A sale of all the property of a partnership, the management or operation of, or the dealing in, or with reference to which constituted its sole business, effects its dissolution, as also its total destruction." *Wells v. Ellis*, 68 Cal. 243, 9 Pac. 80; *Blaker v. Sands*, 29 Kan. 551; *Whitton v. Smith*, *Freem. Ch.* 231; *Wilson v. Davis*, 1 Mont. 183; *Kennedy v. Porter*, 109 N. Y. 526, 17 N. E. 426; *Thompson v. Bowman*, 6 Wall. 316; *Theriot v. Michel*, 28 La. Ann. 107; *Claborn v. Creditors*, 18 La. 501. In Illinois it was held that the mortgage of the entire property by one of the partners and the mortgagee effected a dissolution of the partnership. *Smith v. Vanderburg*, 46 Ill. 34. Keeping in view that a "partnership is a legal entity, formed by the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them," it seems clear, in the light of the fact that appellees had sold all the property of the partnership, and abandoned its purpose, the partnership no longer existed. The contract set out in the complaint was not made for the benefit of the Citizens' Natural Gas Company, etc., the co-partnership, but for the use and benefit of the individual members thereof. When the contract was made it did not inure to the benefit of the partnership. Nothing depended upon the partnership to carry

out the provisions of the contract. The partnership, as such, assumed no liability. The partnership was under no obligations to do anything, so that the individual members might reap the benefits of the contract, but it was left with each of them to put himself in touch with appellant, so as to receive the benefits of the contract, by piping his house, etc., so as to receive from it natural gas. Suppose, for an example, that after this contract had been made one of the appellees had refused and failed to pay appellant for the gas which he was entitled to use under the contract, would it be contended that appellant would have had a right of action against the partnership for such default in payment? Certainly not. How, then, can the alleged partnership have a right of action against appellant for an alleged breach of its contract with the individual members of the partnership? It seems to us that this is the real test, and decisive of the question. As we have seen, no legal right accrued to the partnership by the contract, and the complaint, in such case, would not be good for even nominal damages. If the contract was made for the benefit of the individual members, and not for the partnership, then the appellees must sue individually, and not jointly.

The allegations of the complaint do not show that as between the plaintiffs (appellees here) there was a privity of interest between them in the subject-matter of the action, but, on the contrary, it clearly appears that their interests are several. The co-partnership—if, indeed, any ever existed—had been dissolved by the action of its members by disposing of the joint property and going out of business, and which left absolutely nothing upon which the partnership could rest. As to these appellees, it seems clear to us that in their separate and individual capacity they would, under the facts stated, have a right of action against appellant company for a breach of contract, but they have not a community of interests that would entitle them to sue jointly or as partners. Under the averments of the complaint some of the appellees were entitled to have three fires and three lights, others two fires and two lights, and others one fire and one light. Hence for a breach of the contract they would be entitled to recover unequal damages. In other words, they would each have a right to relief, but the measure of damages would not be the same. The evidence in support of the damages accruing to the one who was to have three fires and three lights would not support a judgment in favor of the one who was entitled to have one fire and one light. Under the averments of the complaint, one of these appellees could not complain because one of his co-appellees had been refused the use of gas under the terms of the contract. The former could not complain because of a breach of the contract as to the latter. The contract, by its express terms, did not inure to appel-

lees collectively or as partners, but to them separately and as individuals. To entitle two or more persons to join as plaintiffs, it is not sufficient that they each have a cause of action arising out of the same transaction or matter. The plaintiffs must have a common interest in the subject of the action and in the relief. Each must be interested in the relief sought by the other. *Martin v. Davis*, 82 Ind. 38; *Heagy v. Black*, 90 Ind. 534. The question we are now discussing may be simplified by an illustration. Suppose A., B., C., D., and E. are the joint owners of personal property, and that their interests are ascertained and agreed upon. They dispose of such property by sale to F. on credit, and F. agrees to pay to each of them the amount represented by their respective interests. Such sale and agreement would create an individual liability against F., in default of which they would each have an individual right of action against him. There would be no community of interest between the vendors, and they would have no joint right of action against the vendee for his failure to keep his promise or agreement to pay them their respective interests under his contract. And that is this case exactly. Here it is averred that appellant company agreed to furnish appellees with gas for fuel and lighting purposes. Appellant was to furnish one of the appellees a sufficient quantity of gas to burn in three stoves and three lights, for which he was to pay a fixed price. It was to furnish another of the appellees gas for one stove and one light, for which he was to pay a fixed price. Under these facts we do not know upon what principle it can be maintained that a breach of the contract as to one of such appellees would give a joint right of action against appellant, nor can we see how a breach of the contract as to all the appellees in their individual capacity can give them a joint right of action. For these reasons the complaint, in our judgment, is wholly insufficient.

There are other questions presented by the record, but, as the judgment must be reversed because of the error in overruling the demurrer to the complaint, we need not consider them. Judgment reversed, with instruction to the court below to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

(151 Ind. 529)

GEISEN v. REDER.¹

(Supreme Court of Indiana. Oct. 14, 1898.)

APPEAL—AGREED CASE—SUFFICIENCY—FAILURE TO EXCEPT—RECORD.

1. The requirement of *Horner's Rev. St. 1897*, § 553 (*Rev. St. 1894*, § 562), that, to constitute an agreed case, "it must appear by affidavit that the controversy is real and the proceedings in good faith," is jurisdictional.

2. An exception to the decision on the trial of an agreed case is necessary to a review thereof.

8. Where the record contains none of the pleadings, assignments of error to the admission of evidence cannot be considered.

Appeal from circuit court, Porter county; W. E. Pinney, Judge.

Action by Nicholas Gelsen against Peter Reder. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Kopelke, for appellant.

HACKNEY, J. The record in this case brings up no pleadings, although it is certified as containing "true and complete copies of all the papers and entries in said cause." The bill of exceptions contains the following, by an attorney for the plaintiff: "This case, your honor, started out at first as an action for the dissolution of a partnership and an accounting and for a receiver to make sale of the firm's property. During the pendency of the action the matters in controversy between the parties have been settled by written agreements, and the interest of Mr. Gelsen is sold to Mr. Reder; and, after these agreements or settlements had been made, a question arose upon one of them; and, in order to save a new action, we agreed that just in the pending case, as it stands, the matter in controversy as to the effect of this stipulation or settlement or sale between the parties should be determined by the court." Immediately an attorney for the defendant said: "I suppose it is agreed by the parties to this action that the statements above made by plaintiff's counsel are the facts in the case, and that they shall stand as the statement of facts." Continuing, the bill recites that "it was so agreed and admitted by both parties in open court that the statements above made shall be the facts in the case." Thereupon two documents are shown to have been read in evidence, the second of which contained the statement, signed by one of the parties only, that "the dispute concerning the meaning of the first contract * * * shall be submitted to, and decided by, the court in the pending case." Additional evidence upon disputed questions was heard and certified in the bill.

These statements indicate a purpose to submit the controversy as an agreed case, but they are far from sufficient to constitute an agreed case, as the same is provided for by the Code. Horner's Rev. St. 1897, § 553 (Rev. St. 1894, § 562). The provision is that "parties shall have the right in all cases, either with or without process, by agreement to that effect, to submit any matter of controversy between them to any court that would otherwise have jurisdiction of such cause, upon an agreed statement of facts, to be made out and signed by the parties; but it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties; whereupon the court shall proceed to try the same, and render judgment as in other cases." The

affidavit referred to in this provision is jurisdictional, and without it no case would be presented. City of Shelbyville v. Phillips, 149 Ind. 552, 48 N. E. 628; Thornton's Ann. Code, § 553, and note; 1 Enc. Pl. & Prac. p. 388. The practice requires also an exception to the court's conclusion or decision. City of Shelbyville v. Phillips, supra. There having been no affidavit, no agreed statement of facts signed by the parties, and no exception to the decision, essential elements of an agreed case are lacking.

The principal questions urged for decision relate to the admissibility of evidence. Such questions do not arise upon an agreed case, the primary feature of which is to invite a decision upon facts not controverted, but fully agreed upon, and presented as the basis for a conclusion of law. The questions urged were sought to be saved by a motion for a new trial,—a method relating to trials upon issues formed and presented by evidence, rather than abstract statements of facts. The action of the trial court in admitting evidence, and granting exceptions to its admissibility, seemed to proceed upon the theory of a controverted, rather than an agreed, case. Such action, however, presents no question for review without the pleadings, which define the issues and determine the limits within which the evidence must be confined. Reid v. Reid, 149 Ind. 274, 49 N. E. 2; Marsh v. Bower (May term, 1898) 51 N. E. 480. The case does not, therefore, present, by proper procedure, any question for decision. The burden rested upon the appellant to bring to this court a record disclosing error, and, having failed to do so, we must presume in favor of the court's action.

If the record is correct in disclosing no pleadings, the appellant, as plaintiff below, presented no cause for relief, and the court's action in denying him relief, although by the irregular method of a trial, reached the proper result. By either of the only two possible methods of presenting the questions below, the appellant should fail. The judgment is affirmed.

(151 Ind. 251)

McINTOSH v. STATE.

(Supreme Court of Indiana. Oct. 13, 1898.)

CRIMINAL LAW—APPEAL—HOMICIDE—INSTRUCTIONS—REASONABLE DOUBT—SELF-DEFENSE.

1. Where the evidence has not been certified to the supreme court, instructions complained of will be considered correct if they would have been so under the issues on any supposable state of the evidence.

2. An instruction that defendant was a competent witness, but that the jury were the judges of the weight to be given his testimony, and that they should take into consideration all the surrounding facts and circumstances, and give it such weight only as they believed it entitled to in view of all the facts, is not error.

3. Where instructions considered as a whole present a point correctly, they will be held to be correct, although some one of them considered alone might have misled the jury.

4. An instruction that in weighing the testimony of defendant the jury can consider "the manner of his testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of the case, as affecting his credibility. You are not required to receive blindly the testimony of such accused person as true, neither are you at liberty to disregard his testimony, but you are to give due consideration," etc.,—when considered with other instructions that the jury could not, on account of defendant's interest in the result, or because he was charged with a crime, disregard his testimony, but that it should be given the same weight as that of other witnesses, if in their opinion it merited it, and that defendant must be acquitted if there was a reasonable doubt of his guilt,—is not error.

5. An instruction on reasonable doubt, that "if, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility that he is innocent, you should find him guilty," is not error, where there are other clear instructions on the subject, favorable to defendant, and all the instructions on the subject requested by defendant were also given.

6. An instruction that the defense of self-defense is frequent, and should be carefully scrutinized, and the evidence carefully weighed, because, if accused acted in self-defense, he ought not to be punished, and because the welfare of society demands it, to the end that parties charged with crime may not make use of the defense to defeat the ends of justice, cannot be held to be error, in the absence of the evidence, as Burns' Rev. St. 1894, § 1964 (Rev. St. 1881, § 1891), forbids a reversal in a criminal case except for errors which, in the opinion of the supreme court, prejudiced defendant in his substantial rights.

Appeal from circuit court, Cass county; D. H. Chase, Judge.

John McIntosh was convicted of murder in the first degree, and he appeals. Affirmed.

Lairy & Mahoney and McConnell & Jenkins, for appellant. W. A. Ketcham, F. M. Kistler, and Geo. S. Kistler, Pros. Atty., for the State.

JORDAN, J. Appellant was charged by indictment, tried by a jury, and convicted of murder in the first degree, and his punishment fixed at imprisonment in the state's prison for life, and, over his motion for a new trial, judgment was rendered accordingly. The only reasons which are urged for a reversal of this judgment are that the trial court erred in giving instructions numbered 14, 15, 20, and 30. The evidence upon which appellant was convicted has not been certified to this court. Therefore, in accordance with the well-settled rule, we will not consider the instructions erroneous if they would have been correct under the issues upon any supposable state of the evidence. *Johns v. State*, 104 Ind. 557, 4 N. E. 153; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600.

By the fourteenth instruction, the court advised the jury that under the law the defendant was a competent witness in his own behalf, but that they were the judges of the weight which ought to be given to his testimony, and that, in deciding upon such weight, they should take into consideration all the facts and circumstances surrounding the case, as disclosed by the evidence, and give defend-

ant's testimony such weight only as they believed it to be entitled to in view of all the facts and circumstances proved on the trial. Surely, this instruction, so far as it professed to go, cannot be said to be prejudicial to the appellant.

Charge No. 15 is as follows: "The law gives persons accused of crime the right to testify in their own behalf, but their credibility and the weight to be given to their testimony are matters exclusively for the jury. Therefore, in weighing the testimony of the defendant in this case, you have the right to take into consideration the manner of his testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of the case, as affecting his credibility. You are not required to receive blindly the testimony of such accused person as true, neither are you at liberty to disregard his testimony, but you are to give it due consideration, and to determine whether or not his statements are true, and made in good faith, or only for the purpose of avoiding conviction." It is contended by counsel for appellant that this instruction in effect informed the jury that, as a legal rule, the testimony of the defendant was not entitled to as much weight as that of other witnesses, or, in other words, that his testimony must be tested by a more rigid rule than that which is applicable to other witnesses. Appellant's insistence is that the court, by advising the jury that they were not required to blindly receive the testimony of the accused as true, cast discredit in the minds of the jury upon his testimony. It appears, however, that the court, in the same charge, told the jury that they were not at liberty to disregard the testimony of the defendant, but must give it due consideration, and determine whether or not his statements were true. This part of the instruction, certainly, was as favorable to the defendant as he could desire. It must be evident, also, if the jury blindly received his testimony as true, it would be the equivalent of their receiving or accepting it as it came from his lips, without the exercise upon their part of any judgment in the determination of its truth or falsity. Certainly, an admonition to the jury against acting in such a manner in receiving the testimony of the defendant, or that of any other witness in the case, if the court under the circumstances deemed it essential, would be proper. When the accused made himself a witness in his own behalf, his testimony became subject to the same rules as other witnesses, and his interest or lack of interest in the result of the trial, his manner of testifying, the reasonableness or unreasonableness of his statements, and all other facts or circumstances disclosed by the evidence in the case which could in any manner aid the jury in weighing his testimony, were matters which they were authorized to consider in testing the weight or credibility thereof. The statements of the defendant, as a witness in the case, were subject to the same tests as those of other witnesses, no more and no less.

Anderson v. State, 104 Ind. 467, 4 N. E. 63, and 5 N. E. 711; Deal v. State, 140 Ind. 354, 39 N. E. 930.

While this instruction standing alone cannot be said to be a complete or accurate statement to the jury of the rules by which they ought to be guided in weighing the testimony of the defendant, and while it may also be said that it is possibly open to the criticism that it singles out the defendant, and directs the admonition or advice therein given alone to his testimony, yet, in the absence of the evidence, we would not be in a position to adjudge that appellant was prejudiced in any of his substantial rights thereby. But, aside from this view of the question, the court, by instruction No. 18, given at the request of the defendant, instructed the jury that it was their duty to consider the defendant's testimony, together with all of the other evidence in the case; and, while it was their right to consider his interest in the result of the suit, still they were not, on that account, authorized to disregard his evidence; neither should they disregard it because he was charged with the crime described in the indictment. The court in this charge further informed the jury that, under the laws, the defendant had the right to testify in his own behalf, and that they should consider and weigh his testimony, in the determination of his guilt or innocence, in like manner as that of any other witness, and give it such weight as in their opinion it merited; and if, from all of the evidence, when so considered together, they had a reasonable doubt of the defendant's guilt, they should acquit him. By instruction No. 24, given also at the request of the defendant, the jurors were advised that they were not at liberty to discredit the defendant's testimony because he was the defendant, but that it was their duty to consider it in the light of all the evidence and circumstances in the case, and if his evidence, when so considered, together with the other evidence in the case, raised in their minds a reasonable doubt of his guilt, it would be their sworn duty to acquit him. Under a well-settled rule, the initial and essential question in every case where error is based upon instructions given is, was the jury thereby misled, to the prejudice of the complaining party? *Thomp. Char. Jur.* § 131. The rule is often asserted and repeatedly affirmed in many of the decisions of this court that instructions ought to be considered and construed as a whole, and not in detached fragments; and when so considered, if they can be said to have presented the law to the jury upon the particular point or question to which they were directed, with reasonable clearness and accuracy, it will not be presumed that the jury were misled thereby, even though it may be said that some particular one of the instructions, or part thereof, considered alone, unexplained or unqualified by the others, is erroneous, or was liable to be misunderstood by the jury. *Insurance Co. v. Buchanan*, 100 Ind. 63; *Shields v. State*, 149 Ind. 395, 49 N. E. 351, and cases there cited; *El-*

lott, App. Proc. § 648. When the two instructions to which we have referred, given by the court at the request of the appellant, are considered in connection with instruction No. 15, to which appellant objects, we cannot perceive how it was possible for the jury to have been misled thereby to his prejudice, as we are bound to presume that they considered and acted upon the instructions as an entirety, and were not controlled by fragments or isolated parts thereof.

By instruction No. 20 the court told the jury that it was not its intention, by the words "reasonable doubt," to declare that a bare possibility of innocence would acquit. The court, continuing in this instruction, said to the jury: "Where a circumstance is of a doubtful character, or doubtful in its bearings, you are to give the accused the benefit of the doubt. *If, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility that he is innocent, you should find him guilty.*" (*Our italics.*) It is the part of this charge in italics which counsel for appellant criticise, upon the ground that the court thereby gave the jury to understand that, if a preponderance of the evidence in the case led them to believe that the defendant's guilt was established, they should find him guilty, regardless of the fact that the evidence was required to exclude all reasonable doubt of his guilt from the minds of the jury before they could legally convict. Counsel, in support of their assignment of error as to the portion of the charge in question, rely on the case of *Rhodes v. State*, 128 Ind. 189, 27 N. E. 886, where an instruction similar to the one in dispute was condemned as erroneous. But the question, under the instructions, as involved in the present case, and as it was presented under the circumstances existing in *Rhodes v. State*, supra, can readily be distinguished. In the latter case, as the opinion therein discloses, the entire drift of the court's charge on the subject of reasonable doubt was unfavorable to the accused. The jury, as it is said in the opinion therein, were repeatedly informed what did not constitute a reasonable doubt, but were not advised as to what did constitute such a doubt. But in the case at bar the circumstances are certainly the reverse of what they were in the case in question. In the present case the court gave a number of instructions whereby it, in language clear and strong, informed the jury what the law required, to constitute a reasonable doubt, and repeatedly and fully advised them in regard to every feature of the case to which such a doubt was applicable. In fact, it seems that the court gave to the jury all the instructions upon the question of reasonable doubt which appellant presented, and the entire drift of the instructions relative to the question of reasonable doubt was as favorable to him as he could desire; and when all of them, relative to the doctrine of

reasonable doubt, are considered together, in obedience to the rule previously mentioned, the jury may be said to have been thereby very fully, clearly, and correctly informed or advised upon the subject of reasonable doubt, and also as to the required tests to which all of the evidence in the case must conform before the jury would be justified in convicting the defendant. It is evident, then, that when the jury considered all the instructions on the question of reasonable doubt, as it must be presumed they did, they certainly could not have understood, from that part of the charge to which appellant's objections apply, that they were authorized, under the law, to convict him upon a mere preponderance of the evidence. *Shields v. State*, supra. In reason, then, appellant's contention upon the point in question cannot be sustained.

Instruction No. 30, given by the court, is as follows: "The defense of self-defense is one frequently made in cases of this kind, and it is one which, I may say to you, should be very carefully scrutinized by the jury. The evidence to this point should be carefully considered and weighed by the jury, for the reason that, if the accused in fact acted in self-defense at the time of the alleged killing, then he ought not to be punished for such act. The evidence on this question of self-defense ought to be carefully considered by the jury for another reason, and that is because a due regard for the ends of justice and the peace and welfare of society demands it, to the end that parties charged with crime may not make use of the plea of self-defense as a means to defeat the ends of justice, and a shield to protect them from criminal responsibility in case of violation of the law." Appellant's objection to this charge is that it necessarily tended to cast discredit and suspicion upon the defense interposed by him, namely, that of self-defense. An instruction similar to the one in question, relative to the defense of insanity as interposed to the charge of murder, was approved by this court in *Sawyer v. State*, 35 Ind. 80; and a like caution given by the trial court to the jury was also approved in *Sanders v. State*, 94 Ind. 147; while in the appeal of *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, the same instruction was by a divided court criticised, upon the ground that it could not be said to embrace a statement of any legal proposition, but was rather in the nature of a general disparagement of the defense of insanity, pleaded by the accused in that case. It was asserted, however, that a case might possibly arise in which such a statement by the court could be properly made; but the court passed the question without deciding whether the charge in controversy constituted reversible error. In the absence of the evidence in this case, we are unable to say that the trial court was not warranted in giving to the jury the caution which it did by the charge in dispute; neither are we, in

the absence of the evidence, in a position to decide that appellant was prejudiced in any manner by the instruction in controversy.

The statute forbids us to reverse a judgment in a criminal case except for errors of the trial court which, in our opinion, prejudiced the defendant in his substantial rights. *Burns' Rev. St. 1894, § 1964 (Rev. St. 1881, § 1891; Horner's St. 1897, § 1891)*. While the trial court ought not in any manner, in its charge to the jury, to disparage or cast suspicion upon any legitimate defense interposed in an action, still, if necessary in the interest of justice, it is certainly the right and duty of the judge to give to the jury such advice and such caution as will aid them in arriving at a true and just decision in the case. The record in this cause, for the reasons stated, does not disclose any error which would entitle appellant to a reversal. The judgment is therefore affirmed.

(151 Ind. 260)

STATE ex rel. HARRISON v. MENAUGH et al.

(Supreme Court of Indiana. July 1, 1898.)

APPEAL—REHEARING—OPINION—RESPONSIBILITY OF JUDGES—PLEADING—ISSUES.

1. The fact that bitter and intense feeling exists in some communities relative to the merits of questions decided by the supreme court will not be considered on a petition for a rehearing.

2. The judges of the supreme court other than the writer of an opinion are responsible only for the final result, and not for the fact that the opinion "is not an opinion, but an argument."

3. A demurrer to a petition seeking relief under a certain statute puts at issue the validity of such statute.

On petition for rehearing. Overruled.

For former opinion, see 51 N. E. 117.

PER CURIAM. Counsel for appellant, in their brief filed in support of the petition for a rehearing, in the main insist that it be granted upon the grounds urged at the former hearing of this cause. 51 N. E. 117. Counsel preface their argument by asserting that: "In view of the bitter and intense feeling in many communities of Indiana at the continuance in office of a number of township trustees who are looked upon with suspicion by the people," etc., they are impressed with the "solemn duty" to file the petition for rehearing, and "in every-day language to argue it, * * * in the hope that mature consideration has changed the opinion of the majority of this court, and in the belief that a few suggestions will lead the minority to modify their final conclusion." Counsel recognize the fact that the minority opinion of Judges HACKNEY and HOWARD expressly declares that the final conclusion therein reached must result in affirming the judgment of the lower court which denied the right of the relator to demand that an election for township trustees be held at the November election of the

present year. This court, under the two opinions in question, may properly be said to have been unanimous in holding that the judgment below must be affirmed for the reason that there was no existing law which authorized the election of township trustees at the November election of 1898. While it is true that the minority opinion in this cause does not agree with the premises from which the final conclusions of the majority of the court were deduced, nevertheless it is evident that it is nothing more nor less than a concurrence in the court's final conclusion that the judgment must be affirmed, and that there could be no election of trustees at the ensuing November election. The material difference or distinction between the two opinions consists in the reasoning by which the ultimate conclusion in each is reached. That of the majority, as will be seen, is arrived at by affirming the constitutional validity of the act of 1897; while that of the minority is reached by denying the constitutional validity of the act of 1897, and, for like reasons, that of the act of 1893.

As to the assertion of counsel that such a "bitter and intense feeling" exists in many communities against the present township trustees, and which, as counsel for appellant seem to intimate, has, in part at least, actuated them to discharge the "solemn duty" by applying for a rehearing in this appeal, we may say that, in regard to this feeling upon the part of these communities, this court has no concern, and in no wise is it responsible for its existence.

We are informed by counsel's brief of the fact, as they therein assert, that some members of the bar, not of counsel, however, in this case, "for some occult reason" are imbued with the desire to have this cause tried and determined in the "forum of public opinion," and that these particular attorneys declare with "charming frankness" that the majority opinion in this case "is not an opinion, but an argument." If the majority opinion can be said to be impressed with this infirmity, the responsibility therefor should be charged to the writer thereof, and not to the court, for the latter is only responsible for the final result reached in the case. We may also say, in passing, that this tribunal, in the determination of questions involved in causes pending therein, cannot be influenced by any "bitter and intense feeling" that may exist in some communities relative to the merits of such questions. Neither is the judgment of this court in appeals thereto to be molded or controlled in any manner by means or methods which can be more properly, and with better effect, employed at a "town meeting" or a political caucus, than in a court constituted for the administration of law and justice. Concluding, we may say that we have again given the questions involved in this cause a careful consideration, and are fully satisfied that the conclusion reached at the former hearing is correct, and in full har-

mony with well-settled principles of law. Considering the principal question involved in this appeal from the final conclusion of either the majority or minority opinion of this court, and it must necessarily follow as, and is, the unanimous opinion of this court, that the petition for a rehearing ought to be denied. It may also be said that appellant's learned counsel, in their criticisms upon the minority opinion, to the effect that the validity of the act of 1893 could not become involved under the complaint of the relator, and that the minority in so holding traveled outside of the record, are certainly mistaken. It is evident that the complaint of the relator is founded upon his theory that the act of 1893 is a valid exercise of legislative power. If the objections which his counsel urge against the validity of the act of 1897 can be maintained, they will certainly apply with equal force, and for like reasons, in striking down the act of 1893; and he could, therefore, have no standing in court to demand the relief which he does under his complaint. That this result would follow, his counsel, in their argument, from the position which they assume, certainly make evident. The petition for a rehearing is overruled, at the costs of the relator.

HACKNEY, C. J. (concurring). The appellant's petition, as addressed to the minority opinion, rests, we respectfully submit, upon false premises, i. e. that the validity of the law of 1893 was not in issue, that the appellees were estopped to assert its invalidity, and that the case of *State v. Wells*, 144 Ind. 231, 41 N. E. 461, and 43 N. E. 133, holds the act of 1893 to be constitutional. As in *Denney v. State*, 144 Ind. 503, 42 N. E. 929, the petition sought the relief prayed upon the earlier act, and denied the validity of the later act. The respondents—properly. we have no doubt—contended that the entire relief prayed could not be granted, because of the invalidity of the earlier act. It was there held that both acts were in question, the relief demanded affirming one act and denying the other. It would be remarkable if one seeking relief under a law could preclude his adversary from denying the constitutional validity of that law. It would be no less remarkable to hold that the question must be specially pleaded, and could not arise upon demurrer. In considering the question of estoppel again argued, it must be borne in mind that the person to be estopped, according to the appellant, is not in court. He is the trustee in office, who, in this case, is not a party denying or affirming the right of the appellant to require an election this fall. The issue in this case, as we affirmed originally, is not as to the right of a trustee; it is as to the right of the people to elect a trustee. It was the loss of this distinction by the majority of the court, as the minority conceived, that made the hold-over clause appear to have application to the case. In the case

of *State v. Wells*, supra, the constitutional validity of the act of 1893 was neither mooted nor decided, and, as well said by appellant's counsel, constitutional questions are never passed upon unless necessary to a decision of the case. The constitutionality of laws is assumed where not denied. The minority adhere to their original opinion.

HOWARD, J., concurs in this opinion.

(151 Ind. 241)

GREGG, Justice of the Peace, v. STATE ex rel. BRANCH.

(Supreme Court of Indiana. Oct. 12, 1898.)

MANDAMUS TO JUSTICE OF THE PEACE—JUDICIAL ACTS.

In an action before a justice of the peace, aided by garnishment, defendant, answering, claimed the fund garnished as exempt, and garnishee answered, admitting indebtedness to defendant. Judgment was rendered against defendant for the amount of his indebtedness to plaintiff, and against garnishee for a part of the sum due defendant. Held that, though the justice erred in refusing to allow to defendant his exemption and in rendering judgment against garnishee, such error could not be corrected by mandamus, as he had jurisdiction of the subject-matter and of the parties, and his acts were judicial.

Appeal from circuit court, Madison county; John F. McClure, Judge.

Application for mandamus by the state, on the relation of James Branch, against Israel W. Gregg, a justice of the peace of Madison county. From a judgment sustaining relator's demurrers to each paragraph of the return to the alternative writ, and in overruling respondent's demurrer to the petition and alternative writ, respondent appeals. Reversed.

Herman F. Willkie and Henrietta Willkie, for appellant. Goodykoontz, Ballard & Campbell, for appellee.

MONKS, J. It appears from the record that one Plowman commenced an action against the relator, Branch, before a justice of the peace of Madison county, to recover for groceries sold and delivered to said relator, and also filed an affidavit and undertaking for a writ of garnishment against the Pittsburg Plate-Glass Company, under the act of 1897. Acts 1897, p. 233. No affidavit showing any grounds for a writ of attachment, as required by section 925, Burns' Rev. St. 1894 (section 913, Horner's Rev. St. 1897), was filed. The relator, Branch, filed an answer setting up that he was a resident householder of Madison county, Ind., and that all of his property, real and personal, which he owned within and without the state, including the claim and debt due from the Pittsburg Plate-Glass Company, was worth less than \$600, and claimed the same as exempt from execution. No verified schedule of property within or without the state was filed by said Branch, as provided by sections

725, 726, Burns' Rev. St. 1894 (sections 713, 714, Horner's Rev. St. 1897). The glass company, garnishee, also filed an answer admitting its indebtedness to the relator in the sum of \$32.30. The cause was tried by appellant, as justice of the peace, and judgment rendered, on September 16, 1897, against the relator for \$35.30, and against the garnishee for \$7.30. This action was brought by the defendant in that case, on the relation of the state, against appellant, as justice of the peace, on September 20, 1897, four days after the rendition of said judgment, to compel him, by writ of mandamus, to allow the relator his exemption of \$600 as a resident householder, which, if sustained, would set aside and vacate the judgment of \$7.30 against the garnishee defendant.

It is clear that appellant's judgment, in refusing to allow the relator his exemption and rendering judgment against the glass company, was erroneous. *Hart v. O'Rourke* (this term) 51 N. E. 330; *Pomeroy v. Beach*, 149 Ind. 511, 49 N. E. 370. Said judgment against the glass company, while erroneous, was not void. *Hart v. O'Rourke*, supra. It is true that when a householder files his verified schedule, and demands his exemption from a sheriff or constable, such officers, in appointing an appraiser and setting off property as exempt, do not act in a judicial capacity; but, when a party to an action in attachment or garnishment claims the right to hold property as exempt on the ground that he is a resident householder of this state, such claim must be set up in an answer to the proceeding in attachment or garnishment, and as a partial or complete defense thereto. *State v. Manly*, 15 Ind. 810; *Perkins v. Bragg*, 29 Ind. 507; *Haas v. Shaw*, 91 Ind. 334. In passing upon the sufficiency of such answer, and the right of such party to plead such facts, and in the trial of said cause, and as to the right of such party to the exemption claimed by such answer under the evidence given, the court acts judicially. *Haas v. Shaw*, 91 Ind. 392, 393. Whether property is liable to attachment or garnishment is a question to be tried and determined by the court in which the proceeding is pending, and the question is res adjudicata after judgment, and the same is conclusive until vacated or set aside. *Id.* It is settled law that mandamus will not lie to correct an error in a decision or judgment of a judicial tribunal; the only remedy in such case is by appeal, or, if there was no jurisdiction, and the judgment is void, by injunction. *State v. Board of Com'rs of Tippecanoe Co.*, 131 Ind. 90, 93, 30 N. E. 892; *State v. Board of Com'rs of Miami Co.*, 63 Ind. 497, 502; *State v. Board of Com'rs of Tippecanoe Co.*, 45 Ind. 501; *Holliday v. Henderson*, 67 Ind. 103, 109; *Hart v. O'Rourke*, supra; *Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455; *O'Brien v. Tallman*, 36 Mich. 13; 14 Am. & Eng. Enc. Law, 127-129;

Elliott, App. Proc. § 515. It is true that a judicial tribunal may be compelled to act, but not to make or refrain from making a particular decision. *State v. Board of Com'rs of Tippecanoe Co.*, 131 Ind. 93, 30 N. E. 892; *State v. Engle*, 127 Ind. 457, 459, 26 N. E. 1077; *Holliday v. Henderson*, 67 Ind. 109; *State v. Board of Com'rs of Tippecanoe Co.*, 45 Ind. 507; Elliott, App. Proc. § 515; 14 Am. & Eng. Enc. Law, 127-129.

As appellant in the trial of said cause, and in rendering his decision and judgment as to the relator's right to an exemption, and as to the judgment against the garnishee, as well as in the main action, acted in a judicial capacity, in which capacity he had jurisdiction of the subject-matter of the action and the parties, it follows that his decision and judgment in said cause, even though erroneous, cannot be corrected by mandamus. If appellant is compelled by a writ of mandamus to allow the relator his exemption as a householder, it would result in setting aside and vacating the judgment for \$7.30 against the glass company, garnishee defendant, and would be correcting an erroneous decision of a judicial tribunal by mandamus. Under the authorities cited, this cannot be done. It follows that the court erred in sustaining appellee's demurrers to each paragraph of the return to the alternative writ, and in overruling the demurrer to the petition and alternative writ. Judgment reversed, with instructions to overrule the demurrer to each paragraph of the return, and to sustain the demurrer to the petition and alternative writ, and for further proceedings not inconsistent with this opinion.

(151 Ind. 247)

FERNER v. STATE.

(Supreme Court of Indiana. Oct. 12, 1898.)

LICENSE TO PRACTICE DENTISTRY—INFORMATION—SPECIAL PERMIT—EVIDENCE—CONSTITUTIONAL LAW—SPECIAL PRIVILEGE.

1. An information under Rev. St. 1894, § 5595, providing that it shall be unlawful for any one to practice dentistry without being registered, need not negative the granting of a special permit under section 5601, providing that any member of the board of examiners may grant a permit, which shall be valid only until the next meeting of the board.

2. Rev. St. 1894, § 5596, providing that three members of the board of examiners (consisting of five reputable practicing dentists) of applicants for a license to practice dentistry shall be appointed by the Indiana State Dental Association, does not contravene Const. art. 1, § 23, forbidding the granting of privileges which shall not on the same terms equally belong to all citizens, the power to appoint in such case being in the nature of a duty, rather than a privilege.

3. On a prosecution for unlawfully practicing dentistry, evidence that defendant leased and occupied rooms for several months for the declared purpose of such practice, that he had done dental work for three or more persons, and that he was engaged in filling teeth at times, and at other times in doing dental work

at the bench, shows that he engaged in the practice of dentistry.

Appeal from circuit court, Jay county; John W. Headington, Judge.

Daniel A. J. Ferner was convicted of unlawfully practicing dentistry, and he appeals. Affirmed.

D. T. Taylor and John M. Smith, for appellant. W. A. Ketcham and Merrill Moores, for the State.

HACKNEY, C. J. The appellant was charged by information with having on the 1st day of July, 1897, and continuously thereafter until the 1st day of January, 1898, unlawfully practiced dentistry without having first "obtained and procured a certificate of qualification and registration so to do from the board of dental examiners," and without, during the period aforesaid, being lawfully registered according to law, and not then and there, nor during any part of said period, being a lawfully registered surgeon or physician engaged in the practice of medicine or surgery. The charge is based upon section 5595 et seq., Rev. St. 1894, the first of which provides that "it shall be unlawful for any one to practice dentistry * * * without being registered according to the provisions of this act." Other provisions require a board of examiners to grant certificates of registration to certain applicants, and certificates of qualification and registration to others. Section 5601 provides that "any member of the board of examiners may grant a permit to practice dentistry to any person who shall file with said member his application therefor, but such permit shall only be valid until the next meeting of said board." It is urged that the charge was subject to the appellant's motion to quash by reason of the failure to negative the granting of the special permit authorized by the section just quoted. We think it quite clear that it is made a crime to practice dentistry "without being registered." Registry, within the purpose of the law, relates to the permanent authority to practice dentistry, and the temporary permit is only a protection until the board shall meet to make the registry. The permit would be a bar to a prosecution, and available as a defense to a charge of practicing without registry. The information is sufficient to charge the absence of registry, although it may unnecessarily charge the failure to procure a certificate of qualification and registration. The one question upon the motion, therefore, is, should the possession of a special permit have been negatived? Exceptions in the nature of a defense, and those not a part of the clause creating the offense, but made by another section of the statute, need not be negatived in the charge, and need not be proven by the state. *Russell v. State*, 50 Ind. 174; *State v. Maddox*, 74 Ind. 105; *Mergentheim v. State*, 107 Ind. 567, & N. E. 568;

Hewitt v. State, 121 Ind. 245, 23 N. E. 83; *People v. Phippin*, 70 Mich. 10, 37 N. W. 888; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *Logan v. State*, 5 Tex. App. 306; *Hale v. State* (Ohio Sup.) 51 N. E. 154; *Bish. New Cr. Proc.* 638, 639. The exception here is independent of the clause creating the offense, and was not required to be negated.

It is insisted, also, that section 5596, *supra*, is unconstitutional, as in violation of section 23 of article 1 of the state constitution, forbidding the granting of privileges which shall not, upon the same terms, equally belong to all citizens. Said section provides for the appointment of a board of examiners consisting of five members, three of whom to be chosen by the Indiana State Dental Association. By this provision, it is claimed, a special privilege is given the Indiana State Dental Association of naming members of the board of examiners, and prescribing the standard of qualification. It is not necessary that members of the association shall be appointed upon the board. Whether the law itself should prescribe the standard of qualification, and whether it does so, are questions not presented. It is not objected that the law discriminates against the appellant in extending the right to practice dentistry, but it is that it discriminates in favor of the dental association in permitting it to exercise official duties. The power to appoint is in the nature of a duty, rather than a privilege. It may not be said to be a special privilege any more than that conferred upon circuit judges to appoint city commissioners or a drainage commissioner, or that the governor, the president of the state university, and superintendents of common schools shall be members of the state board of education, or in many other instances where nonjudicial functions are imposed upon judicial officers or nonexecutive functions are cast upon the executive, or where men, by reason of their learning, are designated to perform a service to the public. Long ago, Mr. Justice Washington said of the phrase "privileges and immunities," as employed in the federal constitution: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign." These, he said, may be "comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230. If more were included, the general assembly would be de-

nied the right to appoint to office, because the appointee would enjoy a privilege not enjoyed by another. Every man appointed to an office in a sense enjoys a privilege not enjoyed by another, but the appointment does not deprive any other citizen of a privilege; on the contrary, the appointee is an instrument of the government to protect such other citizen in his rights.

It has been suggested, rather than argued, that the act in question does not afford due process of law, in that it fails to extend the right of appeal from decisions by the board. It may be seriously doubted if one who does not seek a decision of the board may complain that he could not appeal from its action. It may be suggested, also, that the general rule is that appeals are recognized as allowable only from judicial decisions, and boards of the character of that in question do not render judicial decisions. *State v. Webster* (Ind. Sup.) 50 N. E. 750.

It is further objected that the evidence did not support the verdict that the appellant engaged in the practice of dentistry. It showed that the appellant leased and occupied rooms for several months for the declared purpose of practicing dentistry; that he had done dental work for three or more persons; that at times he engaged in filling teeth, and at other times did dental work at the bench. This we regard as sufficient to require the inference that he engaged in the practice. *Benham v. State*, 116 Ind. 112, 18 N. E. 454. The judgment is affirmed.

(151 Ind. 200)

INSURANCE CO. OF NORTH AMERICA v. MARTIN et al.

(Supreme Court of Indiana. Oct. 11, 1898.)

INSURANCE PAYABLE TO MORTGAGEE—CONDITIONS OF POLICY—SUBROGATION—RIGHTS OF PURCHASERS—LIMITATION OF ACTIONS—DENIAL OF LIABILITY—SUFFICIENCY.

1. A policy provided that, if insured conveyed his interest, the policy should be void, unless assigned to the purchaser with consent of the insurer. A mortgage clause provided that the loss should be payable to the mortgagee, and that the policy would not be invalidated by any act or neglect of the mortgagor, but that if the insurer paid the mortgagee, claiming that as to the mortgagor no liability existed, it should be, to the extent of the payment, subrogated to the rights of the mortgagee. After the issuance of the policy the mortgagor sold the premises, and the purchaser took immediate possession, and assumed the indebtedness thereon. Subsequently, before any assignment of the policy had been made, the buildings were destroyed by fire; and the insurer paid the mortgagee the amount of the loss, taking an assignment of the debt of the mortgagee to the extent of the amount so paid. *Held* that, on the conveyance of the property by the mortgagor, his rights under the policy terminated, and the purchaser acquired none, and the insurer had a valid claim against the property and the purchaser for the amount paid the mortgagee.

2. The insurer, by taking an assignment from the mortgagee of the debt and mortgage lien to the extent of the amount paid, suffi-

ciently showed a denial of liability to the mortgagor or purchaser of the property.

3. The fact that a mortgagee has the right, on default in payment of the interest, to declare the whole debt due before maturity of the principal note, does not start the running of the statute of limitations against the principal note before its actual maturity, on such default.

Appeal from circuit court, Whitley county; J. W. Adair, Judge.

Action by the Insurance Company of North America against Stephen A. Martin and others. From a judgment for defendants, plaintiff appeals. Reversed.

Finch & Finch and Burton E. Gates, for appellant. Marshall, McNagney & Clugston, for appellees.

JORDAN, J. Appellant commenced this action against appellees, Stephen A. and Nancy Martin, the Aetna Life Insurance Company, and William McMannen, by a complaint in four paragraphs, to foreclose a mortgage upon certain described real estate, situated in Whitley county, Ind. Omitting some of the facts alleged in the complaint not essential to the determination of the controversy in this appeal, the following may be said to be a summary of the facts alleged in the first paragraph of the complaint: On August 26, 1885, appellee William McMannen, who was then the owner of the mortgaged premises, secured a loan of \$1,000 from the Aetna Life Insurance Company, and on that day executed to it his note for that amount, which was to be due and payable on January 1, 1890. To this principal note there were attached coupon interest notes, due and payable as therein mentioned. McMannen and wife, to secure the payment of this loan, together with the interest thereon, when due, on the same date executed to the said Aetna Company a mortgage, whereby they mortgaged the real estate described in the complaint. This mortgage was duly recorded as required by law in the recorder's office of Whitley county, Ind. McMannen, the mortgagor, to further secure the mortgagee, procured appellant to issue to him a policy of fire insurance, bearing date of September 1, 1885, whereby the dwelling house situated upon the mortgaged land was insured against loss by fire to the amount of \$300. This policy, among others, contained the following provisions and stipulations: "If the insured shall, by voluntary transfer or conveyance, dispose of the property covered by this policy, or of an undivided interest therein, * * * this policy may be assigned to the party or parties succeeding to the ownership of the property, provided the company shall first consent thereto by indorsement hereon; otherwise this insurance shall cease from the date of such change of ownership." Attached to this policy, and constituting a part thereof, is what is denominated a "mortgage clause," and the provisions and stipulations of this clause are as follows: "It is agreed that any loss or dam-

age that may be ascertained and proved to be due under this policy to the assured shall be held payable, for the account of said assured, to Aetna Life Insurance Co., mortgagee, subject to the following stipulations: (1) It is agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary in the trust deed only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by voluntary transfer, legal process, or conveyance of the property: provided, that the mortgagee or beneficiary shall notify this company of any change of ownership or increase of hazard which shall come to the knowledge of such mortgagee or beneficiary, and shall have permission for such change of ownership or such increased hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted to the mortgagor or owner shall be paid by the mortgagee or beneficiary on reasonable demand, and after demand made by the company upon and refusal by the mortgagor or owner to pay according to the established scale of rates; the company reserving the right to cancel the policy at any time on the terms in said policy provided, on giving to the mortgagee ten days' notice of their intention so to do, and after said ten days this policy and this agreement shall be void. * * * (2) It is also agreed that whenever this company shall pay to the mortgagee or beneficiary any sum for loss on this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or this company, at its option, may pay to the mortgagee or beneficiary the whole of the debt so secured, including such sums as said mortgagee or beneficiary may then have paid for taxes or fire insurance upon the property described in such mortgage or trust deed, pursuant to the terms thereof, with all the interest that may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment is made an assignment and transfer of said debt, with all securities held by said party on the property in question for payment thereof." On March 1, 1888, without the knowledge or consent of appellant, McMannen sold, and, together with his wife, conveyed, the mortgaged real estate, upon which the house insured was situated to the appellee Stephen A. Martin, and Martin went into possession of the property under this sale and conveyance. The fire in-

insurance policy was not assigned or in any manner transferred to Martin, and appellant was at no time requested to assign the policy to him. After the sale and conveyance of the mortgaged premises, as aforesaid stated, on April 4, 1888, the house insured was totally destroyed by fire. Martin, who was at the time the owner of the premises under the sale and conveyance mentioned, gave no notice to appellant of the fire, and made no claim against it for indemnity under the policy. After the fire the mortgagee, under the provisions of the mortgage clause of the policy, demanded payment for the loss of said house; and on July 20, 1888, appellant, under the provisions of the policy and the mortgage clause thereof, paid to the mortgagee, the Aetna Company, \$300, and the latter, as required by the mortgage clause, upon the payment of said amount upon the loss, assigned by indorsement to appellant \$300 of the amount of the said principal mortgage note, said indorsement being as follows: "September 21, 1888. Received on the within note \$233.15 principal, and also \$16.85 interest, from the Insurance Company of North America, and that amount of this note is hereby assigned to said Insurance Co. for their use as their rights may appear under their contract of subrogation, and without recourse upon this company. [Signed] Aetna Life Insurance Co., by M. G. Bulkeley, President. [Corporate Seal.]" The Aetna Company also assigned, by writing duly acknowledged and recorded in the recorder's office of said county, its interest in said mortgage security, to the amount of \$300. It is also averred that Stephen A. Martin, as a part of the purchase money for said land, assumed the payment to the Aetna Company of the mortgage debt, and that he has paid all of said debt except the \$300 assigned to plaintiff, and the interest thereon, and that he denies his liability as to said amount, and there is now due and unpaid of the said amount, principal and interest, the sum of \$500. The prayer of this paragraph, among other things, is for a personal judgment against Stephen A. Martin for \$500, and for a foreclosure of the mortgage in payment and satisfaction of the judgment. Copies of the policy, note, and mortgage, together with the indorsement and assignments mentioned, are filed as exhibits with the first and second paragraphs of the complaint. The second paragraph is substantially the same as the first, except that it does not demand a personal judgment, but prays only for a foreclosure of the mortgage. The third paragraph makes no mention of the insurance policy, or the mortgage clause attached, but simply alleges the execution of the mortgage note, and assignment of a part thereof to appellant, and the assumption of the payment of the debt by Martin, and asks for a judgment against McMannen, and prays for a foreclosure of the mortgage. Copies of the note and mortgage and the assignment mentioned are filed as exhibits with the third

and fourth paragraphs of the complaint. The fourth paragraph is substantially like the third, except that it demands a personal judgment against Martin, and also a foreclosure of the mortgage.

Appellees Martin and wife, having unsuccessfully demurred to each paragraph of the complaint, filed their joint answer thereto, consisting of 11 paragraphs; the first being a general denial. Appellant demurred to each of these paragraphs, except the first; and this demurrer was sustained to the fourth, fifth, sixth, and tenth paragraphs, and overruled to the others. Appellee McMannen was defaulted, and the Aetna Life Insurance Company filed an answer in denial. The second paragraph of Martin and wife's answer, we are informed by the briefs of the respective counsel, interposed as a defense the six-years statute of limitations; but this original second paragraph does not appear in the record, for the reason that after the demurrer thereto was overruled, and at a subsequent term of court, appellees, upon leave of court, filed a second amended paragraph of answer, whereby they pleaded the six-years statute of limitations. No demurrer appears to have been filed to this amended paragraph. The filing of this latter paragraph, of course, eliminated the original second paragraph of the answer from the record; and the clerk, in preparing the transcript, has properly omitted it. Consequently, under the circumstances, the record presents no question on the court's ruling upon the demurrer to the original second paragraph of answer. The third paragraph pleads payment. The seventh is addressed to the first and second paragraphs of the complaint, and when stripped, in part, at least, of conclusions, the facts therein set up as a defense to these two paragraphs of the complaint are substantially as follows: The execution of the notes and mortgage by McMannen to the Aetna Company, and the issuing of the policy by appellant to McMannen, and the sale and conveyance of the land, as averred in the complaint, are all admitted. It is then disclosed by the averments that the mortgagor procured the said insurance policy from appellant, and paid all the premiums therefor; that the mortgage clause was inserted in the policy at the request of the mortgagor, and that the mortgagee did not procure the policy, and paid no part of the premiums; that J. C. Wigent, of Columbia City, Ind., was the agent of the plaintiff, and issued the said insurance policy as said agent, and that he was also the agent of the mortgagee in obtaining the mortgage in controversy. At the time the mortgaged property was sold and conveyed to Martin, neither he nor his said wife had any knowledge of the existence of the insurance policy, and they did not obtain any knowledge in regard thereto until long after the said sale and conveyance; and, had the defendant Martin known of the policy when the property was

conveyed to him, he "could and would have procured an assignment of the policy to him, with the consent of the plaintiff." The appellant had full knowledge of the sale and conveyance of the property to Martin within a few days thereafter. The mortgaged premises, apart from the house situated thereon, were of a value which exceeded four times the amount of the mortgage debt. It is further alleged that the defendant Martin purchased the mortgaged premises for occupation as a home, and within a few days after the conveyance to him he moved his family and his household goods into the dwelling house thereon, which was the same insured under said policy, and thereafter continued with his family for some weeks to occupy the house as a home, until it was destroyed by fire. It is alleged that his occupation was a careful and prudent one, and that he exercised unusual precautions to guard against the hazards of fire. The fire which destroyed the said dwelling house occurred in the daytime, and the defendants, together with the aid of their neighbors, made every exertion to stay the progress of the flames. The origin of the fire was by reason of sparks from the chimney falling upon the roof of the house, and resulted from natural causes, and without any fault or negligence upon the part of either Martin or his wife. It is averred that the fire was one of the hazards which the plaintiff assumed when it issued said policy, and that said hazard was in no manner increased by the conveyance of the property to the defendant Martin; and it is also alleged that said house would have burned precisely as it did, had McMannen not conveyed the premises to Martin. After the fire the defendant Stephen A. Martin made proof to the plaintiff of the loss, which the latter accepted without protest, or notice to said defendant that it did not regard itself as liable or bound to him under the policy. And it is also averred that plaintiff voluntarily paid the loss to the said mortgagee, the Aetna Company, in accordance with the stipulations and provisions contained in the policy, and now contends that by reason of said payment, and by enforcing the provisions of forfeiture embraced in said policy relative to the conveyance of the insured property by McMannen, it is subrogated to the rights of the mortgagee in the mortgage, to the extent of the loss paid, and that it is entitled, to that extent, to foreclose said mortgage; that plaintiff, in paying said loss to the mortgagee, only discharged the obligation which it had assumed, and ought not to be heard, in a court of equity, to demand an enforcement of a penalty or forfeiture to relieve it from its obligation. The eighth paragraph is a denial of the averments of the third and fourth paragraphs of the complaint, and the ninth is a plea of payment. The eleventh paragraph is directed to the third and fourth paragraphs of the complaint, and recites the

facts out of which, as it is alleged, the cause of action accrued upon which these paragraphs of the complaint are said to be based. After admitting the execution of the note and the mortgage to secure the same to the Aetna Company by McMannen, upon the mortgaged premises, this paragraph proceeds to allege substantially the following facts: McMannen, on the day he executed the mortgage in suit, procured from the plaintiff the policy of insurance in question upon the dwelling house situated upon the mortgaged premises, to the amount of \$300. This policy contained a clause of forfeiture, to the effect that, if McMannen sold or conveyed the property covered by the policy, without the consent of the insurer, appellant herein, the insurance should cease from the date of said conveyance. At the request of the said mortgagor a clause was inserted in the policy to the effect that the loss, if any, should be paid by the plaintiff to the said mortgagee in discharge of the mortgage debt, and the plaintiff, as against the mortgagee, should waive its right to insist on the provisions for forfeiture. The mortgage clause, it is averred, further provided that if the plaintiff should pay said loss to the mortgagee, and should claim, as to the mortgagor, that it was not liable for the loss so paid, it should be subrogated to the rights of the mortgagee, and should receive from it an assignment of the note and mortgage, to the extent of said payment; that subsequent to the execution of the said mortgage and policy said McMannen and wife conveyed the mortgaged real estate to the defendant Stephen A. Martin; and that the plaintiff had full knowledge of said conveyance, and made no objections thereto, but did not formally or in writing consent to said conveyance. At the time of the conveyance the defendants had no knowledge of the existence of the insurance policy, and had they known of its existence, it is alleged, they "would and could, with the consent of the plaintiff, have procured the assignment of said policy" to Martin as purchaser. Plaintiff, with the full knowledge of such conveyance, failed to give to the defendant Martin notice of its desire to cancel the policy or forfeit the same by reason of said conveyance. The paragraph then proceeds to allege substantially the same facts as does the seventh paragraph of the answer relative to the value of the mortgaged premises being in excess of the mortgage debt, and also in regard to the careful and prudent manner in which the defendants occupied the house, and that the fire occurred without any fault or negligence upon their part, and the unavailing efforts which were made to subdue the fire, and that said building would have been destroyed precisely as it was, had said conveyance not been made. It is then averred that after the fire Martin made proof of loss to the plaintiff, which was accepted without protest, and that ap-

pellant paid the amount of the insurance, to wit, \$300, to the said mortgagee, the said Aetna Company, to be applied by it to that amount in discharge of the mortgage debt; that, after said payment, plaintiff claimed that it was entitled, under the provisions of the policy relative to the transfer of the property, and under the terms and conditions embraced in the mortgage clause thereof, to demand and receive from the mortgagee an assignment of the note and mortgage to the extent of the loss paid by it to the mortgagee, and under said demand it obtained the assignment set forth in the complaint; and it is alleged that plaintiff has no other or different rights in this case "than such as have equitably accrued to her under the aforesaid facts." It is then averred that, prior to the commencement of this action, plaintiff gave the defendants no notice that it intended to hold the policy void as to the defendant Stephen A. Martin; and, to maintain this action, it is alleged that plaintiff has come into a court of equity after more than six years have elapsed from the time the payment of the loan was made, and now seeks to enforce a forfeiture of the policy by reason of the breach against the conveyance of the property, which breach has occasioned it no injury, and it also seeks to be relieved from its obligation to pay the loss, which equity, as it is averred, will not permit; and the paragraph closes with a demand for judgment in favor of the defendants. This latter paragraph, like the seventh, is replete with conclusions, and these, in part at least, we have eliminated. After the ruling of the court on the demurrer to the answer, appellant replied thereto by a general denial; and the cause, being at issue, was submitted to the court, and upon the evidence being heard the court made a special finding of facts, and stated its conclusions of law thereon in favor of defendants, and, over appellant's motion for a new trial, rendered its judgment to the effect that appellant take nothing by the action, etc.

It is apparent, and in fact is not denied by appellant, that the assignment of the mortgage debt, together with the mortgage security, as alleged in the third and fourth paragraphs of the complaint, arises out of and is based upon the same facts and circumstances disclosed by the first and second paragraphs of the complaint. Aside from the question in regard to the statute of limitations, the cardinal one, which the parties to this appeal seek to have determined, is the right of appellant to prevail in this action, when the facts as alleged in the seventh paragraph of the answer are considered with reference to their being a complete bar to the cause of action set up in the first and second paragraphs of the complaint; but, in determining the sufficiency of the answer in its application as a defense to these paragraphs of the complaint, we may first properly review and consider some of the material facts as disclosed by the complaint and the exhibits

filed therewith. It appears that McMannen in August, 1885, when he was the owner of the real estate on which the house that was destroyed by fire was situated, obtained from the Aetna Company a loan of \$1,000, and executed to this company his promissory note for that amount, to become due and payable on January 1, 1890; and to secure the payment of the principal note, together with the coupon interest notes when due, he and his wife mortgaged the said real estate to the said Aetna Life Insurance Company. As a further security to the mortgagee for this loan, he procured appellant to issue to him a fire insurance policy on the house in controversy, insuring him against loss thereof by fire to the amount of \$300. This policy, as we have seen, contained a prohibitory provision against the transfer or alienation of the property insured. It was provided, however, that in the event of the transfer or conveyance of the property covered by the insurance the policy might be assigned to the person succeeding to the ownership of the property, provided that the consent of the insurer (appellant herein) to such assignment of the policy was first obtained by indorsement thereon; otherwise, it was stipulated and provided, the insurance, under the policy, should cease from the date of such change of ownership. Attached to this policy as a rider, and made a part thereof, was the usual mortgage clause, wherein it was agreed "that any loss or damage that may be ascertained or proved to be due under this policy to the assured shall be held payable for the account of said assured to the Aetna Life Insurance Co., mortgagee, subject to the following stipulations." Among these stipulations, and those particularly applicable to the question here involved, are the following: "It is also agreed that whenever this company shall pay to the mortgagee or beneficiary any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured." After the execution of the mortgage and fire policy in controversy, McMannen conveyed all of his right and title in the property to the appellee, Martin, without any assignment to him of the policy. These facts are not only disclosed by the complaint, but are also shown by the answer of appellee. It is certainly evident, in the light of the facts and circumstances of this case, considering the prohibition of the policy against alienation of the insured property, that, when McMannen conveyed his title to the mortgaged premises to Martin without any assignment of the insurance policy to the latter, the relations which existed under the policy between appellant, as insurer, and McMannen, as the insured, were

dissolved or terminated by virtue of the express stipulations of the policy, and from and after the date of the change of title of the insured property neither the mortgagor nor his vendee had any rights or concern in the policy, and thereafter, under the circumstances, appellant owed no duty to either of said parties. For it is a general and well-settled principle of insurance law that a policy of fire insurance is peculiarly a personal contract, and does not run or pass with the title to the insured property, in the absence of special stipulations providing therefor. The alienation of the insured property, as the authorities affirm, *ipso facto* avoids or invalidates the policy, unless the purchaser, with the consent of the insurer, takes an assignment thereof; and an assignment, generally speaking, must be made with the knowledge and consent of the insurer. Especially is this essential when the policy requires the assignment to be made with the consent of the insurer. Among the many authorities which fully support the foregoing propositions, the following may be consulted: *Lett v. Insurance Co.*, 125 N. Y. 82; 25 N. E. 1088; *Ayres v. Insurance Co.*, 17 Iowa, 183; *Simeral v. Insurance Co.*, 18 Iowa, 319; *Insurance Co. v. Ross*, 23 Ind. 179; *McCulloch v. Insurance Co.*, 8 Blackf. 50; *Insurance Co. v. Coquillard*, 2 Ind. 645; *Insurance Co. v. Gallagher*, 50 Ind. 209; *May, Ins.* § 6; *Carpenter v. Insurance Co.*, 16 Pet. 495; *Savage v. Insurance Co.*, 52 N. Y. 502; *Insurance Co. v. Beffrey*, 48 Minn. 9, 50 N. W. 922; 7 Am. & Eng. Enc. Law, 1028; *Trust Co. v. Kenneally*, 38 Neb. 895, 57 N. W. 759. The property insured in this case, it appears, was destroyed by fire on April 4, 1888, over a month after the mortgagor had transferred all of his right and title to Martin. Consequently, at the time of the fire, and for over a month prior thereto, all of the rights of the mortgagor in the policy, under its express provisions and stipulations, had been destroyed and terminated by his own voluntary act, and he was in no position to demand that appellant pay the indemnity to the mortgagee for his benefit, nor for that of his vendee; and certainly the latter, who was a stranger in all respects to the policy, in the absence of a proper assignment, had no rights whatever thereunder, and each was in the same attitude as though the policy had never actually existed.

We may properly next consider the rights of appellant under the policy in dispute. There is no question, in view of the well-settled principles of insurance law, but what the mortgage clause in the case at bar constituted a contract between appellant, the insurer, and the Aetna Life Insurance Company, the mortgagee. By this contract the terms and conditions of the policy relative to the neglect of the mortgagor or owner of the property, and the prohibition against the alienation thereof, etc., were modified, and the mortgagee was thereby removed beyond the effect or control of these stipulations and conditions. *City Five-Cents Sav. Bank v.*

Pennsylvania Ins. Co., 122 Mass. 165; *Insurance Co. v. Olcott*, 97 Ill. 439; *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Richards, Ins.* § 158. In *Insurance Co. v. Olcott*, supra, in considering such a clause the court said, "The mortgagor and mortgagee held distinct interests under the original policy, which in effect constituted two contracts." The provisions of the contract created by the mortgage clause in question also provided for subrogation in the event the policy was invalidated as to the interest of the mortgagor or owner. An examination of this clause will disclose that the agreement therein relative to this feature of the case, in substance, is that whenever appellant paid to the mortgagee any sum for loss under the policy, and denied its liability as to the mortgagor or owner of the property, appellant at once, to the extent of such payment, became legally subrogated to all the rights of the mortgagee in and to all securities held by it for the payment of such debt, etc. It is evident, we think, that one of the conditions or considerations which actuated appellant to agree to waive, among others, the provision relative to the alienation of the property, and to agree to pay the indemnity to the mortgagee regardless of the change of title, was the stipulation or agreement contained in the mortgage clause for its subrogation or substitution to all the rights of the mortgagee in the debt and mortgage lien to the extent of any sum paid to the mortgagee under the policy for the loss of the property by fire. The contract, in effect, provided that after the policy had been invalidated by alienation of the property the indemnity therein provided should remain wholly for the benefit of the mortgagee, and that neither the mortgagor, nor those claiming title to the property through him, in the absence of an assignment, should be entitled to any beneficial interest therein, and that payment of the loss to the mortgagee should not be a discharge of the mortgage indebtedness, but such payment should at once legally operate to subrogate, pro tanto, appellant to the rights of the mortgagee in the mortgage debt, and the mortgage lien as security; or appellant, at its option, had the right to pay the entire debt to the mortgagee, and thereby succeed to all the rights of the latter through an assignment; or, in other words, the provisions of the mortgage clause, under the circumstances, were to the effect that the amount due for the loss of the property, after the transfer of its title, should not be a fund to be applied as a payment upon the mortgage debt, for the benefit of the mortgagor or owner of the insured property, but that on payment of the loss to the mortgagee the indebtedness, to the extent of the loss paid, should remain and be deemed a fund for the reimbursement of appellant as the insurer. *Insurance Co. v. Beffrey*, supra; *Institution v. Leake*, 73 N. Y. 161; *Allen v. Insurance Co.*, 132 Mass. 480; *Dick v. Insurance Co.*, 10 Mo. App. 376.

affirmed in 81 Mo. 108; *Honore v. Insurance Co.*, 51 Ill. 409; *Carpenter v. Insurance Co.*, supra; *Insurance Co. v. Tyler*, 16 Wend. 397; *Sheld. Subr.* (2d Ed.) § 237; *Jones, Mortg.* (5th Ed.) § 420. Certainly, under the facts disclosed by the first and second paragraphs of the complaint, the special agreement or stipulation for subrogation contained in the policy was binding on the mortgagee, and it seems to have so considered it; for, as the complaint shows, upon the payment of the loss the mortgagee, by indorsement, assigned to appellant an amount of the principal mortgage debt equal to the amount which appellant paid in satisfaction of the loss of the property destroyed, and at the same time the mortgagee, in accordance with the method prescribed by section 1107, *Burns' Rev. St.* 1894, also assigned, to a like extent, the mortgage security. In fact, appellant may be said, by virtue of its subrogation under the agreement and the circumstances in the case, to virtually occupy the position of an assignee or purchaser from the mortgagee for value. *Sheld. Subr.* §§ 5, 6, 248. This is not, as appellees seemingly insist, an action to enforce subrogation, but it is one for the foreclosure of a mortgage; and the question, in the main, is, was the subrogation upon which appellant, under the facts, relies, warranted thereby? That it was, and that the debt, to the amount paid, with interest, in the light of the authorities cited, still exists in favor of appellant, there is no doubt. That the facts set up in the seventh paragraph of the answer are insufficient as a bar to this action is equally manifest. Appellees, as we have seen, were strangers to the insurance policy. At no time does it appear that they, or either of them, had any interests or rights whatever therein. After the change of title, the insurance, under the policy, existed for the benefit of the mortgagee, and for its benefit alone. How, then, under the circumstances, appellees can avail themselves of its provisions to defeat this action of appellant, is not apparent. The averments, or rather surmises, upon the part of appellees, that the house would have been destroyed in like manner as it was if the title had not been transferred by *McMannen*, and the alleged facts of the prudence upon the part of appellee *Martin*, and the precaution which was exercised to prevent the fire, are futile; for, as heretofore said, at the time of the fire neither his grantor nor he himself had any existing interests or rights under the policy. We have examined the authorities cited by counsel for appellees, upon which they rely to support their contention, among which is the case of *Insurance Co. v. Race*, 142 Ill. 338, 31 N. E. 392. Neither this latter case, nor the others cited by appellees' counsel, under the facts in the case at bar, have any application in support of their contention.

In regard to the question of limitation, which the learned counsel for appellant and

appellees have so fully discussed, it may be said that by the express provisions of the principal note it was to mature on January 1, 1890. While it is true, as appellees contend, upon default in payment of interest, etc., the mortgage empowered the mortgagee to exercise at its option the right to declare the entire debt due, and proceed, if it desired, to foreclose the mortgage, still that right would not start the running of the statute of limitations, as against the principal note, prior to its actual maturity, by reason of the default in payment of any interest note. The fact that appellant was subrogated pro tanto to the rights of the mortgagee would not alter the rule in this respect, and the statute, as against the principal debt in the hands of appellant, under the facts at least, would not begin to run until January 1, 1890, the date of its maturity. The following decisions support this conclusion: *White v. Miller*, 47 Ind. 389; *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545. This action was commenced within six years from that date. Therefore the decision upon the debatable question as to whether the six or ten years' provisions of the statute of limitations applied is not material.

In answer to the insistence of appellees that the complaint does not disclose that appellant denied its liability to the mortgagor or owner of the property at the time it paid the loss to the mortgagee, it may be said that it is true, as the authorities affirm, that appellant was not entitled to subrogation upon its mere denial of liability, but to entitle it to this right the facts in the case must justify such a denial. It does appear, however, from the averments of the complaint, that after the fire in question the mortgagee, under the policy, demanded of appellant payment for the loss of the house, and that the latter, in accordance with the policy and the provisions of the mortgage clause, paid said loss to the former, and took from it an assignment of the debt and mortgage lien, to the extent of the amount paid. These facts, we think, sufficiently show a denial of liability by appellant to the mortgagor or owner of the property.

Without further extending this opinion, we think the court erred in holding the seventh paragraph of the answer sufficient in bar of the action. Appellant's right to prevail in this action may be said more properly to rest on the first and second paragraphs of the complaint, and as the eleventh paragraph of the answer is, in substance, similar to the seventh, as a defense therefor to the cause of action, as alleged in the first and second paragraphs of the complaint, it is open to the same objections as is the seventh paragraph of the answer. The judgment is reversed, and the cause remanded, with instructions to the court to vacate its judgment, and for further proceedings not inconsistent with this opinion.

(151 Ind. 245)

CRIST et al. v. WAYNE INTERNATIONAL BUILDING & LOAN ASS'N.

(Supreme Court of Indiana. Oct. 12, 1898.)

APPEALS—PARTIES.

Under Burns' Rev. St. 1894, § 647 (Horner's Rev. St. 1897, § 635), providing that a party to a judgment who desires to appeal therefrom must join all his co-parties, such co-parties must be made co-appellants; and placing the name of a co-party in the title of the appeal immediately after appellee's name, in this wise: "And C. not joining in this appeal,"—is insufficient.

Appeal from circuit court, Huntington county; C. W. Watkins, Judge.

Action by the Wayne International Building & Loan Association against Lyman C. Crist and wife. On her application, Minnie Pashong was made a party defendant. From a judgment for plaintiff, defendants Lyman Crist and Pashong appeal. Dismissed.

Thomas G. Smith, for appellants. James M. Hatfield and Griffith & Flinn, for appellee.

McCABE, J. The appellee sued the appellant Lyman C. Crist and Jennie Crist, who is not made a party to this appeal, to recover a judgment upon a bond executed by said Jennie for \$700, and to foreclose a mortgage upon certain real estate, executed by both of them, to secure the payment of said bond, and to obtain the appointment of a receiver. On her application the other appellant herein, Minnie Pashong, was made a party defendant, she claiming an interest in said real estate, and filed a cross complaint setting up such interest. Issues were formed upon such cross complaint and upon the complaint. The Crists were husband and wife. The issues formed were tried by the court, resulting in a special finding of the facts, upon which the court stated conclusions of law leading to judgment against all the defendants, and a decree foreclosing the mortgage.

Numerous errors are assigned by the appellants. But we are met with an objection by the appellee to the consideration of such errors on the ground that one of the parties to the judgment, and the principal party against whom the judgment was rendered, has not been made a party to this appeal, and for that reason it moves to dismiss the appeal. This being a vacation appeal, the act approved March 9, 1895 (Acts 1895, p. 179), does not apply. The defect mentioned goes to the jurisdiction of this court over the appeal.

In the title of the cause, immediately preceding the assignment of errors, after naming the appellee, the following words appear immediately after appellee's name, to wit: "And Jennie Crist not joining in this appeal." If this language could even be construed to mean that she is or was an appellee, and that she declined to join in the appeal, it would be insufficient, because appellees never join in appeals, and never decline to join therein.

Appeals are prosecuted without consulting the wishes of appellees. Besides, appellants' attorney, in writing out the assignment of errors, was only authorized to speak for the appellants, and had no authority to speak or write for the appellee, and say that she did not join in the appeal. The only way to bring the appeal within the jurisdiction of this court was to join all the co-parties to the judgment, or judgment defendants, as appellants, and then Jennie Crist could have declined to join in the appeal, or, failing so to decline, she would be regarded as having joined, and then the jurisdiction of this court over the appeal would have been complete. Rev. St. 1894, § 647; Horner's Rev. St. 1897, § 635; Rev. St. 1881, § 635; Gregory v. Smith, 139 Ind. 48, 38 N. E. 395; Vordermark v. Wilkinson, 142 Ind. 142, 39 N. E. 441; Lee v. Mozingo, 143 Ind. 667, 41 N. E. 454; Abshire v. Williamson, 149 Ind. 248, 48 N. E. 1027. For failure of appellants to comply with this statutory requirement, this court is without jurisdiction over the appeal, and it therefore must be, and is, dismissed.

(20 Ind. App. 680)

BALTIMORE & O. S. W. RY. CO. v. DOES.
(Appellate Court of Indiana. Oct. 14, 1898.)**RAILROADS—FIRES—CONTRIBUTORY NEGLIGENCE—SPECIAL VERDICT—SUFFICIENCY.**

1. A judgment for damages caused by a fire originating on a railroad right of way is not proper where the verdict consists of interrogatories and answers, and the facts found do not show affirmatively that plaintiff was without contributing fault.

2. One suing for damages caused by a fire originating on a railroad right of way is not entitled to a judgment where the special verdict states that he was free from contributory negligence, but does not find any facts supporting such a conclusion.

Appeal from circuit court, Clark county; G. D. H. Gibson, Judge.

Action by John P. Does against the Baltimore & Ohio Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

C. L. & H. E. Jewett, for appellant. Voight & Stotsenburg and John W. Baldwin, for appellee.

COMSTOCK, J. Appellee sued appellant to recover damages caused by a fire which it was alleged originated on the appellant's right of way, and was negligently permitted to communicate with appellee's land, and there consumed certain hay, fence rails, and other property of appellee. The cause was put at issue, submitted to a jury, and a special verdict returned, on which the court rendered a judgment in favor of appellee. Appellant assigns as error: (1) The sustaining of appellee's motion for judgment on the special verdict; (2) the overruling of appellant's motion for judgment; (3) in rendering judgment in favor of appellee; (4) in overruling appellant's motion for a new trial.

Appellant contends that there is no finding of facts showing that the appellee was free from contributory negligence. The verdict consists of interrogatories and answers thereto. To authorize a judgment in favor of appellee, the facts found must show affirmatively that he was without contributory fault. In the case of *Railway Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760, the court, by Reinhard, J., says: "It is not enough for the jury to state in their verdict that the injury was received by the plaintiff without his contributing negligence. Such a statement is but a conclusion or inference to be drawn from the ultimate facts of the case. It may be proper for the jury to find this inference when it has found the facts upon which it is predicated." No citation of authorities is needed in support of the proposition that a special verdict should find only facts, and to entitle the party having the burden of the issue to a judgment all the facts must be found, and mere conclusions and matters of evidence will not serve the same purpose as the finding of facts. In the very well considered case of *Railroad Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663 (an action for damages from a fire set out by a railroad company), the rights and obligations of the property owner are ably discussed. Black, J., speaking for the court, says: "When, in such a case, the property owner had notice of the fire endangering his property to the loss for which he sues, if he could have prevented the loss by reasonable effort, and did not make such effort, or unless any attempt he could make and did not make to save his property after he discovered its danger would be useless or extraordinarily hazardous, he cannot recover for such loss. * * * Where, as in this state, the burden rests upon the plaintiff to show his want of contributory negligence, it becomes necessary for him to show whether or not he or his servant in charge of the property had knowledge of the existence of the fire during its progress; and if it is not made to appear that such knowledge did not exist, then it devolves upon the plaintiff to show what efforts were made to save him from loss, and it is incumbent upon him to prove the use of efforts reasonable under the circumstances,"—citing *Bevier v. Canal Co.*, 13 Hun, 254; *Hogle v. Railroad Co.*, 28 Hun, 363; *Eaton v. Navigation Co.*, 19 Or. 391, 24 Pac. 415; *Tilley v. Railway Co.*, 49 Ark. 535, 6 S. W. 8; *Railway Co. v. Johnson*, 96 Ind. 40; *Railway Co. v. Hadley*, supra; *Tien v. Railway Co.*, 15 Ind. App. 304, 44 N. E. 45; *Railway Co. v. Porter* (Ind. App.) 44 N. E. 1112; *Railroad Co. v. Bailey* (Ind. App.) 46 N. E. 688. See, also, *Railway Co. v. Carmon* (Ind. App.) 48 N. E. 1047. In *Railway Co. v. Hadley*, supra, appellee sought to recover damages to his lands, alleged to have been sustained by reason of appellant's alleged negligence. The court said: "In the present case the finding fails to show where the appellee was, or what he was doing, at the time

of the fire,—whether he was present thereat or absent; and, if present, what he did to keep the fire from spreading is not made to appear. The facts found are silent as to his whereabouts. * * * What efforts he or his family made to arrest the fire and to prevent the burning of the property, and why they did not succeed therein, is not made to appear. It cannot be presumed that the appellee was absent at such a time, or, if he was present, that he did all he could to prevent or lessen the injury. We think the verdict is fatally defective in this regard. It should have found the facts necessary to show that the appellee was free from fault. This it does not do. If the facts found were such as made it most probable that the appellee was absent, an express finding to that effect might not be necessary." The only finding relative to the question of contributory negligence in the verdict under consideration is in answer to the following interrogatory: "Was not the loss of said property by fire without the fault or negligence of the plaintiff, John P. Does? Answer. Yes." The verdict does not show where the appellee was, nor what he or any one else did, if anything, at any time before or during the fire, to protect his property. As we have seen, the statement contained in interrogatory 25, supra, and the answer thereto, is not the finding of facts showing freedom from contributory fault. The verdict is fatally defective in failing to find the facts from which such a conclusion might be drawn. For this reason the trial court erred in sustaining appellee's motion for judgment on the special verdict. It is claimed by appellee's learned counsel that the evidence is not in the record. We do not deem it necessary to consider the questions presented by the motion for a new trial, as they may not occur again, and do not therefore determine whether or not the evidence is in the record. From a consideration of the entire verdict, we think justice demands a new trial. The judgment is therefore reversed, and the cause remanded for a new trial.

(21 Ind. App. 10)

HANCOCK v. LAKE ERIE & W. R. CO.
et al.

(Appellate Court of Indiana. Oct. 4, 1898.)

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—SPECIAL VERDICT—WILLFUL INJURY—COMPLAINT.

1. A special verdict, in an action for injury caused by the frightening of plaintiff's horse, when close to a railroad crossing, by a passing train, shows contributory negligence, notwithstanding finding that in approaching the crossing plaintiff exercised all the care ordinarily exercised by prudent persons under similar circumstances, and that the flagman was not in his usual and proper place, the other findings showing that, while view of the approaching train was prevented by obstructions, plaintiff could, if she had stopped and listened attentively, instead of talking and laughing with others in the team, have heard the train while she was at a safe distance from the track, and

if she had looked attentively could have seen the flagman giving warning signals when she was more than 100 feet from the track.

2. No willful injury of plaintiff is charged by a complaint alleging that defendant caused its train to approach and pass over the crossing at a speed of 25 miles an hour, in known and purposed violation of the speed ordinance of the city; that it willfully failed and omitted to sound the whistle for the crossing, and willfully omitted to maintain a flagman at the crossing; that the flagman was willfully away from his post of duty, and willfully failed to warn plaintiff of the approach of the train; that defendant willfully caused the train to come close to plaintiff while about to cross the track; and then and thereby willfully, and in known and purposed violation of the statute, frightened her horse, and thereby willfully and illegally, as aforesaid, caused him to quickly turn and upset the buggy, causing plaintiff's injury, which was received by her without any fault on her part.

Appeal from circuit court, Howard county; L. J. Kirkpatrick, Judge.

Action by Helena H. Hancock against the Lake Erie & Western Railroad Company and another. Judgment for the named defendant, and plaintiff appeals. Affirmed.

Fippen & Purvis and Moon & Wolf, for appellant. Bell & Purdum and John L. Rupe, for appellee.

ROBINSON, J. Appellant brought this action against appellee and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, which latter road was at the time using the track of the former, to recover damages for injuries alleged to have been received at a highway crossing. A special verdict was returned, upon which judgment was rendered in appellee's favor, and this action of the court is the only question presented by the assignment of errors. It is conceded by counsel for appellee that the verdict shows negligence on the part of the company. From the special verdict it appears that about 1 o'clock in the afternoon of August 10, 1893, a clear day, appellant, with her sister, mother, and 10-year old daughter, all in a one-seated top buggy drawn by a gentle horse, approached a street crossing in Tipton, Ind., where Jefferson street crosses appellee's tracks. Two of the ladies occupied the buggy seat, and the daughter sat on the lap of one, and appellant on the lap of the other. As seated, appellant's head came near the top of the buggy. In going from Deal street to the crossing, about 600 feet, the horse was checked from a trot to a walk about half a square from the crossing, and from that point was driven to the crossing in a trot. When she checked the horse into a walk she listened for a train, but heard none, and from that point on she looked continuously towards the crossing for trains and the flagman, and listened continuously for trains, and saw and heard neither, nor any warning of danger, until near the track, and when she first saw the train it was so near the horse as to make it impossible to prevent his scaring. Appellant was going west and the train

south. There were obstructions on the north side of the street from where appellant entered on the same, so that the track north of the street, or a train approaching thereon from the north, could not be seen by a person at any point on said street east of a few feet from the railroad track. There were four tracks at the crossing,—the main track, and two switches east and one west. A box freight car stood on the east-side track, 30 feet north of the north line of the street, which further obstructed appellant's view. Appellant was well acquainted with all the surroundings of said crossing, which was a dangerous one, and at which a flagman was constantly needed. The noise of the horse and buggy on the brick-paved street and a mill in operation in the immediate vicinity interfered with appellant's ability to hear the train, and the buildings and other obstructions on the north side of the street obstructed the sound of the approaching train. Appellant's senses of sight and hearing were unimpaired. Appellant and those with her, as they approached the crossing, were laughing and talking among themselves. The train, as it approached the crossing, was making a loud noise, which was heard by persons as far east as Deal street, and by a number of persons both east and west of the crossing. The engine bell was ringing, and the pop valve of the engine released, causing a loud noise. If appellant had stopped and listened attentively, she could have heard the train approaching the crossing before she came within 100 feet of the crossing, and if she had stopped and listened attentively she could have heard the train approaching in time to have stopped within a safe distance of the track. The flagman kept at the crossing had a little house on the south side of the street, and immediately west of the track, in which he usually stayed if no train was approaching, and if a train was approaching it was his custom to come out and signal persons approaching, and the proper and usual place for signaling was near the flagman's house. At said time he was on the south side of the street, about 50 feet west from the track, and his attention was called to appellant when she was about 150 to 200 feet from the crossing, and he then waved his flag, and when appellant was about 50 feet away he gave a second warning with his flag. Appellant failed to see said warnings, because the flagman was not at his usual place. Immediately after the second warning the flagman started towards said crossing, and cried out to appellant to stop, but she did not see or hear him or the train until she was in immediate proximity to said crossing, and upon the right of way, and after she saw the train she could not have prevented the horse from becoming frightened and turning around and overturning the buggy. Appellant, from the time she came onto Jefferson street from Deal street, could have seen the flagman on the street with his flag, and within view of appellant.

until she came to the crossing. If she had looked attentively, she could have seen the flagman waving his flag to give warning before she came within 100 feet of the crossing.

It is the law in this state that a person approaching a railroad crossing, known by him to be dangerous, must exercise care in proportion to the danger to be avoided; that he must use his senses, must listen for signals or the noise of approaching trains, must observe signs put up as warnings, and look for trains where there is a view of the track; that if he is injured at a crossing the fault is *prima facie* his own, and he must show affirmatively that his own negligence did not contribute to the injury; that in approaching a crossing he must assume that there is danger, and act with ordinary care and prudence, on that assumption. See *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Railway Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270; *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Pennsylvania Co. v. Meyers*, 136 Ind. 242, 36 N. E. 32.

It appears that there were obstructions which shut out almost all sight in the direction from which the train was approaching. That fact imposed the duty of increased care in the use of the sense of hearing, and to that end appellant, in approaching the crossing, should have stopped and attentively listened. *Railway Co. v. Duncan*, *supra*. And the jury find in their verdict that, if appellant had stopped and listened attentively, she could have heard the train approaching the crossing before she became within 100 feet of the crossing. Appellant knew that a flagman was kept at the crossing, and she was acquainted with his usual mode of attending the crossing. It is true the jury find that she failed to see the flagman when he gave the warnings because he was not at the usual and proper place for him to be. But it appears that the flagman was near, and the jury find that appellant, from the time she came onto Jefferson street at Deal street, about 600 feet from the crossing, could have seen the flagman on the street with his flag, and within view of appellant, until she came to the point where the accident occurred, and that if she had looked attentively she could have seen the flagman waving his flag to give warning before she came to Mill street, about 100 feet from the crossing.

It is argued by counsel that the finding of the jury of the ultimate fact that appellant, in approaching the crossing, exercised all the care ordinarily exercised by prudent persons under similar circumstances, must be regarded as a determination of the question of contributory negligence by the jury. Where, upon the facts found, two or more inferences may be drawn therefrom, the finding of such ultimate fact by the jury is proper. *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714. But where the jury find the facts, informing

the court exactly what was done and what was not done by the injured party, and the court can, as a matter of law, adjudge that the injured party was or was not guilty of contributory negligence, the finding of such ultimate fact by the jury must give way to the findings of such specific facts. *Towers v. Railroad Co.*, 18 Ind. App. 684, 48 N. E. 1046; *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270; *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106; *Board of Com'rs v. Bonebrake*, 146 Ind. 311, 45 N. E. 470. Taking the specific facts found, we cannot say that they are such as warrant the finding of such ultimate fact by the jury. Such a conclusion is not consistent with the particular facts found. When the jury find precisely what the complaining party did and what he did not do, as in this case, the question of her negligence becomes one of law, and the jury's conclusion must give way. The rule announced in *Railroad Co. v. Grames*, 136 Ind. 39, 34 N. E. 714, is not questioned, but it has no application to the case at bar. Where the jury returns a general verdict, they are required to find, and do find, the ultimate fact as to the care exercised by the injured party, and, if there is some evidence to support such a conclusion, it must stand without reference to what an appellate tribunal may think about the preponderance of the evidence. What the injured party did in such case is concluded by the jury from all the evidence, and, when there is some evidence from which the jury can say that the complaining party acted as a reasonably prudent person would act under like circumstances, such conclusion must stand. *Railroad Co. v. Williams* (Ind. App.) 51 N. E. 128. But when the jury return a special verdict, and state, as facts, what the complaining party did, and there can be but one conclusion drawn from such facts, it is the duty of the court to state such conclusion as matter of law. The cases holding a railroad company liable where the traveler has been misled by some affirmative act of a flagman are not controlling in the case at bar. It is held that, where the company is required to close a gate upon the approach of trains, the open gate is an invitation to cross, and the person approaching the crossing has a right to rely upon the invitation, but even then he is not excused from the use of some care to avoid injury. *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843. But in the case at bar appellant relies upon the fact that the flagman was not at his usual place, and that because he was not there she did not see him. She does not rely upon having been misled by some affirmative act of his. *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270; *Cadwallader v. Railway Co.*, 128 Ind. 518, 27 N. E. 161.

It is true that a traveler approaching a crossing has a right to presume that the law will be obeyed, but in acting upon that presumption he is bound to exercise due care, un-

der the circumstances. He has no right to rely entirely upon receiving the warning signals required by law, and approach the crossing without looking and listening for the approach of trains. In determining the conduct of the complaining party in approaching a crossing, the jury have the right to take into consideration the absence of statutory signals, but the absence of such signals does not excuse such party from the exercise of due care. *Miller v. Railway Co.*, 144 Ind. 323, 43 N. E. 257; *Railroad Co. v. Consyer*, 149 Ind. 524, 48 N. E. 352, and 49 N. E. 452; *Pennsylvania Co. v. Stegemeler*, 118 Ind. 305, 20 N. E. 843; *Railroad Co. v. Williams* (Ind. App.) 51 N. E. 128. Taking the specific findings of facts as to what appellant did as she approached the crossing, and the further findings of the jury that if she had listened attentively she could have heard the approaching train, and that if she had looked attentively she could have seen the flagman waiving his flag to give warning, under the rules declared in the cases above cited we can but conclude that appellant was guilty of negligence proximately contributing to her injury.

The third paragraph of complaint seeks to recover for a willful injury. It is charged in this paragraph that appellee caused its train to approach and pass over the crossing "at a rate of speed of twenty-five miles per hour, in known and purposed violation of the speed ordinance of the city of Tipton"; that appellee "willfully failed and omitted to sound the whistle of said locomotive for said street crossing," and "willfully omitted to maintain a flagman at said crossing"; that the flagman "was willfully away from his post of duty, and willfully failed to warn the plaintiff of the approach of said train"; that appellee "willfully caused said locomotive and train of cars to come into close proximity to said horse and plaintiff while then and there about to cross said railroad at said point," and "then and there and thereby willfully and illegally, and in known and purposed violation of the statute, * * * frightened said horse, * * * and thereby willfully and illegally, as aforesaid, caused him to quickly turn round and upset said buggy in which plaintiff was riding," causing her injury,—“all of which said wounds and injuries herein mentioned were received by her without any fault or negligence on her part.” The complaint does charge that a number of acts were willfully done, but it does not charge that appellee willfully injured appellant. Because appellee willfully failed to sound the whistle, and willfully ran the train at an unlawful speed, and the flagman was willfully away from his post of duty, and the other acts enumerated were willfully done, it does not necessarily follow from the pleading that there was any intention to injure any one. The pleading charges that certain acts were done willfully, and concludes that because of these willful acts appellee willfully injured appellant. It is not shown

that, at the times these willful acts were done, appellee's employes had any knowledge that appellant or any one else was near the crossing. The paragraph does not charge that appellant's horse was purposely and willfully frightened by the servants of appellee, nor are the facts alleged such that such an inference can be drawn. Thus, it has been said: "It is only necessary to charge, in a complaint which seeks redress for a willful injury, that the injurious act was purposely and intentionally committed, with the intent willfully and purposely to inflict the injury complained of." *Gregory v. Railroad Co.*, 112 Ind. 385, 14 N. E. 228. It is true that the unlawful intent involved in a willful act may be either actual or constructive, but there are no facts averred in this paragraph which show that there was either an actual or constructive intent to injure appellant or to injure any one else at the time of the occurrence pleaded. The engineer may have omitted to sound the whistle either from forgetting it or from thinking it unnecessary, and, in either case, so far as this pleading goes, such omission is nothing more than negligence. A paragraph of complaint in *Railroad Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801, very similar to the one under consideration, was held to charge no more than negligence, the court saying: "Notwithstanding the frequent use of the words 'purposely' and 'willfully,' the pleading does not charge that the defendant purposely or willfully killed the intestate, or purposely or willfully ran the train upon him, or purposely or willfully caused it to be run upon him. The allegations amount to no more than a charge of killing through negligence." In the case of *Conner v. Railroad Co.*, 146 Ind. 430, 45 N. E. 662, the court said: "The substance of the rule, as established by the cases to which we have referred, is that, to entitle one to recover for an injury without showing his own freedom from contributory negligence, the injurious act or omission must have been purposely and intentionally committed with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequences would be to produce injury to others, the actor having knowledge of the situation of those others." In *Railway Co. v. Miller*, 149 Ind. 490, 49 N. E. 445, it was said: "The liability of appellant, under the circumstances in this case, must be tested or measured by the acts or conduct of its employes in the control of the engine after they became aware that the deceased was approaching the crossing where the collision occurred. *Railroad Co. v. Graham*, 95 Ind. 286." It is true it is averred that the particular street is a much-traveled street, but there are no averments from which it can be inferred that the crossing and surroundings were of such a character that the natural and probable consequence of running a train over the crossing at a high rate of speed and without sounding the whistle would result

in an injury. It cannot be said that the conduct of appellee's servants shows an aggressive wrong. The most that can be said of the pleading is that it avers simply acts of nonfeasance. Construing this paragraph from the specific statement of facts, and not from its general averments, we must conclude that its averments as to the cause of the injury, notwithstanding the epithets cast into it, do not show any willful or intentional wrong. *Ivens v. Railway Co.*, 103 Ind. 27, 2 N. E. 134; *Railway Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684; *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504; *Miller v. Miller*, 17 Ind. App. 605, 47 N. E. 338; *Railroad Co. v. Nash*, 1 Ind. App. 298, 27 N. E. 564. As we construe the third paragraph of complaint, the issue of a willful injury is not presented. There is no error in the record. Judgment affirmed.

COMSTOCK, J., took no part in this decision.

(21 Ind. App. 40)

OLSON v. CHISM.

(Appellate Court of Indiana. Oct. 12, 1898.)

PRINCIPAL AND SURETY—DISCHARGE—BILLS AND NOTES—EXTENSION OF TIME—APPEAL—REVIEW.

1. An extension of time given the maker of a note releases the surety only where it is for a consideration, for a time certain, and without his consent.

2. The fact that the payee of a note told the surety, after it was past due, that he had given the maker an extension, and, relying thereon, the surety failed to indemnify himself from the maker, who became insolvent after the extension, does not raise an equitable estoppel in favor of the surety, where he did nothing to enforce the collection, and it does not appear that the extension was without his consent.

3. A verdict based on conflicting evidence will not be disturbed.

Appeal from circuit court, Benton county; S. P. Thompson, Judge.

Action by George M. Chism against Ole Olson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Smith & Gray, for appellant. Fraser & Isham, for appellee.

ROBINSON, J. Appellee recovered a judgment against appellant and one Taylor in an action on a promissory note. In appellant's second paragraph of amended answer he averred that he signed the note as surety, and received no part of the consideration, which was known to appellee when the note was executed; that after the note became due appellee told appellant that he had extended the time of payment, and had agreed to give Taylor one year more time; that appellant relied upon such statement, and believed the same true, and was thereby prevented from indemnifying himself; that up to the time of such extension Taylor was

solvent, and that at the time suit was brought he was insolvent; that by reason of such statement appellant was induced to neglect any and all means he might have used for his own protection.

There was no error in sustaining a demurrer to this paragraph of answer. Without entering into any discussion as to necessary averments in pleading the surety's release, it is not averred in the case at bar that the extension of time given was upon any consideration, nor that there was any extension, but that appellee told appellant he had agreed to extend the time. In order that the extension of time of payment may release a surety, it must appear that it was for a consideration, for a time certain, and without the surety's consent, and that the holder knew that the person seeking to be released was a surety. *Voris v. Shotts* (Ind. App.) 50 N. E. 484; *Brannon v. Irons*, 19 Ind. App. 305, 49 N. E. 469; *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862; *Holmes v. Boyd*, 90 Ind. 332; *Beach v. Zimmerman*, 100 Ind. 495, 7 N. E. 237; *Henry v. Gilliland*, 103 Ind. 177; 2 N. E. 360; *Cates v. Thayer*, 93 Ind. 156; *Hume v. Mazellin*, 84 Ind. 574.

Nor does this paragraph of answer plead an equitable estoppel. Appellant knew the note was past due, and that it was unpaid, and nothing was done by appellee which prevented appellant from enforcing the collection of the note under the statute. It does not appear from the pleading that the extension of time was made without the knowledge or consent of appellant. He could have agreed to an extension, and, so far as the pleading shows, he may have done so.

Some argument is made upon the evidence, but upon the point argued it is admitted the evidence is contradictory. In such case we cannot interfere with the jury's finding. There was some evidence to sustain the verdict of the jury, and that is sufficient. Judgment affirmed.

(21 Ind. App. 42)

FULLER v. FULLER'S ESTATE.

(Appellate Court of Indiana. Oct. 12, 1898.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—IMPLIED CONTRACTS—EVIDENCE.

1. Decedent, at an early age, after her parents had died, went to live with claimant, a half-brother, and continued to live with him until her death at 28 years of age. Claimant cultivated and lived upon a large farm, and had a large family. Decedent assisted in the work of the household, and acted and was treated as a member of the family, and had no express agreement to receive pay for her services, nor to pay for board or care received by her. Claimant's final report as guardian of decedent showed no charge for her maintenance or care. *Held*, that there was no implied contract entitling claimant to a recovery against decedent's estate for board and care.

2. A claim against a decedent's estate for the feed and care of a pony will not be sustained where claimant, who was operating a large

farm, gave the pony to decedent, his half-sister, and a member of his family, on account of her kindness to his family, without agreement as to the terms on which it was to be kept, and the pony was used in common by all the family.

Appeal from circuit court, Madison county; John F. McClure, Judge.

Claim of William H. Fuller against the estate of Ida Fuller, deceased. Judgment in favor of the estate, and claimant appeals. Affirmed.

Henry, McMahan & Van Asdal, for appellant. Walter Vermillion, W. F. Edwards, and Bagot & Bagot, for appellee.

COMSTOCK, J. Claim of appellant against the estate of Ida Fuller, deceased, for balance due appellant for board and care of decedent, for money and medicine furnished during her lifetime, and for the care and feed of a pony owned by her; amounting in all to \$791. The cause was submitted to the court, and the trial resulted in a finding and judgment for costs in favor of the estate. The appellant moved to modify the judgment, in this, to wit: "That claimant recover of and against said estate the sum of \$264 for 60 months' feed and care of pony at \$4.40 per month, and costs of suit." Appellant also moved for a new trial upon the following grounds: "(1) That there was no evidence to sustain the finding and judgment of the court; (2) that the finding and judgment of the court is not sustained by the evidence; (3) that the finding and judgment of the court is contrary to the evidence; (4) that the finding and judgment of the court is contrary to law,"—which motions were overruled, and exceptions duly taken. These rulings of the court are assigned as error.

Counsel for appellee, before discussing the alleged errors, insist that the questions raised by the assignment of errors are not properly presented by this appeal. We have, however, carefully examined the record, and, having concluded that the judgment of the trial court should be affirmed upon the merits of the cause, do not pass upon the preliminary question raised by the appellee. Appellant's claim is made up of four items, viz.: (1) Six years' board; (2) forty-nine weeks' board and care; (3) six years' care and feed of pony; (4) cash furnished decedent during her last sickness. Appellant's learned counsel do not claim that there is evidence to support the last claim. Nor do they claim that the evidence shows an express contract between appellant and decedent to pay for her support and the services for which he sues. They do, however, insist that the facts and circumstances show an implied contract upon which he is entitled to recover. The evidence shows that the services for which a recovery is sought were rendered to the decedent. Decedent was the half-sister of appellant. Her parents died, and at an early age she, with a younger sister, went to live with appellant,

with whom she continued to live until her death. She had inherited some property from her father, and appellant was appointed her guardian. His final report shows that he charged her for services as guardian for 14 years the sum of \$28. It does not show that he charged her anything for maintenance or care. Soon after he took decedent and her sister to live with him, his first wife died. She left surviving her one child, a young girl. Decedent was at that time about 12 years old. She and her sister assisted in the work of the household. Within a year or two after the death of his first wife, appellant married a second time. By his second wife he had eight children. Decedent assisted in the care of all of them, assisted in taking care of appellant's wife in two of her confinements, and assisted in the general work needful to house-keeping. Appellant's family was large. He lived upon and cultivated a farm of some 300 acres; at certain seasons of the year employed hands, increasing the size of his family, and the labor of the household. She acted and was treated and was beloved as one of the family; had no agreement to receive pay for her services, nor to pay for board or care received by her, although there were business relations between her brother and herself, she loaning him money and taking his note therefor. This was the manner of her life up to the time of her death, which occurred when she was 28 years old. The only agreement made was between appellant and his brother to the effect that he would charge nothing for the board and home he furnished the sisters after they were 14 years old. In all respects she was treated as one of appellant's family. The evidence does not show such facts and circumstances from which the law would imply that appellant expected to receive pay, and that decedent expected to pay, for the board furnished and services rendered by appellant. There is some evidence that the decedent expressed a wish that her brother should receive some compensation for his kindness to her. It was for the trial court to determine the credibility of this evidence. Bearing in mind the well-recognized rule of law that whenever a member of a family, as in case of parent or child, or when near relationship exists other than that of parent and child, the law does not, in the absence of an expressed contract, imply a promise to pay for services, but that the facts and circumstances must exist which, within themselves, clearly raise the presumption that such services were to be paid for, and applying it to facts disclosed by the evidence, we are of the opinion that the motion for a new trial was properly overruled.

As to the assignment of error based upon the overruling of the motion to modify the judgment so as to allow appellant the item for feeding the pony, we think it only necessary to say that the evidence shows that appellant, a large farmer, presented decedent with a pony, on account of her kindness to

him, his wife, and children. It was used in common by all the members of the family. It was given to decedent while she was making her home on a large farm, and which she intended to make her home. With this gift there was no agreement as to the terms upon which it was to be kept. A son of appellant testified that his father presented decedent with the pony and with its feed. The circumstances under which it was given, and the manner of its use, we think, were such as to justify the trial court in the conclusion that appellant did not expect to charge for keeping this animal any more than he would charge his own daughter or any other member of his family. The judgment is affirmed.

(31 Ind. App. 51)

SWAIM v. GRINLEY et al.

(Appellate Court of Indiana. Oct. 13, 1898.)

MORTGAGES—ASSUMPTION OF PAYMENT OF NOTES—MAKER'S LIABILITY.

In an action on a note secured by mortgage, defendant answered that subsequent to their execution an action was commenced against him for possession of the premises, and by agreement between plaintiff therein and himself, in consideration that plaintiff assume the payment of such note, judgment was entered in his favor for the land; that plaintiff herein had full knowledge of the assumption of the debt; and that, subsequent to such judgment, the premises were conveyed to others. *Held*, that such answer was insufficient to relieve defendant from responsibility, since it was not alleged that the payee had accepted the agreement of assumption.

Appeal from circuit court, Parke county; A. F. White, Judge.

Action by Louis N. Grinley against Lafayette Swaim. Defendant impleaded George W. and Alice Jessup. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wright & Seller, for appellant. Puett & McFaddin, for appellees.

HENLEY, C. J. Appellee Grinley was the plaintiff below, and began this action against appellant upon a promissory note, by a complaint in one paragraph. Appellant answered in four paragraphs, and also filed a cross complaint of two paragraphs against appellee Grinley and his co-appellees, George W. and Alice Jessup. The separate demurrer of appellee Grinley, directed to the fourth paragraph of answer and to the first and second paragraphs of cross complaint, was sustained. The separate demurrers of appellees George W. and Alice Jessup to each paragraph of cross complaint was also sustained. There was a trial by the court without the intervention of a jury, and a finding in favor of appellee Grinley, and judgment for the amount of the note in suit.

The rulings of the lower court in sustaining the various demurrers to the pleadings, as before stated, are the alleged errors properly assigned to this court by the appellant for review.

The fourth paragraph of answer, to which a

demurrer was sustained, admits the execution of the note in suit, but further avers that, to secure the payment of said note, appellant and wife executed a mortgage upon certain real estate in Parke county, Ind., which appellant at said time owned; that said mortgage was duly recorded; that Grinley was the owner and holder of the note and mortgage all the time from its execution until the bringing of this suit; that on the 11th day of February, 1887, Moses Swaim and Margaret Swaim began their action in the Parke circuit court against appellant to quiet their title to the said land so mortgaged by this appellant to said Grinley, and by the judgment of said Parke circuit court the title to said land was quieted in said Moses Swaim; and that afterwards, on the 8d day of July, 1893, said Swaim began an action against appellant for possession of the said real estate, and such proceedings were had in said action as that on the 19th day of September, 1893, there was a judgment rendered by agreement in favor of said Swaim, and that, as a part consideration for said judgment by agreement, the said Moses Swaim was to assume and pay off the note secured by said mortgage, and should take the land subject to the lien of said mortgage. It is further alleged that appellee Grinley had full knowledge of the commencement and termination of said actions, and had full knowledge of the judgment by agreement in favor of said Moses Swaim, and had full knowledge of the assumption by said Swaim of said debt as a part of the consideration for the judgment rendered in his (said Swaim's) favor. Said answer concludes as follows: "Defendant avers that by the delay of plaintiff to collect, or to try to collect, the said note, that he has been released, and is not liable on said note; wherefore," etc. There are two paragraphs of the cross complaint which present substantially the same facts as are found in the fourth paragraph of answer. In the first paragraph of the cross complaint it is alleged that appellees George W. and Alice Jessup are "interested and necessary parties to a full determination of the matters herein involved, and that they are made parties to answer as to their said interest." In addition to the allegations of the fourth paragraph of answer, the second paragraph of cross complaint, as the pleader denominates it, avers that said mortgaged premises were on the 14th day of October, 1893, conveyed to appellees George W. and Alice Jessup, "who appear to be the present owners thereof." The prayer of the paragraph is as follows: "Wherefore he (plaintiff) avers that he is not liable on said note, and that he asks judgment for costs and all other proper relief."

It is argued by counsel for appellant that on the facts appearing in the fourth paragraph of answer, and appearing fully in both paragraphs of cross complaint, with the further allegation that appellant only parted with his title on condition that the note in suit should be paid, the appellant is put in a position where he has a right to compel the

appellee Grinley to exhaust the mortgaged premises before proceeding against him personally for the debt. To sustain this position, counsel cite three cases from the supreme court of this state, which we have carefully examined. It is held in *Durham v. Craig*, 79 Ind. 117, that when a mortgagor sells the mortgaged premises, and the purchaser assumes the payment of the mortgage debt, as a part of the consideration, the land is in his (the purchaser's) hands a primary fund for the payment of the debt, and the purchaser, in equity, as between him and the vendor (mortgagor), becomes the principal debtor for the mortgage debt, and either the creditor or the mortgagor has the right to have the land applied to the payment of the mortgage debt in preference to a creditor of the vendee. In the case of *Stanton v. Kenrick*, 135 Ind. 582, 35 N. E. 19, it is held that one who in a deed assumes and agrees to pay an existing incumbrance upon the land, as a part of the purchase price, becomes by such assumption the principal debtor, and liable to be sued in the first instance by the holder of the debt, and, as between grantor and grantee, the former is surety and the latter principal. To the same effect are the cases of *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485; *Sef-ton v. Hargett*, 113 Ind. 592, 15 N. E. 513.

We are unable to see where the principles of law announced in the cases cited apply to this cause. Neither paragraph of the answer or cross complaint presents facts which would bring the cause within the operation of the rule as announced in the cited cases. Appellee could have brought his action primarily against any person who, as purchaser of the mortgaged premises, had assumed and agreed to pay the debt; but it is optional with the creditor whether he do this, or pursue the principal debtor upon his note. The creditor is not bound to accept the terms of a contract entered into between his debtor and a stranger, and to which contract he was not a party, but he may accept it. The doctrine of novation is in no way involved in such cases, the original debtor is not released, and the creditor is not a party to the transaction in any way. As between the original debtor and the purchaser of the mortgaged real estate, who has assumed and agreed to pay the mortgage debt, they, by the transactions as between themselves, fix their liability for the debt; but this does not in any way change the liability of the original debtor to the payee of the note, and the payee can, if he chooses, pursue the debtor individually, and collect his claim, without regard to any arrangement which may have been made between the maker of the note and a third person. Now, if any arrangement was entered into between appellant and the purchaser of the land, whereby, as between appellant and the purchaser of the land, appellant became surety, and the purchaser principal, for the payment of the note in suit, and if afterwards appellant was compelled to pay the debt, then,

after such payment, appellant can proceed against the purchaser personally, or foreclose the mortgage, which equity will keep alive for his benefit. Neither paragraph of the cross complaint stated a cause of action against either of the appellees, and the demurrers were properly sustained to it. For the reasons heretofore stated the fourth paragraph of answer was also clearly insufficient. Judgment affirmed.

(21 Ind. App. 28)

BOYCE v. SCHROEDER.

(Appellate Court of Indiana. Oct. 11, 1898.)

MASTER AND SERVANT—DEFECTIVE TOOLS—SUFFICIENCY OF COMPLAINT—SPECIAL VERDICT—INSTRUCTIONS.

1. A complaint by a servant for injuries caused by the use of a defective tool furnished by the master need not aver that the servant carefully examined the tool before using it; since, when a master places an implement in the hands of the servant, he impliedly undertakes that it is sound and fit for the use intended, and that he will exercise ordinary care to keep it so.

2. Where, in an action by a servant for injuries caused by the use of a defective tool furnished by the master, the facts found by the special verdict were sufficient to enable the court to adjudge defendant guilty of negligence, and plaintiff free from fault, as a matter of law, it is immaterial whether a finding that plaintiff used that degree of prudence that an ordinarily prudent man would have used under similar circumstances was authorized.

3. Injuries to the driver of a truck were caused by the breaking of a pin or key used to keep a wheel on the axle. The key had been greatly worn by constant use, and its condition could have been seen if the grease and dirt covering it had been removed, but not otherwise. The master had used the truck for nearly two years prior, and had made no inspection of it or the pin. It was no part of the driver's duty to inspect the truck. *Held*, that the master was liable.

4. The giving of instructions generally as to the law of the case where a special verdict is to be returned is improper.

Appeal from superior court, La Porte county; John E. Cass, Judge.

Action by William Schroeder against Jonathan Boyce for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Gallaher and H. B. Tuthill, for appellant. C. R. & J. B. Collins, for appellee.

HENLEY, C. J. The original complaint in this cause was filed in the La Porte circuit court on the 9th day of April, 1891, and the trial of the cause which resulted in the judgment from which this appeal is prosecuted was had at the November term, 1895, of the La Porte superior court. The amended complaint upon which the cause went to trial was in two paragraphs. The first paragraph alleged, in substance: That on the 30th day of April, 1889, the appellee was employed by appellant to work in and about appellant's lumber yard. That he was employed to operate what is commonly called a lumber

"squill," which is a two-wheeled truck, pulled by a team of horses, and used to transport lumber from place to place; that about the said 30th day of April, 1889, while appellee was at work in the proper discharge of his duties, driving a team of horses, which was hitched to and hauling the said truck loaded with lumber, and while appellee was so driving as aforesaid, "the truck broke; that is to say, that the pin or key which holds and keeps the wheel on the axle was old and worn out and became broken, thereby permitting the wheel and axle to become separated, and thereby causing the aforesaid truck and the lumber piled thereon to fall, and causing the lumber which was piled on said truck as aforesaid to fall on the plaintiff, whereby one of his legs was broken and otherwise greatly injured." That appellee had no authority, and it was not his duty, to examine or repair said truck, but that his duty was to hitch his horses to the loaded truck, and to drive said horses with said load to the place where said lumber was to be stacked or loaded onto cars. That the breaking of said pin or key was caused by the defective and unsafe condition of said truck, which was unsafe for use, and worn out, which condition was known to appellant, who negligently and carelessly used said truck in his business, but that the condition of said truck was unknown to the appellee. The general allegations as to the negligence of appellant and appellee's freedom from fault are found in the complaint, which concludes with a demand for judgment in the sum of \$1,999. The second paragraph of complaint differs from the first in but one respect. It counts on the appellant's implied knowledge of the defect which caused the injury by reason of the length of time the truck had been out of order. Appellant demurred to each paragraph of complaint, which was overruled, and the cause was put at issue by a general denial. There was a trial by jury, and a special verdict returned, which is in the form of interrogatories and answers, as is provided by the act of the general assembly of 1895, in relation to special verdicts. Both parties to the action moved for judgment upon the special verdict. The motion of appellee was sustained, and that of appellant overruled. Appellant moved for a new trial, which was denied. The errors assigned in this court are: (1) That the court erred in overruling the demurrer of appellant to the first paragraph of complaint; (2) that the court erred in overruling the demurrer of appellant to the second paragraph of complaint; (3) that the court erred in sustaining appellee's motion for judgment on the special verdict; (4) that the court erred in overruling appellant's motion for judgment on the special verdict; (5) that the court erred in overruling appellant's motion for a new trial.

Counsel attack both paragraphs of complaint, and argue the question from the

standpoint that appellee's injury must have occurred from the risks and dangers naturally incident to his employment; that the complaint does not show that appellee was without knowledge of the danger of the business in which he was engaged, etc. The complaint clearly proceeds upon the theory that appellant's liability arises from the fact that he placed worn-out and defective tools in the hands of appellee, his servant, and that such defects were known to the master, and unknown to the servant. It was not necessary that the complaint aver that appellee carefully examined the truck before proceeding to use it, because, when the master places an implement in the hands of the servant, he, the master, impliedly undertakes that it is sound and fit for the use for which it is intended, and that he will exercise ordinary care and prudence to keep it in such condition. We think both paragraphs of complaint stated a cause of action, and that the court did not err in overruling the demurrer thereto.

In this case the jury was required to answer 253 interrogatories. It was found by the jury that appellant, in the year 1889, operated and maintained a lumber yard in the city of Michigan City, Ind., and employed in such work between 50 and 100 men, and used in such work between 80 and 52 wheel trucks or "squills"; that appellee was employed to work in said appellant's lumber yard, and that his duties were to drive the horses which hauled the trucks which were used in moving lumber from place to place; that the lumber was placed on said trucks by other employes, called "pillers"; that appellee was on the 30th day of April, 1889, engaged as aforesaid, in driving a team of horses attached to a loaded truck, when the truck broke down; that the truck was loaded with about 1,000 feet of lumber, which was the ordinary load for a truck; that appellee was driving on the road ordinarily used to drive upon in hauling lumber from the place where the truck was loaded to the place where he was directed to take it; that the roadway was plank, and it was necessary, in driving a horse attached to a loaded truck, that the driver should walk closely alongside the truck, and to hold the lines in one hand, and place the other hand on the lumber on the truck, to aid in guiding the truck; that appellee was driving in the manner last described when the accident occurred; that no particular truck was used by appellee, but it was the practice of the man whose duty it was to load the trucks to take any truck that might be handy to load upon, and the men whose duty it was to hitch to and drive the horses attached to the loaded trucks took them as they were loaded; that the truck which broke down and caused appellee's injury was hitched to in the usual course of the business, and was driven by appellee along said roadway in a slow and careful manner, and, while so driving said

truck, it broke down, and the lumber fell upon appellee, and caused the injury for which he maintains this action for damages. It was further found by the jury that appellee was in full possession of his mental faculties, had good eyesight and hearing, and that the accident occurred in the daytime; that the accident was caused by the breaking of the pin which was used to keep the wheel on the axle; that the key had become greatly worn by constant use, and by being rubbed by the hub of the wheel; that the said pin was covered with oil, grease, and dirt, and the condition of said pin could have been seen if the oil, grease, and dirt had been removed; that the appellant had used said truck in his lumber yard for nearly two years prior to the time appellee was injured, and at no time had either the appellant himself or any one in his behalf made any inspection of said truck or pin; that the oil, grease, and dirt covered the pin and the outer portions of the hub of said truck to such an extent that appellee could not see that said pin was nearly worn off; that appellee had no knowledge of the worn and unsafe condition of said pin, and that the accident was wholly the result of the defective, worn, and unsafe condition of said pin; that appellee "looked over" the truck after he had hitched the horse to it, and before he started with the load; that the truck was furnished appellee by appellant for appellee's use in hauling lumber; that appellant owned said truck, and that he made no effort to keep said truck in repair; that the pin which held the wheel in place was made of material which with constant use would wear away; that said truck was in constant use; that it was no part of appellee's duty to inspect or look over the truck, or any part thereof; and that he was entirely ignorant of the worn and defective condition of the pin which held the truck wheel in place, and at the time of the accident was acting in obedience to the direction of appellant, and in the line of his (appellee's) duty. The jury also found fully the extent and character of appellee's injury, and they further found that appellee at all times, and under all the facts and circumstances, as found by the verdict, used that degree of prudence and caution that an ordinarily prudent man would have used under similar circumstances.

Whether or not the latter finding would be authorized in this case is immaterial, as the facts found are full and clear, and were sufficient upon which the court could, as a matter of law, adjudge appellant guilty of negligence, and appellee free from fault. The facts found, we think, bring the case squarely within the law as stated in the recent case of *Railway Co. v. Amos* (Ind. App.) 49 N. E. 854, where it was said: "It is the duty of a master, who employs a servant to work with tools furnished by the former, to exercise ordinary care and diligence in providing such tools; to furnish tools which will be safe

for the servant in the use thereof about the master's business, pursuant to the contract of employment. It is also the master's duty towards the servant to exercise a reasonable supervision over such tools, and to exercise ordinary care to keep them in safe condition for the use of the servant. He cannot divest himself of the responsibility by delegating the performance of such duties to agents or other servants. The master is required to take notice, not only of the deterioration of tools and appliances by continued use, but also of such deterioration, by natural or ordinary decay, as may be discovered by reasonable inspection, in any material which may be provided by him as tools or parts thereof. The servant has a right to rely upon the master's observance of these requirements and performance of these duties. The servant impliedly assumes the risks ordinarily and naturally incident to the particular service in which he voluntarily engages as a servant, and he is bound to exercise ordinary care for his own safety in the use of the implements so provided. If he is injured because of his own want of such care, he cannot recover of the master because of contributory fault; and if he is injured through want of due care on his part, yet without any failure of the master to perform such duties on his part, the injury is to be regarded as one the risk of which was assumed by the servant. But the duty of inspection does not lie equally upon the master and servant, for the servant has the right to assume that the master has so performed his duty that the servant may rely upon the safety of such implements provided by the master, unless their defectiveness is open to the observation of ordinarily prudent men, in which case the servant cannot so rely upon their safety; and, if he voluntarily continues to use them in such condition, he assumes the additional risk. The implied undertaking of the master is not that the implement is absolutely free from danger in its use, but that, according to its kind, it is sound and fit for the use to which it is to be put so far as ordinary care and prudence can discover, and that he will exercise ordinary care and prudence to keep it in such condition. These legal propositions are so elementary, and are so often stated, in substance, in the reported decisions of our state, that this repetition of them may seem unnecessary." Applying the law as stated to the facts as found by the special verdict in this cause could lead to but one conclusion. The lower court did not err in sustaining appellee's motion for judgment upon the special verdict, and did not err in overruling the motion of the appellant for judgment in his favor.

It is also argued by counsel for appellant that the lower court erred in giving certain instructions, and in refusing to give certain other instructions. Waiving the claim of appellee's counsel that the instructions are not properly in the record, it has been repeatedly

held that the giving of instructions generally as to the law of the case is improper in cases where the jury has been ordered to return a special verdict, and the action of the court in giving or refusing to give such instructions is not reversible error. *Woolen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Town of Kentland v. Hagen* (Ind. App.) 46 N. E. 43; *Board v. Bonebrake*, 146 Ind. 311, 45 N. E. 470. There is evidence in the record which supports every material allegation of the complaint. We find no error. Judgment affirmed.

(21 Ind. App. 36)

FEIGHNER et al. v. DELANEY.

(Appellate Court of Indiana. Oct. 12, 1898.)

**MALICIOUS PROSECUTION—PLEADING—SUFFICIENCY
—RECORD—EVIDENCE.**

1. Where a complaint for malicious prosecution alleges that defendant corporation, by its president, naming him, and its officers and agents, at the instigation and procurement of the company, falsely and maliciously and without probable cause procured plaintiff to be indicted, etc., it sufficiently charges that the act was done by the corporation.

2. *Horne's Rev. St. 1897, § 1673* (*Burns' Rev. St. 1894, § 1742*), provides that no indictment shall be non pros'd except by order of court on motion of the prosecuting attorney, and that such motion must be in writing, and the reasons therefor must be stated. *Held*, that where the venue of a prosecution was changed, and the indictment was non pros'd on motion of the prosecuting attorney, based on a letter from the prosecuting attorney of the county where the prosecution was begun, which letter was mentioned in and attached to the motion, the letter was not admissible as part of the record of the prosecution in an action brought by the accused for malicious prosecution.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by John Delaney against William Feighner and another. Judgment for plaintiff, and defendants appeal. Reversed.

John A. Kersey and R. B. Beauchamp, for appellants. Waugh, Kemp & Waugh and Roscoe Kimple, for appellee.

BLACK, J. The appellee sued the appellants, the Peerless Stamping & Glass Company and William Feighner, to recover for malicious prosecution. The court overruled a motion to require the appellee to make the complaint more specific, and also overruled a demurrer to the complaint for want of sufficient facts. In the meager reference to these rulings in one of the briefs for the appellants, the criticisms of the pleading seem to be directed to the allegation of the complaint that "the defendant William Feighner and the said Peerless Stamping and Glass Company, by its president, William Feighner, and its officers and agents, at the instigation and procurement of said company, falsely and maliciously, and without probable cause, procured the plaintiff to be indicted," etc. This, we think, was not mere-

ly an allegation that the act complained of was done by officers and agents, but was a sufficient charge of the doing of the act by the corporation; and it was not necessary to state further than was done the names of the officers and agents, or their relation to the corporation, or to set forth particularly the manner in which the defendants procured the prosecution, or to further show that the corporation authorized or ratified the action of its officers and agents. It is sufficient, in pleading, to state the issuable facts, without setting forth the evidence by which they are to be proved. *Railway Co. v. Savage*, 110 Ind. 156, 9 N. E. 85; *Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646. Each of the appellants answered by general denial. There was a special verdict, and the court overruled separate motions of the appellants for a new trial. On the trial the appellee offered in evidence a transcript of the record in the criminal prosecution against him, certified by the clerk of the Miami circuit court, to which the venue had been changed from the Grant circuit court, where the prosecution was commenced. This transcript contained an entry of record in the Miami circuit court, showing that Joseph N. Tillett, prosecuting attorney, moved the court to nolle prosequi the cause; that the court sustained this motion; and that it was ordered "that said cause be, and is hereby, nolle pros'd, and said defendant is now discharged without day." In connection with this entry in the transcript was set out a copy of the motion of the prosecuting attorney. This motion, omitting its caption and the signature thereto of said prosecuting attorney, was as follows: "Comes now Joseph N. Tillett, prosecuting attorney for the county of Miami, in the state of Indiana, and moves the court to enter a nolle prosequi in the above-entitled cause, and shows the court that the said cause is in this court upon a change of venue from Grant county; that your petitioner knows nothing of the facts of the case, but that the prosecuting attorney of Grant county, Orlo L. Cline, desires the dismissal of the case, because, in his opinion, the state has not sufficient evidence to convict the defendant. The letter of said Orlo L. Cline is attached hereto." Following this motion in the transcript so offered in evidence is a copy of a letter, dated at Marion, Ind., and addressed to J. N. Tillett, prosecuting attorney, Peru, Ind., and proceeding as follows: "Dear Sir: Your letter informing me of the setting of case of State of Indiana vs. Delaney, on charge of arson, was received in due course of mail. I have come to the conclusion, after consulting with the parties that know about the facts, that there is not sufficient evidence to secure a conviction, and suggest for that reason the case be dismissed, whenever you see fit to do so. I never did think the case a very good one. All the evidence we have is circumstantial. No one of our witnesses can identify the de-

fendant, and not even give their best judgment as to the person being the defendant, although two of our witnesses saw the party who attempted to burn the building, and they are both acquainted with the defendant. I don't think it is proper to take the time of the court to try the case, when we have no stronger evidence than we have. Yours, truly, Orlo L. Cline." The appellants objected to the introduction and reading to the jury of that portion of this transcript which consisted of a copy of the letter purporting to have been written by the prosecuting attorney of the Grant circuit court to the prosecuting attorney of the Miami circuit court; but the court overruled the objection, and permitted the entire transcript to be read in evidence. It cannot be doubted that such a letter in evidence would be influential with the jury. It is manifest that, if the letter alone were offered in evidence on the trial of the case at bar, it would be inadmissible. It seems to have been admitted because it was regarded as a part of the record of the criminal prosecution, whose termination it was proper to prove by the record of the Miami circuit court. The statute (section 1673, Horner's Rev. St. 1897; section 1742, Burns' Rev. St. 1894) provides: "No indictment shall be non prossed or information dismissed except by order of the court on motion of the prosecuting attorney; and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court before such order is made." We are not required to determine whether or not the written motion of the prosecuting attorney on which alone an indictment may be non pros'd is necessarily a part of the record without a bill of exceptions. The motion set forth in the transcript offered in evidence is not one immediately relating to and founded upon matters of record in the cause in which the motion was made, but is one founded on reasons therein stated, which are not matters of record in that cause. Perhaps, therefore, it should not be regarded as a direct motion constituting a part of the record. See Elliott, App. Proc. § 191. But, even if the motion itself be properly regarded as a direct motion, and as constituting a part of the record, the letter submitted with the motion in support of its statement of reasons why the indictment should be non pros'd did not constitute a part of the record. The proper purpose of the appellee in the case at bar, so far as the record of the Miami circuit court was concerned, was to prove the existence of the criminal prosecution as alleged, and its ending with the discharge of the appellee, before the commencement of the action for damages. This proof could have been made without the reading of the letter in evidence, and the letter could not add anything proper to the same effect. The judgment is reversed, and the cause is remanded for a new trial.

(21 Ind. App. 46)

DUTTON v. ENSLEY.

(Appellate Court of Indiana. Oct. 13, 1898.)

ESTOPPEL—FIXTURES—INTENTION—MISTAKE.

1. The owner of land mortgaged it, and with the money thereby obtained erected a house, erroneously supposing it to be on her land. Afterwards, having learned that the house was on the land of an adjoining owner, she sold her land, representing that the house was on, and a part of, the realty conveyed. Thereafter the mortgage was foreclosed, and the foreclosure purchaser removed the house onto the land purchased, for which act the original owner sued him as for a conversion. *Held*, that plaintiff was estopped from asserting title to the house on account of her representations to her grantee.

2. Where a house is erected on the land of an adjoining owner as a permanent fixture to be used for a residence, it becomes a fixture to the property of the adjoining owner, notwithstanding the house is merely set on blocks.

Appeal from circuit court, Pulaski county; G. W. Beeman, Judge.

Action by Sarah E. Ensley against Lewis Dutton. From a judgment for plaintiff, defendant appeals. Reversed.

Steis & Hathaway, for appellant. John C. Nye, for appellee.

WILEY, J. Appellee was plaintiff below, and sued appellant for the alleged wrongful conversion of a certain frame dwelling house. The issue was joined by a general denial, trial by the court, special finding of facts made, conclusions of law thereon, and judgment for appellee. The court found that appellee, on the 9th day of October, 1889, was the owner of the W. ½ of the S. E. ¼ of section 7, township 30, range 2 W., in Pulaski county, Ind.; that on said day she executed a mortgage on said land, her husband joining her, to the state of Indiana, to secure a school fund loan for \$—; that with a part of the money so borrowed, appellee, in 1887, built the house in controversy, but by mistake built it on land of one Morrison, which was adjoining her land above described; that on September 23, 1889, appellee conveyed said land by warranty deed, her husband joining, to George T. Bouslog; that on the same day said Bouslog conveyed said land to appellee's husband; that on May 16, 1891, William Ensley, the appellee joining with him as his wife, conveyed by warranty deed said land to Edwin J. Short; that when said land was sold to said Short, the agent of the Ensleys showed said house as a part of the improvements on said land, but nothing was said as to what land said house was upon; that on July 17, 1891, said Short and wife conveyed said real estate to one Butterfield; that said building was set on blocks about 18 inches high, but was not made fast to said blocks; that when appellee erected said building she supposed she was putting it on her own land, as above described, and did not learn to the contrary until after she moved into it; that she did not know for about 15 months that said

building was on the Morrison land; that about 5 months after she learned that said house was situated on Morrison's land she and her husband moved away, but employed persons to look after it for her; that, the interest on said loan being in default, said land was sold by the auditor in March, 1893, and bid in by one Benson for \$335.90, the amount then due; that said auditor conveyed said land by deed to said Benson; that before the commencement of this action said Benson conveyed said land by quitclaim to appellant; that in the fall of 1893, appellant, without appellee's permission, removed said house, and converted it to his own use; that it was of the value of \$50; that in May, 1891, said William Ensley and appellee, his wife, placed said real estate in the hands of one Hey, as agent, for sale; that they described the improvements thereon, including the house in controversy, and that when said real estate was sold to said Short said house was taken into account as a part of the improvements thereon; that prior to the commencement of this action appellee did not make any demand on appellant for the return of said house, or payment for the same; and that when said house was built it was placed where it was by mistake. As a conclusion of law the court stated that appellee was entitled to recover of appellant \$50, and rendered judgment accordingly. Appellant's motion for a new trial was overruled.

The errors assigned are: (1) Overruling the motion for a new trial, and (2) that the court erred in its conclusion of law. For a correct disposition of the controlling question in the case, we need only consider the assignment of error calling in question the conclusion of law as stated by the court. From the finding of facts it is clear that appellee and her husband knew, before they placed the land in the hands of their agent for sale, that the house in controversy was not on the land owned by them, or either of them, but was on the land of Morrison. Notwithstanding this fact, they represented to their agent that the house was on this land; was a part of the improvements thereon; that it was so represented to Short, the purchaser, and taken into account in the sale to him. It thus appears that, while the house was not on the land owned by appellee, and afterwards by her husband, they parted with the title, and upon their representations the house was taken into account as a part of the improvements of the real estate, and considered in arriving at the value thereof; and that they received the benefit of it. This was such a fraud on the purchaser that appellee cannot now be heard to complain. By her representations, or being a party to the representations made by her husband, whatever title she had to the house, if any, she parted with,

and she is now estopped from asserting title.

But there is another reason why appellee is not entitled to recover under the facts found, and that is, it is not shown that she was the owner of the dwelling house in question, or that she was entitled to the possession thereof. The findings show beyond all question that appellee erected the house on the real estate of Morrison, and that she intended that it should be a permanent fixture, and that it was to be used for a residence. The manner in which the house was placed on and attached to blocks can have no bearing in determining the question as to whether it must be regarded as personal or real property. The modern authorities no longer adhere to the doctrine that physical annexation is the proper criterion by which to determine whether a fixture is real or personal property. *Railroad Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, and 22 Pac. 995, 16 Am. St. Rep. 471; *Meig's Appeal*, 62 Pa. St. 28. In the case of *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, the court said: "The united application of these requisites is regarded as the true criterion on an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intent of the party making the annexation to make the article a permanent accession to the freehold." This court, in *Improvement Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848, by Robinson, J., quoted approvingly the rule laid down in *Binkley v. Forkner*, supra, and cited many authorities in support of it. We still adhere to that doctrine. Nor can the fact that appellee built the house on Morrison's land by mistake, measured by the subsequent facts in the case, and the acts of appellee, change, modify, or abrogate the rule. In *Seymour v. Watson*, 5 Blackf. 553, it was held that, where a fence was built by mistake on adjoining lands, where the party building the fence supposed he was building on his own land for the purpose of inclosing it, the fence so built became realty, and passed with the land. In that case it was said: "It is a general principle that all permanent buildings follow the tenure of the soil on which they are erected." See, also, *Hamilton v. Huntley*, 78 Ind. 521. The house in question became a fixture to the freehold of Morrison. Under the findings there is no fact found which would change its character, and it clearly appears that appellee has not shown that she was either the owner or entitled to the possession, and hence she has shown no right to recover. The judgment is reversed, with instructions to the court below to restate its conclusion of law, and render judgment for appellant.

(173 Ill. 508)

ST. LOUIS & C. R. CO. et al. v. POSTAL
TEL. CO. OF ILLINOIS.

(Supreme Court of Illinois. June 18, 1898.)

EMINENT DOMAIN — SUMMONS — PARTIES — PLEAD-
INGS — JURISDICTION — DAMAGES — EVI-
DENCE — JUDGMENT.

1. Under Eminent Domain Act, § 2, providing that the party seeking the condemnation shall apply to the judge of the circuit or county court, either in vacation or term time; and section 3, providing, if the petition is presented to a judge in vacation, the judge shall note thereon the day of presentation, and when he will hear the same, and shall order the issue of summons,—the proceeding, though in vacation, is one in court, so that the summons is properly returnable to the court instead of the judge.

2. Failure to make a mortgagee defendant in condemnation proceedings does not entitle the mortgagor or lessee to have the proceedings dismissed.

3. Petition to condemn right of way for a telegraph line along a railroad right of way need not locate each pole, or state how many wires are to be put on the cross-arms.

4. Petition in condemnation proceedings need not show in the exact words of the statute that compensation cannot be agreed on by the parties, but any words affirmatively showing this will suffice.

5. Petition to condemn right of way for telegraph line on a railroad right of way may show by its description of the location of the telegraph line that such line will not incommode the public use of the railroad.

6. Rev. St. c. 134, § 2, authorizing a telegraph company to construct lines "along and upon a railroad," and section 3, giving such company power to exercise the right of eminent domain, authorize condemnation of right of way lengthwise on the right of way of a railroad company.

7. Petitioner for condemnation of right of way for telegraph line need not file a plat of the location of the proposed line, where it would not give a more intelligible statement of the manner of the proposed construction than is set out in the petition.

8. A real effort to agree on compensation for right to construct a telegraph line on a railroad right of way, so as to authorize condemnation proceedings for such right, is shown by evidence that the railroad company refused to make any agreement allowing such construction, on the ground of a prior agreement giving exclusive rights to another telegraph company.

9. Where petition to condemn right of way for telegraph line along a railroad right of way describes the whole railroad right of way, a cross petition is not necessary for recovery of damages to the part not sought to be taken.

10. Condemnation may be had in one county of right of way for telegraph line along a railroad right of way extending through several counties; Rev. St. c. 134, § 3, authorizing it to be taken in the manner provided for the exercise of the right of eminent domain; Eminent Domain Act, § 2, providing that one authorized to condemn property may apply to the judge of the county court where any part of the property is situated; and Prac. Act, § 2, authorizing an action against a railroad company to be brought in any county through which its road runs.

11. Though the eminent domain act contains no provision for recording a condemnation judgment in any other county than that in which it is rendered, it may be recorded in other counties in which are parts of the land condemned.

12. Eminent Domain Act, § 9, providing that the jury shall, at the request of either party, go on the land sought to be taken or damaged, and examine it, does not require them to go

along the entire line of a railroad, along which right of way for telegraph line is being condemned; it not being shown that the right of way differs in other places from the part on which the jury goes.

13. So far as concerns the question of compensation and damages in proceedings to condemn right of way for telegraph line along a railroad, the land taken is only the portion occupied by the poles, though other parts may be damaged by erection of the poles and stringing the wires.

14. Stipulation, in petition to condemn right of way for telegraph line along railroad right of way, that if ever the railroad company desires to change location of its tracks, or construct new ones, petitioner will remove the poles to such other points on the right of way as said company shall designate, is binding on petitioner, and so affects the question of damages.

15. On the question of compensation for condemnation of a right of way for a telegraph line along a railroad right of way, it cannot be shown what rent was stipulated in a lease by the railroad company to another telegraph company giving it exclusive use of the railroad right of way; such lease being void as creating a monopoly.

16. Even if the amount paid by a telegraph company to a railroad company for use of its right of way is competent on the question of compensation in proceedings by another telegraph company to condemn right of way for its line, evidence that the rent was the privilege given the railroad to use the telegraph line for its own business is too indefinite.

17. Defendant cannot complain that, while a petition asked for condemnation of right of way for the entire distance between two places, the verdict and judgment did not give him right of way for the full distance.

18. Judgment in proceedings to condemn right of way for telegraph line along a railroad right of way is not void for uncertainty because, like the petition, locating the line in the alternative, as, "at a distance of not less than 25 feet from the outer edge of said railroad track upon the east side of said track, or at such points as may be agreed upon" by the parties.

Carter, C. J., and Cartwright, J., dissenting.

Appeal from Jackson county court.

Condemnation proceedings by the Postal Telegraph Company of Illinois against the St. Louis & Cairo Railroad Company and another. Judgment for petitioner. Defendants appeal. Affirmed.

This is a petition, filed on June 4, 1897, in the county court of Jackson county, by the appellee, a telegraph company, organized under the laws of Illinois on April 20, 1887, for the purpose of condemning a right of way for its telegraph line upon and along the right of way of the St. Louis & Cairo Railroad Company, from Cairo, in Alexander county, to East St. Louis, in St. Clair county, a distance of about 152 miles. The petition alleges that the St. Louis & Cairo Railroad Company was a corporation under the laws of Illinois, and owned all the right of way of the railroad extending from East St. Louis to Cairo; that on February 1, 1836, said railroad company leased to the Mobile & Ohio Railroad Company said right of way for a term of 45 years; that said Mobile & Ohio Railroad Company was in possession and control of said right of way and railroad; that said right of way is 100 feet wide, and extends the entire length of said railroad

from East St. Louis to its terminal, in Cairo; that said railway from East St. Louis to Cairo is a single line, constructed at the center of the right of way; that the track is about 4 feet and $8\frac{1}{2}$ inches gauge, with switches, turnouts, etc., such as are necessary to operate a single-track railway; that the right of way extends about 50 feet wide from a line along the center between the rails of the main track. The other allegations of the petition, so far as it is necessary to refer to them, are set forth in the opinion.

The defendants entered a special appearance, and, on the day set for the trial, moved to quash the summons, and also made a number of motions to dismiss the petition upon several grounds, which are referred to in the opinion. The appellant the St. Louis & Cairo Railroad Company also filed a demurrer, specifying various causes of demurrer, most of which were the same in substance as the grounds alleged in support of the motions to dismiss the petition. The motion to require the petitioner to furnish a more particular description of the proposed location of the line of telegraph over the right of way of the defendants was sustained. The demurrer was also sustained so far as it alleged that the petition did not contain a sufficient description of the property sought to be condemned, or of the proposed telegraph line to be erected. All the other motions to dismiss were overruled, and the demurrer to the petition was also overruled, except as to the ground of demurrer already stated. The petitioner then amended its petition, so as to describe more particularly the property sought to be condemned, and the proposed location of the telegraph line to be built. The defendants then traversed each and every of the allegations of the petition, as amended, and called for proofs. The petitioner then introduced its certificate of incorporation, and certain testimony to show that it could not agree with the appellants as to the compensation to be paid. It also offered a copy of the resolution of its board of directors, authorizing the location and construction of the telegraph line upon said right of way. The court found the issues for the petitioner, and adjudged that it was entitled to maintain the proceeding, and ordered the cause to proceed to trial before a jury upon the issue of compensation and damages. A trial was had, and an award was found by the jury; but, both the petitioner and the defendants having moved for a new trial, the same was granted. On July 6th the defendants again appeared, and made motions to quash the summons and dismiss the amended petitions, which motions were overruled. Defendants then refiled their original demurrer upon the same grounds as those already stated, which was also overruled. Defendants then traversed all the allegations of the amended petition; but the court ruled that its finding at the former trial upon said issues, which was in favor

of the petitioner, should still stand as the judgment of the court. The defendants then moved for leave to file a cross petition, which was denied. The jury was called, and evidence was submitted upon the question of compensation and damages. At the close of the evidence, defendants moved the court to direct the jury to go upon the land sought to be condemned in the counties of St. Clair, Monroe, Randolph, Perry, Jackson, Union, and Alexander, to view the premises. This motion was overruled.

The jury returned a verdict as follows: "We, the undersigned jurors, beg to report that after hearing the evidence in the above-styled cause, and having gone upon the lands and right of way sought to be taken and damaged, and determined upon the compensation and damages that it would be just for the petitioner to pay the defendants, we find and have ascertained that the just compensation to be made to the St. Louis and Cairo Railroad Company for taking and damaging their lands and right of way described in the petition for a right of way to construct and maintain a telegraph line and erect telegraph poles at a distance of about one hundred and seventy-five feet from each other, over the right of way of defendant the St. Louis and Cairo Railroad Company, at a distance of not less than twenty-five feet from the outer edge of said railroad track, upon the east side thereof, or at such point as may be agreed upon by the petitioner and the railroad company operating said road, beginning at the corporation line of said railroad of the city of East St. Louis, Illinois, and extending southerly through the counties of St. Clair, Monroe, Randolph, Perry, Jackson, Union, and Alexander, to the corporation line of the city of Cairo in the state of Illinois, to be the sum of \$99. And we find the just compensation and damages to be paid to the Mobile and Ohio Railroad Company for such taking of said premises to be the sum of one dollar." After the verdict, and before the jury was discharged, the defendants moved the court to go upon all the lands described in the petition in said several counties, and view the same; and, in support of said motion, submitted an affidavit of the sheriff, showing that the jury had gone to view the land in question upon said right of way within the limits of the city of Murphysboro, and for a distance of two miles south thereof and one mile north thereof, making a total distance of about three miles. This motion was overruled, and judgment was entered on the verdict. The present appeal is prosecuted from the judgment so entered by the county court.

Ritchie, Esher & Woolley and John M. Herbert, for appellants. Loesch Bros. & Howell, Frank J. Loesch, and J. R. McIntosh, for appellee.

MAGRUDER, J. (after stating the facts).

1. The defendants, limiting their appearance

for the purpose, moved to quash the summons, upon the ground that this proceeding was begun in vacation, and summons was returnable to the court, and not to the judge. This motion was properly overruled. The contention of the appellants is that the county court obtained no jurisdiction of them by the service of summons, because the summons was returnable to the court, instead of being returnable to the judge of the court. Section 3 of the eminent domain act provides that, if the petition is presented to a judge in vacation, the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issue of summons, etc. This cause was set to be heard on June 23, 1897, which was in vacation. Section 2 of the eminent domain act also provides that the party seeking condemnation shall apply to the judge of the circuit or county court, either in vacation or term time. While it is true that the act makes use in several of its sections of the expression "judge or court," yet it was not the intention of the act to provide two tribunals for the hearing of condemnation cases,—one, the judge, as an individual; and the other, the court, as a judicial tribunal. The judge cannot exercise judicial power, except when sitting as a court, and not as an individual. Whether the proceeding be in vacation or term time, it is a proceeding in court. Therefore the summons was properly made returnable to the county court, instead of the judge. Such was the view of this court in reference to the contention here made upon this point when it was urged in *Bowman v. Railroad Co.*, 102 Ill. 459.

2. It is claimed that the petition should have been dismissed, upon a motion made for that purpose, for want of necessary parties thereto. In support of this motion, the appellants submitted an affidavit showing that the railroad right of way was subject to a mortgage or deed of trust executed by the St. Louis & Cairo Railroad Company to certain trustees, to secure a certain amount of indebtedness, and also showing that said trustees were dead, and that certain successors in trust had been appointed in their places. The motion to dismiss was based upon the fact that these mortgagees or trustees were not made parties defendant to the petition to condemn. As the mortgagees were interested parties, they should have been made defendants. But the failure to make them defendants cannot be taken advantage of by the appellants, one of whom is the mortgagor, and the other the lessee of the mortgagor. "An omission of any proper party will not invalidate the proceedings as against such persons as are made parties. The only consequence is that, as against the omitted party, the condemnation is nugatory." 7 Enc. Pl. & Prac. p. 504. The mortgagees, not being made parties, would be left unaffected as to their interests by the judgment

of condemnation. The condemnation is nugatory as to them, but not invalid as to the appellants. A party will not be permitted in a court of review to take advantage of an error that does not injuriously affect himself or his interests. *Bowman v. Railroad Co.*, supra; *Brown v. Miner*, 128 Ill. 148, 21 N. E. 223; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616; *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866. There was no error, therefore, in overruling the motion to dismiss for want of parties.

3. Motion was made to dismiss the petition, and the point was raised in the traverse of the appellee's amended petition that the amended petition does not contain a sufficient description of the property sought to be appropriated, nor of the proposed line or route of telegraph. It is claimed by the appellants that the petition does not set forth precisely what it demands, and just what portion of defendant's property it proposes to take or damage. The petition is not justly subject to the charge thus made against it. It is sufficient to describe the land condemned with reasonable certainty. *Railway Co. v. Turner*, 68 Ill. 187; *Chicago & A. R. Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485. An examination of the allegations of the petition will show that the property sought to be condemned is described with reasonable certainty. Where a telegraph company seeks to condemn a part of the right of way of a railroad company, the position and size of the telegraph poles should be stated. *Broome v. Telephone Co.*, 49 N. J. Law, 624, 9 Atl. 312. Data should be given by which the location of the telegraph poles may be determined, and the intended heights of the poles, as well as the number and size of the cross-arms they are to bear, should be indicated. *Telephone Co. v. Broome*, 50 N. J. Law, 432, 14 Atl. 122.

Here, the petition describes the right of way, upon which the petitioner seeks to locate its line, as the railway of the defendants, running from East St. Louis to Cairo, in the manner set forth in the statement preceding this opinion. The petition then states that the petitioner desires to construct a line of telegraph over and above said right of way for its entire length from its commencement, in East St. Louis, to its terminal, in Cairo; that a portion of said right of way lies in Jackson county; that the petitioner would locate a line of telegraph upon said right of way, and does not seek to acquire the fee to any lands, or the right to use the same for any purpose, but to locate a telegraph line thereon, and to repair and maintain the same, and use the same for telegraph purposes; that it desires only one line of poles; that it will be constructed of the best material and upon the most improved plan; that the poles will be not less than 25 feet long, and 1 foot in diameter at the base, and be set in the ground at a depth of not less than 5 feet; that upon the poles will be at-

tached suitable arms, six feet in length, fastened near the top of the poles, and insulators, on which will be strung, at or near the upper end, wires of suitable material, and sufficient in number to enable the petitioner to promptly transmit telegraph messages; that the poles will be set about 175 feet from each other, and will be erected upon the right of way at a distance of not less than 25 feet from the outer edge of the railroad track, and upon the east side of said track, or at such point as may be agreed upon by the telegraph company and the railroad company operating the same; that in places where the line crosses the track, or where it is necessary to do so, to prevent interference with any work or use of said railroad, the poles will be so high above the ground as to permit the wires to be suspended so far above any structure of defendants as to prevent any interference therewith; and that the said poles will be so erected on said telegraph line, and so constructed and maintained, as not to obstruct or interfere with the business or use of said railroad, or hinder the usual travel and traffic thereon, or in any manner obstruct the use of, or come in contact with, any other line of telegraph upon said right of way; that there is no improvement or superstructure on said line, where it is necessary to construct and maintain said telegraph line, except the trestlework and bridges, and except the filling and embankments; that such filling and embankments consist of a mere transformation of the earth into shape and condition to fit it into a railroad bed, but that the same is not at a point where petitioner intends to set poles and suspend wires.

The petition thus sets forth every detail necessary to identify and describe the location of the proposed telegraph line. It designates the railroad track as a fixed monument, and gives the height of the poles, the diameter of the poles, the distance of the poles from the track, the distance of the poles from each other, and the length of the cross-arms. This covers every reasonable intentment of the statute. It is true that the petition does not state how many wires are to be placed upon the cross-arms, except that their number will be sufficient to enable the petitioner to promptly transmit telegraph messages. It is, however, no more required that the petitioner should state the number of wires to be hung on the cross-arms, than it is for a railroad company, in condemning land for a right of way, to designate how many railroad tracks it will put upon the strip 100 feet wide which it seeks to condemn for its railroad. It is assumed that it will not put down any more tracks than the condition of its business will warrant. So, here, it may be assumed that the telegraph company will not string any more wires than its business will demand. It seems to be conceded that the construction of the petitioner's telegraph lines will re-

quire the erection, through the whole line of the railroad right of way, of about 4,500 telegraph poles. To locate each pole by an individual description, so as to designate by metes and bounds the exact spot of earth occupied by each, would require the insertion in the petition of 4,500 separate descriptions. The very statement of such a proposition shows its unreasonableness.

4. It is furthermore contended by the appellants that the petition does not show an endeavor on the part of the petitioner to agree with defendants as to compensation and damages, and a failure to so agree. This contention is without merit. The eminent domain act requires the petitioner to show that "the compensation to be paid for or in respect of the property, sought to be appropriated or damaged for the purposes above mentioned, cannot be agreed upon by the parties interested." The petition avers that "the petitioner has applied to the defendants for the privilege and right of way to construct its telegraph line upon said right of way, and has endeavored to come to an agreement upon the damages to be paid to said company for said right of way aforesaid, but has wholly failed to reach an amicable agreement with either of said companies, by which said right of way could be secured or damages agreed upon; * * * and for such purposes compensation to be paid for and in respect of the property sought to be appropriated cannot be agreed upon by said defendants and the petitioner." The averment of the petition is clearly sufficient. "The averments in the petition to condemn land for a public use need not be in the language of the statute, but any allegations showing affirmatively that the petitioner has been unable to agree with the owner in respect to the compensation to be paid will suffice." *Reed v. Railway Co.*, 126 Ill. 48, 17 N. E. 807.

5. It is further urged that the petition fails to show that the proposed telegraph line will not incommode the public use of the railroad. The allegations of the petition, as already above referred to, show that this objection is not well taken. Such allegations must be considered in connection with the description of the location of the telegraph line. The location of the line, as indicated in the petition, shows that the public use of the railroad will not be seriously incommoded.

6. The appellants further moved to dismiss the petition upon the alleged ground that a telegraph company in Illinois cannot lawfully condemn a right of way lengthwise upon the right of way of a railroad company. We are of the opinion that the statute expressly authorizes such a condemnation. It may be conceded, as contended by counsel, that property already taken and dedicated to one public use cannot lawfully be taken for another public use inconsistent with the first, unless the legislature in express terms has so declared. *Chicago & A. R. Co. v. City of Pon-*

tiac, *supra*. Even if it were true that the erection and operation of a telegraph line is a public use inconsistent with the public use to which a railroad right of way is devoted, which is a question here not passed upon, yet there is legislative authority in this state for taking a portion of such right of way for the purpose of constructing and operating a telegraph line. Section 2 of chapter 134 of the Revised Statutes of this state, in regard to telegraph companies, provides that every telegraph company incorporated under the laws of this state "may enter upon any lands for the purpose of making surveys and examinations with a view to the erection of any telegraph line, and take and damage private property for the erection and maintenance of such lines, and may, subject to the provisions contained in this act, construct lines of telegraph along and upon any railroad, road, highway, street or alley, along or across any of the waters or land, within this state, and may erect poles, posts, pliers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad, highway, street or alley, or interrupt the navigation of such waters." A telegraph company is thus empowered to construct lines of telegraph "along and upon any railroad." Under section 3 power is given to such company to exercise the right of eminent domain, when it may be necessary to take or damage any property. Counsel for appellants contend that the word "upon" here means "across," and that the legislature only intended to confer the right to construct a telegraph line across the right of way. It is furthermore said that a "railroad" is a track upon which cars run, and that the legislature cannot have intended to confer the power to erect a telegraph line upon a railroad track. The word "railroad" may sometimes mean the track or ground upon which the rails constituting the track are laid, or it may mean the right of way, including the track and the land on either side of the track, according to the connection in which the words are used. The telegraph line may be built "along and upon" the railroad. The word "along" indicates that the construction is to be lengthwise, and the very fact that a construction upon the track cannot have been contemplated by the legislature would lead to the conclusion that the construction is intended to be upon the right of way and along the same. Where the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. Black, *Interp. Laws*, p. 35.

Counsel, however, refer to the case of *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 88 Va. 920, 14 S. E. 803, as supporting their contention in regard to this matter. In the

latter case, a provision of the Virginia Code (section 1287), providing that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," was held not to authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. It will be observed that the language there was different from the language here. There the words are "along and parallel to"; here the words are "along and upon" any railroad. A careful reading of that case will show that, if the words there had been the same as the words here, their meaning would have been, in the opinion of the court, "along the right of way and parallel to the track." In Louisiana, however, the words "along and parallel to" were held to have a different meaning from that given to them in the Virginia case. In *Postal Tel. Cable Co. of Louisiana v. Morgan's Louisiana & T. R. & S. S. Co.*, 49 La. Ann. 58, 21 South. 183, an act of the legislature of Louisiana (Act 1880, No. 124) authorized "the construction of telegraph lines along and parallel to any of the railroads" in that state; and it was held by the supreme court of Louisiana that the act in question gave the right to construct a telegraph line over a railroad's right of way. *Postal Tel. Cable Co. of Louisiana v. Louisiana W. R. Co.*, 49 La. Ann. 1270, 22 South. 219. If an act which authorizes a telegraph line to be constructed "along and parallel to" a railroad authorizes its construction upon the railroad right of way, it is certainly true that an act which authorizes a telegraph line to be constructed "along and upon" any railroad confers the power to construct it lengthwise upon the right of way. Mr. Lewis, in his work on *Eminent Domain*, at section 269 says: "A telegraph line may be built along a railroad right of way, it being no material interference with the use for railroad purposes." In Alabama a statute provided that any telegraph company incorporated in that or any other state "shall have the right to construct, maintain, and operate lines of telegraph along any of the railroads or other public highways in the state of Alabama,—but so as not to obstruct or hinder the usual travel on such railroad or other highway." Acts 1872-73, p. 130, § 1. And it was held in that state that such statute authorizes the appropriation by eminent domain proceedings of a right of way for a telegraph line along and upon a railroad right of way. *New Orleans, M. & T. R. Co. v. Southern & A. Tel. Co.*, 53 Ala. 211.

7. The appellants complain that the county court overruled their motion to compel appellee to file a plat of the location of its proposed line. The overruling of this motion was not error. The case of *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 604, is referred to to sustain this objection. In that case the facts (which it is not necessary here to state) show that an affidavit was

fled setting up the necessity of a plat, in order to make manifest the use to which the petitioner designed to devote the land sought to be condemned. But here a plat, if filed, could not give a more intelligible statement of the manner in which the appellee proposed to construct its telegraph line than is set forth in the petition. A plat would have added no force to the description in the petition, or made the location any more intelligible. No showing was made, by way of affidavit or otherwise, as to the necessity of such a plat.

8. The next objection is that the petitioner failed to show any real effort to agree prior to the beginning of the suit. We have already seen that the averments of the petition upon this subject were sufficient. The contention now is that the proof introduced did not show that there was an endeavor made to agree, and a failure to agree. This objection also is without force. The testimony shows that a representative of the telegraph company went to the vice president of the Mobile & Ohio Railroad Company, and tried to procure the right to construct a telegraph line upon the right of way in question. The vice president of the company declined to agree to the construction of the telegraph line, upon the ground that the Mobile & Ohio Railroad Company had a contract with the Western Union Telegraph Company, by which it had agreed to give the Western Union Telegraph Company the entire right of way, lands, and bridges of the railroad company, and any extensions and branches thereof, for the construction, maintenance, and operation of a line of poles and wires; and upon the ground that, by the terms of such contract, the Western Union Company was authorized to use the name of the Mobile & Ohio Railroad Company to resist any effort on the part of any competing line to construct on said right of way any competing telegraph line. In other words, the Mobile & Ohio Railroad Company refused to grant the privilege asked because of an existing contract which gave the Western Union Company the exclusive use of the railroad right of way for telegraph purposes. Such a contract has been held void, as being against public policy. *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *New Orleans R. Co. v. Southern & A. Tel. Co.*, supra. As the Mobile & Ohio Railroad Company had a lease of the right of way, which was not to expire for 34 years, a refusal on its part to allow the appellee to construct its telegraph line rendered such construction impossible, without reference to what the lessor, the St. Louis & Cairo Railroad Company, might have to say in the matter. The testimony, however, shows that the appellee, through a proper representative, made an effort to induce the latter railroad company to make an agreement with it for the construction of the telegraph line upon the right of way in question, but failed to

effect such agreement. We are of the opinion that this testimony showed sufficient effort on the part of the appellee to agree upon compensation with the appellants, and also showed a failure of such efforts. Where an owner refuses to sell altogether, negotiation as to the amount of compensation is thereby cut off. *Bowman v. Railroad Co.*, supra; *Booker v. Railway Co.*, 101 Ill. 333; *Thomas v. Railway Co.*, 164 Ill. 634, 46 N. E. 8. It is not necessary that there should be a series of efforts, or a prolonged negotiation, in order to agree upon compensation; an effort to agree is all that is required. In *re Village of Middletown*, 82 N. Y. 196. There was here, on the part of the railroad companies, a refusal to accede to any terms of agreement in regard to the compensation and damages, and that refusal was based upon the existence of the illegal contract already referred to.

9. The appellants, upon the trial below, made a motion for leave to file a cross petition. This motion was denied, and its denial is assigned as error. The court below did not err in this regard. The petition in this case sufficiently described the right of way, extending from East St. Louis to Cairo, and seeks to condemn a part of such right of way. In a condemnation proceeding in this state, the defendant has the right to file a cross petition, where other property, not described in the petition, is damaged. But if the property alleged to be damaged, as well as the property which is taken, is described in the petition, no cross petition is necessary. In *City of Bloomington v. Miller*, 84 Ill. 621, which was a proceeding by the city to condemn land for a street, a part of a certain lot was sought to be so condemned, and the lot was described in the petition. It was there held that damages as to the part not sought to be appropriated might be allowed without any cross petition by the owner. In that case, in referring to the case of *Mix v. Railway Co.*, 67 Ill. 319, we said (page 623): "In that case the damages relied upon related to property not mentioned in the petition, no part of which was taken or even touched by the proposed improvement. In this case, as we understand the record, this lot 10 is a part of the property mentioned in the petition, from which a part is proposed to be taken. * * * The ascertainment of the just compensation to the owner for taking away a part of his lot of necessity involves the consideration of the value of the whole property intact, and the value of that part of the lot not taken, when contemplated as after the proposed part shall have been taken. This subject-matter needed no cross petition." In *Railroad Co. v. Mayrand*, 93 Ill. 591, it was held that a cross petition was not necessary to obtain damages to the remainder of lands not taken, where the petitioner sought to take only a portion of such entire tract, the court saying: "Where the petition, as in this case, shows that the de-

fendant is the owner of an entire tract of land, and that the petitioner proposes to appropriate a strip running through the tract described, there can be no need of a counter petition." In the case at bar the cross petition of the appellants described no property by metes or bounds or otherwise, nor did it show that the appellants owned property in addition to the right of way. The cross petition alleged that "these defendants are entitled to damages to their property, contiguous to the property to be taken, which will be damaged by the erection and maintenance of the proposed telegraph," etc. The contiguous property here referred to is simply the remainder of the right of way, after taking out the portions sought to be condemned for telegraph purposes, which right of way was described in the petition. In describing it, the petitioner brought within the terms of the petition all the property of the railroad company which could be damaged by the proposed improvement; hence no cross petition was necessary. The refusal in no wise prejudiced the defendants, because they were allowed to introduce testimony for the purpose of showing that the right of way in question would be damaged by reason of the construction of the telegraph line. "Where part of the lot or tract only is taken, a cross petition is not necessary in order to obtain damages to the part not taken." Lewis, Em. Dom. § 316.

10. It is next contended by appellants that the county court of Jackson county was without jurisdiction as to any part of this land outside of that county, and that, if the court had jurisdiction as to any land outside of that county, it should have directed the jury to go upon the lands in the other counties, as well as those in Jackson county. This contention would have great weight, if it were not for the express language of the statute of Illinois upon this subject. As a general rule, where land lies in one county, proceedings in rem, affecting the same, cannot be carried on in another county. *Prima facie* a proceeding in rem is local, and jurisdiction thereof is confined to the courts of the locality where the property is situated. While such is the general rule, the legislature has the undoubted power to modify or change the rule. It is only when there are no statutory provisions to the contrary that condemnation proceedings should be instituted in the county in which the land taken or affected is situated. Lewis, Em. Dom. § 316. "Unless the statute prescribes otherwise, the proceedings must be brought in the county where the land lies, even though the works effecting the damage are in another county." 7 Enc. Pl. & Prac. 478.

It becomes necessary, therefore, to examine the statutory provisions in this state upon this subject. Section 3 of chapter 134 of the Revised Statutes, in regard to telegraph companies, provides that, "when it shall be necessary for the construction, alter-

ation or repair of any line of telegraph to take or damage any property, the same may be done, and the compensation therefor ascertained and made, in the manner which may be at that time provided by law for the exercise of the right of eminent domain." When reference is made to the eminent domain act, which provides by law for the exercise of the right of eminent domain, section 2 of that act is found to provide that, in all cases where the right to take private property for public use has been heretofore or shall be hereafter conferred by general law upon any corporation, it shall be lawful for the party authorized to take or damage the property so acquired, "to apply to the judge of the circuit or county court, either in vacation or term time, where the said property, or any part thereof, is situate, by filing with the clerk a petition," etc. 1 Starr & C. Ann. St. p. 1042. In the case at bar the petition for condemnation has been filed in the county court of Jackson county. A part of the railroad right of way which is sought to be condemned is situated in Jackson county. Hence, although the rest of the right of way is situated in counties other than Jackson county, the condition prescribed by the statute here exists. The statute does not state that, when the property is situated in more than one county, a petition must be filed in each one of said counties; but it does state that the application may be made to the judge of the county court where any part of the property is situated. In addition to the provision thus referred to, contained in section 2 of the eminent domain act, section 2 of the practice act reads as follows: "Actions against a railroad or bridge company may be brought in the county where its principal office is located, or in the county where the cause of action accrued, or in any county into or through which its road or bridge may run." Here the railroad of the appellants runs through Jackson county, and therefore this condemnation proceeding is properly brought in such county under the terms of said section of the practice act. We are of the opinion that the contention of the appellants that there was a lack of jurisdiction in the county court of Jackson county, because all the right of way did not lie in that county, cannot prevail, in the light of the power thus expressly conferred by the eminent domain and practice acts upon the county court. Three jurisdictional facts here exist: First, the telegraph company has authority to condemn; second, it may apply to the judge of the circuit or county court where said property, or any part thereof, is situated; and, third, actions against a railroad company may be brought in any county into or through which its road may run. These statutory provisions are plain and free from ambiguity, and their meaning will be presumed to be the meaning which the legislature intended to convey. Courts cannot tamper with the clear and unequivocal meaning of the

words used, even though the consequences appear not to have been such as were contemplated by the legislature. 23 Am. & Eng. Enc. Law, p. 298. Here, however, it cannot be said that any consequences will follow from the interpretation thus given to the statute which were not intended by the legislature. If a special condemnation proceeding should be instituted in each one of the counties through which the right of way runs, there would be in all of such suits the same petitioner, the same defendants, and the same right of way. Under such circumstances it hardly seems necessary to file seven different petitions, in seven different county courts, in seven different counties, to condemn the same right of way in all the seven counties. Such a course would be to subject the people of the state, without any good reason, to the costs and annoyance of seven different lawsuits, and the petitioner to the delay consequent upon the bringing of so many proceedings.

It is said, however, that the statute contains no provision for recording a condemnation judgment, rendered by the county court of Jackson county, in the recorder's office, or elsewhere, in any other county. While there may be no such statutory provision, it is at the same time true that the recorder's office in each of the other counties in which the proceeding was not begun is open to receive the record of the decree or judgment rendered in the county where the proceeding was begun. The partition act of this state provides that a petition for partition may be filed in the county where the premises or some part thereof is situated, and that every person having any interest, who is not a petitioner, shall be made a defendant to such petition, and that, if the lands lie in different counties, the court may appoint separate sets of commissioners for each county, or one set for all of them, as may seem best for the parties interested. Under this statute no difficulty has ever been experienced in the institution of partition proceedings, where the lands sought to be partitioned lie in different counties. The partition act contains no provision requiring the recording of the decree of partition, or the deed made under a sale in the partition proceeding, in any county other than that in which the proceeding was instituted. And yet it has never been supposed that any party to such proceeding cannot file a copy of his decree or his deed in the county where the lands acquired by him in such partition proceeding are situated. The possession taken by the telegraph company of the portions of the right of way lying in other counties than Jackson county is notice of its rights, and would put upon inquiry any person having knowledge of such possession. In *Postal Tel. Cable Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, supra, and *Postal Tel. Cable Co. v. Louisiana W. R. Co.*, supra, proceedings were instituted in one parish in Louisiana to con-

demn a right of way for a telegraph line upon the entire railroad right of way running through a number of parishes; but the supreme court of Louisiana, as will appear by a reference to these cases, had no difficulty in sustaining a condemnation judgment rendered in the district court of one parish only. In the Louisiana cases the proceeding was sustained upon the ground that the right of way was an entirety, and that one jury could make an award of compensation for such entire right of way, though passing through several parishes or counties.

The defendants below made a motion that the court direct the jury to go upon the right of way sought to be condemned in the other six counties, besides Jackson county, through which the same ran. This motion was overruled, and the overruling of it is assigned as error. It appears from the verdict of the jury that they went upon the lands and right of way sought to be taken and damaged. They so recite in their verdict. The appellants themselves have shown in the record that the jury did go upon and view the right of way for a distance of three miles in Jackson county, including the portion of such right of way which passed through the city of Murphysboro. The defendants did not prove in any way that the right of way in any of the other counties differed in any respect from the right of way in Jackson county. Section 9 of the eminent domain act provides that the jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same. This section, however, does not require the jury to go upon every part of the land sought to be taken or damaged. It would seem, therefore, that in this case the action of the jury was in compliance with the terms of the statute. Counsel for appellants say that the court had no power to refuse their request that the jury go upon the lands in person and examine the same. This may be true, but the request authorized by the statute was not refused. It was only the request that the jury go upon the right of way in all the different counties which was refused. If there were any improvements upon the right of way in any of the other counties than Jackson county, it does not appear that such improvements were different from those in Murphysboro, which were viewed by the jury. We are of the opinion that the court below committed no error in overruling said motion.

11. Appellants claim that the court below erred in admitting evidence for the petitioner, and excluding evidence offered by the defendants, and also in giving instructions for the petitioner, and in refusing instructions asked by the defendants, and in modifying certain of the instructions asked by the defendants, and giving the same as modified. It is impossible for us to notice all the objections growing out of the admission and exclusion of evidence, and the giving and re-

fusal and modifying of instructions. Objections made by the appellants arrange themselves under several general heads, and apply as well to the instructions as to the evidence. We will consider this branch of the case under these general heads, without entering into detail.

In the first place, the appellee claims that the compensation to be paid to the appellants must be the value of the ground occupied by each of the telegraph poles erected upon the right of way; that the land taken is nothing more than those portions of it upon which the telegraph poles stand, or into which they are inserted; that the rest of the compensation to which appellants are entitled, other than for the land thus taken, consists merely of the damages accruing to the remainder of the right of way by reason of the erection of the telegraph poles and the stringing of the wires upon the cross-arms thereon; and that, as to the spaces between the telegraph poles over which the wires near the top of the poles are strung, such spaces are not land taken. On the contrary the appellants contend that, by the construction and operation of the telegraph line, the appellee not only takes the ground occupied by the telegraph poles, but that the strip of ground, as wide as the cross-bars, over which the wires are strung, is also land taken. In other words, the appellants claim that the appellee takes that part of the right of way over which the wires, extending from pole to pole, are strung. The theory of the court below, in its rulings upon the evidence, and in the giving and refusal of instructions, was that the appellants were entitled, for their just compensation, to the value of the land actually taken by the erection of the poles, and to such damages as were done to the right of way by the erection of poles and by the stringing of the wires thereon. This theory is sustained by reason, and by the previous holdings of this court. In the present case the petitioner introduced evidence showing that the land embraced within the right of way throughout its whole extent was worth from \$25 to \$40 per acre, and that the actual ground to be occupied by all the telegraph poles to be erected upon the whole right of way amounted to an eighth of an acre. In *Telegraph Co. v. Katkamp*, 103 Ill. 420, testimony was introduced showing what the land upon which it was proposed to construct a telegraph line was worth per acre. The appellants below introduced no evidence as to the value per acre of the land to be taken by the erection of the telegraph poles, but introduced witnesses who stated that the compensation to be awarded to the railroad company for the construction of the telegraph line on its right of way should not be less than certain sums of money per mile, said amounts varying from \$100 to \$250 per mile. Upon what basis the land for railroad purposes was estimated to be worth \$100 per mile, or \$150 per mile, or \$250 per mile, does

not appear. "Testifying to amounts of damages, where there is no basis of damage, is of no value as evidence." *Telegraph Co. v. Katkamp*, *supra*.

The appellants claim that the spaces, 175 feet long, between the telegraph poles, should be regarded as lands taken. We cannot agree with this contention. The spaces over which the wires are strung from pole to pole are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire, by the judgment of condemnation, the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it, or injure it, for any other purpose than to erect telegraph poles, and suspend wires upon them, and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles, and under its wires, for the purpose of repairing its line. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an easement upon what it condemns, for the purpose of entering thereon in order to erect and repair the line. *Lockie v. Telegraph Co.*, 103 Ill. 401. In the *Lockie Case* we said: "The only exclusive right of occupancy the company acquires by such a proceeding is the occupancy of the ground occupied by the poles erected for telegraph purposes." The spaces between the telegraph poles, and over which the wires are strung, are used jointly by the railroad company and the telegraph company,—by the former for such purposes as are appropriate to a railroad right of way, and by the latter in the exercise of its right to the easement already referred to. Inasmuch as the telegraph company does not take the exclusive use of the remainder of the right of way not occupied by the poles, and inasmuch as the railroad company still continues to use the same, it cannot be said that such remainder is taken by the condemnation proceeding. It is merely damaged to the extent to which the telegraph company has an easement, or the right to enter, for the purpose of constructing and repairing its line. The measure of damages, therefore, suffered by the railroad company, is not the value of the land embraced within the right of way between the poles and under the wires; but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph com-

pany for its purposes. In *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78, where the city sought to condemn the right to extend a street over the railroad right of way, including its tracks, we held that the value of the land embraced within the crossing is not the measure of just compensation for such interest as may be taken, but that the measure of compensation is the amount of decrease in the value of the use for railroad purposes, caused by the use for purposes of a street, such use for the purposes of a street being exercised jointly with the use by the company for railroad purposes. The same doctrine is applicable here so far as the spaces between the telegraph poles and over which the wires are strung are concerned, the use of such spaces for telegraph purposes being exercised jointly with the use of the same by the company for railroad purposes. The verdict rendered by the jury below is not inconsistent with the mode of ascertaining the compensation as here outlined.

It is said, however, that at some future time the railroad company may conclude to lay down another track, and that, if it does so, the telegraph poles will be in the way as an obstruction. It is also said that at some future time the railroad company may conclude to erect certain structures upon its right of way for railroad purposes, and that the erection thereof will be hindered and interfered with by the telegraph wires stretched from pole to pole. Such damages might be regarded as remote in character, in view of the fact that the evidence does not show any immediate demand for the construction of such additional track, or for the erection of the structures referred to. But, whether such damages be regarded as remote or not, the petition in this case contains the following statement: "And in the event that said railroad company shall at any time desire to change the location of its tracks, or construct new tracks or side tracks where the same do not now exist, the petitioner hereby consents to remove such poles to such other point or points on the said right of way adjacent thereto, which shall be designated by said railroad company, upon reasonable notice, and at the expense of petitioner." The petition also states that, in case of the erection of any structures by the appellants upon the right of way, the wires will be suspended high enough to prevent any interference therewith. These allegations in the petition are in the nature of stipulations to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court. *Chicago & A. R. Co. v. Joliet, L. & A. Ry. Co.*, 105 Ill. 388; *Peoria & P. U. R. Co. v. Peoria & F. Ry. Co.*, Id. 110. Indeed, section 2 of the act in regard to telegraph companies only authorizes such companies to construct lines of telegraph along and upon railroads, and to erect poles for supporting the insula-

tors and wires of their lines, upon condition that such construction and erection are done "in such manner and at such points as not to incommode the public use of the railroad." It is a condition precedent to the erection of the telegraph line that the public use of the railroad shall not be incommoded. The telegraph company accepts the right to put its line upon the railroad right of way, subject to the condition that it does not incommode the use of the railroad. In view of this provision of the statute, and in case the telegraph line is constructed as directed by the statute, the railroad company will not suffer any damages by reason of being incommoded in the use of its right of way. We are therefore of the opinion that the court below committed no error in its rulings in regard to the evidence, or in regard to the giving or refusal of instructions, so far as its action was based upon the theory that the spaces between the telegraph poles and under the wires were not taken by the condemnation proceeding. Its action in the respects mentioned, having been based upon the theory that only the spaces occupied by the poles were taken, and that the spaces between the poles and under the wires were damaged only by the use of the same in the manner stated, was, in our opinion, correct.

In the second place, it is claimed by the appellants that the appellee must make compensation proportionately for the costs and expenses to which the appellants are alleged to have been subjected in putting the right of way in condition. In other words, it is said that the appellee cannot avail itself of improved conditions without compensation. No evidence was introduced here on behalf of the appellants to show that any work had been done by them, or any expenses incurred by them, in clearing the right of way along and upon which the appellee's telegraph line is proposed to be located. The petition expressly avers that, if there has been any transformation of the surface of the earth into shape and condition to fit it for a railroad bed, the petitioner does not intend to set poles and suspend wires at the points where such transformation has taken place. We cannot say in this case that the appellee is entitled to be mulcted in damages by reason of availing itself of any improved conditions created by the appellants. In the Louisiana cases referred to, it appeared that the railroad right of way ran for miles through swamps, timbered and not timbered, and that such timbered and swamp lands had been made available for a right of way at a cost of much labor and money, and had been kept clear and in suitable condition at a considerable expense, the maintenance of it in such condition being necessary for the proper and safe operation of the railroad trains. No such state of facts exists here, where the right of way for the most part is level prairie land. Under the instructions of the court, the jury were authorized to award, as com-

pensation to the appellants, the value of the ground taken for the erection of the telegraph poles; and, if such ground had an increased value by reason of being improved in the manner stated, the appellants had the benefit of it at the hands of the jury under the instructions. The rulings of the court in regard to the evidence and instructions, so far as they refused to make what counsel call improved conditions of the right of way a basis for the award of compensation, were not erroneous.

In the third place, appellants claim that the trial court erred in refusing to allow them to prove that the railroad companies, or one of them, had rented the use of their right of way to other telegraph companies at certain amounts per year, and that the rents so received should be taken into consideration in establishing the amount of compensation to be awarded. There was no error in the action of the court in this regard. The contract of lease with another telegraph company, which it was proposed to prove, gave such telegraph company the exclusive use of the railroad right of way, and therefore was void upon grounds of public policy, as being in restraint of trade, and as creating a monopoly. *Crow. Electricity*, § 45. In addition to this, the contract of lease, which it was proposed to prove, gave the use of the telegraph line to the railroad for its trains, so that the railroad company was authorized to use the telegraph line in sending its own dispatches, and in moving its trains, and in managing its own business. It was not shown, nor was it proposed to show, how much such use of the telegraph lines by the railroad was worth. The contract of lease, therefore, was not sufficiently definite, as to the amount received by the railroad company from the telegraph company, to indicate what was the rental value of the privilege of erecting and operating a telegraph line upon the right of way, even if the amount of rent paid by the telegraph company to the railroad company was competent evidence for the purpose of fixing the amount of compensation to be awarded. It does not appear that the rental value proposed to be proven was any criterion of the value of the easement proposed to be taken by the present appellee.

12. It is furthermore claimed by the appellants that there is a variance between the petition and the verdict and judgment in the present case, and that the judgment is void for uncertainty. This objection is without force. The petition proposes the construction of a telegraph line through the entire length of the railroad right of way, from its commencement in East St. Louis to its termination in Cairo. The verdict and judgment only cover the route which begins at the corporation line of East St. Louis, and extends to the corporation line of Cairo; that is to say, the appellee abandoned so much of the petition as asked for the construction of

its telegraph line on the railroad right of way inside of the city limits of East St. Louis and Cairo. The verdict and judgment gave less than the petitioner asked for. The only party having a right to complain of this would be the appellee, and not the appellants. A party will not be allowed to complain of an act that does not injuriously affect him or his interests. *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866.

The judgment is said to be void for uncertainty, because it describes the location of the line as the same is described in the petition, to wit: "At a distance of not less than twenty-five feet from the outer edge of said railroad track upon the east side of said track, or at such points as may be agreed upon by said telegraph company and the railroad company operating said road." The uncertainty is said to consist in the alternative character of the location, as above described. We see no objection to the form of the judgment as here set out, and do not regard it as being void for uncertainty. After the judgment of condemnation is entered, if the parties, instead of having the line located 25 feet from the outer edge of the track, choose to agree upon some other point or line of location, there can be no reasonable objection to such change. The judgment of the county court is affirmed. Judgment affirmed.

CARTER, C. J., and CARTWRIGHT, J., dissent.

(156 N. Y. 628)

WALKER et al. v. PHOENIX INS. CO. OF HARTFORD, CONN.

(Court of Appeals of New York. Oct. 4, 1898.)

INSURANCE — INCUMBRANCES — CONDITIONS — WAIVER.

A policy provided that it should be void if the property insured was incumbered, without insurer's consent, and that insurer's acts in respect to the appraisal of a loss should not be deemed a waiver. At the time the policy was issued, insurer had no knowledge of an incumbrance on the property. After a loss, the insured asked that the policy might be corrected as to a clerical error, and a clause making it payable to the mortgagee inserted. The insurer corrected the error, but refused to attach the clause, and appointed an adjuster. On his failure to agree with the owners, appraisers were appointed under the policy; and, after their appraisal, insurer left at the agents who had issued the policy a bill for premiums. *Held*, that the question of the waiver of the conditions as to incumbrance was for the jury.

Appeal from supreme court, general term, First department.

Action by Stillman R. Walker and another against the Phoenix Insurance Company of Hartford, Conn. From a judgment of the general term (35 N. Y. Supp. 374) affirming a judgment for defendant, plaintiffs appeal. Reversed.

George W. Stephens, for appellants. Dallas Flannagan, for respondent.

VANN, J. On the 11th of November, 1890, the firm of Saunderson & Starkweather, through their broker, named Clark, applied to the defendant for insurance upon some printing machinery and materials, which were at the time subject to two chattel mortgages, but this fact was not then disclosed to the company. Each mortgage contained a covenant on the part of the mortgagors to keep the property insured for the benefit of the mortgagees, who are the plaintiffs in this action, and to assign the policy to them. Said application was made at the main office of the defendant to one Haslock, the "application clerk," who passed upon substantially all applications, fixed the rate, and ordinarily took the risk and bound the company, as well as gave permits for change of ownership and the like. Mr. Haslock thereupon signed and delivered what is known as a "binder,"—a brief instrument, whereby the defendant insured Saunderson & Starkweather against loss by fire upon said property to the amount of \$1,000, "subject to the conditions of" its "several policies." The next day the property insured was injured by fire, but a policy of the standard form, covering the same risk as the binder, was at once issued, and delivered to the broker who had made the application for insurance. On November 13th, the day after the fire, the broker discovered that the name of one member of the firm insured was misspelled in the policy; so he took it to the same office of the defendant, where he again saw Mr. Haslock, told him about the fire, stated that the property insured was incumbered by chattel mortgage, and requested him to correct the spelling in the name, and to insert the usual "mortgage clause." In answer to this request, as Mr. Clark stated on his direct examination, Mr. Haslock "said that he could change the word 'Starkweather,' but that he could not change the mortgage note or put it on, or, rather, he could not change it because it was not on; that he could not put the mortgage note on. I said, 'How will that affect in the case of the fire?' He said it would make no difference, as the loss would be settled with Saunderson & Starkweather, and a check paid to their order." Mr. Clark thereupon asked Mr. Haslock to give notice when he drew the check to the order of Saunderson & Starkweather, so that the plaintiffs could be present at the time the check was paid to them, and get the amount of their claim therefrom, but it does not appear that any answer was made to this request. Upon his cross-examination, Mr. Clark described the interview, after making the request for said changes, as follows: Mr. Haslock "said he could not do it at that time, as the fire had occurred, but he could change the name of 'Starkweather,' and, regarding all losses, it would make no difference in their payments, as they would draw their check to the order of Saunderson & Starkweather, and * * * Walker & Bresnan could look to Saunderson & Starkweath-

er for their money. I then asked the gentleman if he would not hold his check when he paid the loss, and let me know, that I might have Bresnan & Walker there when the check was paid either to Mr. Saunderson or Mr. Starkweather." Mr. Haslock denied that he said a check would be given for the loss, but admitted saying: "We settled with the insured only. It makes no difference, and it is out of my hands." While this conversation was going on, Mr. Haslock corrected the misspelled name, and soon after handed the policy thus corrected to the broker, who was acting for the owners of the property. Haslock also testified that he reported the existence of the mortgages to Mr. McKay, the manager of the company, but could not say whether it was before any steps had been taken to adjust the loss. He was, however, in the same office as the manager and in constant communication with him. On the 13th of November, Mr. McKay appointed as adjuster for the company one Watlington, who at once conferred with Mr. Saunderson, and told him that, when his statement of the property insured was ready, he would be prepared to ascertain and fix the amount of loss with him. Mr. Saunderson prepared an itemized statement of the property, as required by the policy, embracing many items, with descriptions and values, and on the 18th of November delivered it to Mr. Watlington, who, a day or two later, negotiated with Mr. Saunderson "and his adjuster" at the scene of the fire, examined the property in connection with the schedule furnished, and said they had better have the amount of the loss ascertained by appraisers. Prior to this time no mention had been made of an appraisal on either side. Thereupon appraisers were selected, an appraisal had, an award made and brought to the office of the company. Proofs of loss on the basis of the appraisal were made by the insured, and delivered to the defendant, about the 29th of November, and no objection was made as to their form or sufficiency. On the 8th of December, Mr. Clark's firm tendered a check to the defendant for the premium on the policy, but the company refused to receive it. On the 20th of January following, the defendant sent to Mr. Clark's firm a formal bill for \$45, of which \$30 was for the premium on the policy in question, and the remainder on another policy, with a request to remit for the same. No remittance appears to have been made, nor was any reason given by the company for sending said bill; and, although it is now claimed by its counsel to have been sent inadvertently, there is no evidence in the record to that effect. After all the rights of the insured had been duly assigned to the plaintiffs, an action was brought by them upon the policy for the amount of the loss, which was less than the amount of the insurance. Upon the trial the foregoing facts appeared, and at the close of the evidence the court directed a verdict in favor of the defendant,

and the plaintiffs duly excepted. From the judgment of affirmance rendered by the general term, the plaintiffs appealed to this court.

The policy provided that it should be void "if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. * * * If fire occurs, the insured shall * * * separate the damaged and undamaged property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon. * * * This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal. * * *" As the defendant did not know of the existence of the chattel mortgages when the insurance contract was made, the mortgage clause above quoted rendered it voidable, at the election of the defendant. If, however, the company, after learning the facts, treated the policy as valid, or put the insured to trouble and expense on account thereof, it was evidence from which the jury might have found a waiver of the forfeiture caused by the existence of the mortgages. Thus, as was said in *Armstrong v. Insurance Co.*, 130 N. Y. 564, 29 N. E. 992: "The rule is now established * * * that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived. *Titus v. Insurance Co.*, 81 N. Y. 410; *Roby v. Insurance Co.*, 120 N. Y. 510, 24 N. E. 808; *Pratt v. Insurance Co. (N. Y.)* 29 N. E. 117." And more recently, referring to the same subject, in *Kiernan v. Insurance Co.*, 150 N. Y. 190, 195, 44 N. E. 698, 699, this court said: "While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either, for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy. *Ronald v. Association*, 132 N. Y. 378, 30 N. E. 739; *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991; 2 *Biddle, Ins.* § 1052. While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that, with full knowledge of all the facts, it intended to 'abandon or not to insist upon the particular defense afterwards relied upon,' a verdict or finding to that effect establishes a waiver, which, if it

once exists, can never be revoked. *Trippe v. Society*, 140 N. Y. 23, 35 N. E. 316; *Benninghoff v. Insurance Co.*, 93 N. Y. 485; *Brink v. Insurance Co.*, 80 N. Y. 108; *Clement, Dig. Fire Ins.* p. 624, § 6; 2 *May, Ins.* 504a; 2 *Biddle, Ins.* § 1053." The authorities are too numerous and the principle too well settled to require further argument or citation.

Assuming that whatever was said or done between the representative of the insurance company and the owner of the property which related solely to an appraisal is not to be regarded as evidence of waiver, owing to the provision in the policy relating to that subject, the question presented for decision is whether there was enough other evidence from which the jury might have found a waiver by the company. When Mr. Clark applied to Mr. Haslock to change the policy, the latter stood for the company, and whatever he did it did. He changed the policy, not in an important respect, to be sure; but still, by making any change at all, did he not recognize the policy as an existing contract, and show an intention not to insist upon the forfeiture? If he regarded the policy as void, why should he have made the change? What object was there in changing a contract that could not be enforced against the company? Why should any alteration be made in a void instrument? Even a clerical change, made by one party to a written agreement at the request of the other, is some evidence of a recognition of the validity of the instrument, because otherwise there would be no reason for making any change. The party who alters a writing entered into between himself and another, at the latter's request, necessarily treats that writing as an existing instrument, and invites the other party to act on it as such. The nature or extent of the alteration is not important, provided there is an intention to alter something that is still in force, and which is regarded as still binding. It cannot be presumed that the company meant to do nothing, or to do a meaningless act, when at its chief place of business, acting through an agent possessing general authority, it deliberately altered its written obligation so as to make it conform to the original intention of the parties. A reasonable man does not ordinarily change a void contract at the request of the other party thereto, unless he wishes to revive, continue, or treat it as valid. If he wished to treat it as a nullity, one would expect him to decline because it was a nullity. If the company meant nothing in making the alteration, why did it make it? The change made called for an explanation of the motive in making it; and whether the explanation, which rested simply upon inference, was satisfactory or not, was a question for the jury to determine.

The company not only made the change, but, through Mr. Haslock, said, in substance,

that the policy would be paid notwithstanding the existence of the chattel mortgages and the occurrence of the fire. While he refused to make the policy payable to the mortgagees, he did not put his refusal on the ground that the policy was void, but, as the jury might have found, on the ground that, after the fire had occurred, he could not change the persons to whom the payment was to be made, which might subject the company to a double liability. Thus, at a time when the company, if it intended to take advantage of the forfeiture, should have said so, it not only failed to say so, but changed the policy, and said that it would be paid. This was followed by the appointment of an adjuster who requested in behalf of the company, as the policy permitted, that an inventory of the property injured should be made by the insured, not for the purpose of an appraisal, for none had yet been suggested, and no difference of opinion as to value had arisen, but for the purpose of an adjustment. The statement or inventory thus called for was required by the policy to be complete, and to set forth the quantity, cost, and value of each article. The defendant thus put the insured to trouble and expense by requiring him to comply with the terms of the contract to this extent, and thus enforced it pro tanto upon its part. After this schedule had been furnished, negotiations for the express purpose of adjusting the loss were entered into between the representative of the company and the insured, and finally the company sent a bill for the premium.

We think that, under the authorities, the evidence thus alluded to was for the consideration of the jury. While they might have found in favor of the defendant if the case had been submitted to them for decision, there was some evidence which would have enabled them to find a waiver by the company. It is not necessary that the company should say, in terms, through its officers or agents, that it waives a forfeiture; but it is sufficient if what it says and does would induce a reasonable man to believe that it did not intend to treat the policy as void. The acts stated are utterly inconsistent with such an intention. When not only a change was made in the policy, but an assurance was given that it would be paid, and the insured were required to furnish an inventory for the purpose of an adjustment, which was entered upon, and finally a request made for the payment of the premium, and no explanation of these facts was furnished by the company, we think it was the duty of the learned trial judge to submit the case to the jury. While it may be that some officers or agents of the defendant acted in ignorance of what the others had done, this does not affect the question. If the company intended to treat the policy as a valid instrument, upon three different occasions, through at least two different agents, they

furnished some evidence of waiver which presented a question of fact. Without further comment, we think the judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur, except PARKER, O. J., not sitting. Judgment reversed, etc.

(187 N. Y. 33)

CONWAY v. CITY OF ROCHESTER et al.

(Court of Appeals of New York. Oct. 18, 1898.)

RAILROAD TRACKS IN STREETS—CONSTRUCTION OF PAVEMENT—LIABILITY OF ABUTTING OWNERS
—DUTY OF COMMON COUNCIL.

1. Laws 1890, c. 565, § 98, as amended by Laws 1892, c. 676, § 98, provides that "every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe"; and provides, further, that, in case of neglect to make pavements or repairs after 30 days' notice to do so, the local authorities may make same at the corporation's expense. *Held*, that an abutting owner is not liable for the cost of constructing a new pavement between the tracks and the rails thereof, and for two feet in width outside of same.

2. This section makes mandatory the duty of the common council to request a railway company to construct a pavement between its tracks, the rails of its tracks, and for two feet outside thereof, on a street or avenue, before the city makes a repavement.

Appeal from supreme court, appellate division, Fourth department.

Suit by John Conway against the city of Rochester, and others, composing its executive board, to restrain defendants from awarding a paving contract. An order vacating a temporary injunction was affirmed by the appellate division (49 N. Y. Supp. 244), and that court afterwards allowed an appeal to the court of appeals, and certified questions. Reversed.

John Desmond, for appellant. John F. Kinney, for respondents.

PARKER, C. J. The common council of the city of Rochester determined to pave, with asphalt, one of its streets that was in part occupied by the tracks of the Rochester Railway Company, over which its cars were operated. Before the ordinance was adopted to pave the street the officers of the railway company were waited upon, with the view of ascertaining whether the company would assist in paving the street. After consideration of the question, the officers decided that the company could not be compelled to contribute towards the expenses of repaving the street, and so advised the municipal authorities. The latter seemed to have reached the same conclusion, for they proceeded to take the necessary steps to pave the street

from curb to curb, without giving the Rochester Railway Company notice that it was required to pave the portion of the street within its tracks and two feet in width outside of its tracks. Thereupon plaintiff, who is a taxpayer in the city and also an abutting owner upon the street in question, instituted this suit, at the commencement of which a temporary injunction was granted restraining the defendants from awarding any contract for the making of such pavement. Subsequently an order was granted vacating the injunction, and an appeal taken from that order to the appellate division, which affirmed the order.

Thereafter, upon a motion made for a reargument and for leave to go to the court of appeals, the appellate division decided to allow an appeal to this court, and it certified two questions for our consideration: First. Are the abutting owners on Lyell avenue liable for the cost of constructing a new pavement between the tracks, and the rails of the tracks, and for two feet in width outside of the tracks, of the Rochester Railway Company? Second. Is the duty of the common council of the city of Rochester to request the Rochester Railway Company to construct a pavement between its tracks, and the rails of its tracks, and for two feet outside thereof, on Lyell avenue, before the city constructs such pavement, mandatory?

As the answer to these questions must be found in the statute, I quote section 98 of the general railroad law, which is applicable to the Rochester Railway Company: "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interests or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation, shall be liable to such city or village for a penalty not exceeding five hundred dollars to be specified in such ordinance or regulation." Laws 1890, c. 565, § 98, as amended by Laws 1892, c. 676, § 98.

We note, first, that the legislature by this statute intended to provide that so much of a street or avenue as should be within the tracks of any street surface railroad corporation, and for two feet in width outside such tracks, shall be kept in repair. The duty of

keeping such portion of the streets in permanent repair is not suggested or advised, but is commanded. So much of the statute certainly is mandatory.

It will next be observed that the party charged with the performance of the duty is specifically pointed out. The street surface railroad corporation continuing to use any of its tracks "shall," says the statute, "keep in permanent repair" such portion of the street. This language is mandatory. The municipal authorities are given no authority to relieve the railroad corporation of the whole or any portion of the needed repairs, or to impose the whole or any portion of the cost upon the abutting owners or the city at large.

Having provided that a given portion of a street occupied by a street surface railroad corporation shall be kept in permanent repair, and that the work shall be done by the corporation in actual occupation of the tracks, the statute next undertakes to provide a method by which the duty enjoined by the statute can be enforced in such a manner as will best protect the interests of the public in such streets, and so it declares that, when such repairs are made, they shall be made "under the supervision of the proper local authorities." But the power of the local authorities does not end with the right of supervision of the repairs made to such portion of a street by a surface railroad corporation. The legislature saw fit to vest in the local authorities the further right to determine when the repairs should be made and how they should be made. The statute provides that the corporation shall make such repairs under the supervision of the proper local authorities "whenever required by them to do so, and in such manner as they may prescribe."

Again, it will be observed that the language employed is mandatory so far as the railroad corporation is concerned. The local authorities may determine when and how the street shall be repaired, but when that is done the statute steps in, and says the railroad company is to do the work. As a safeguard against the neglect or refusal of a railroad corporation to repair a street in accordance with the determination of the proper local authorities, it is further provided that, "in case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation." Our examination of the statute then leads to the conclusion that, under section 98 of the railroad act, it became and was the duty of the Rochester Railway Company to keep in permanent repair such portion of the street though which it passed as was within its tracks and two feet in width outside, and that the local authorities of that city were vested with the authority of determining when the repairs should be made, and, thus empowered, the local authorities did determine that repairs should be made, and the character of them. They decided

that the entire street should be repaved, and that the material to be used should be asphalt. This they had the right to do, and when this determination was made the statute intervened, and commanded that the Rochester Railway Company should make the repairs thus ordered, under the supervision of the local authorities. In case of the neglect of the corporation to repave within 30 days after notice given it to do so, then the local authorities were to do the work at the expense of the corporation, while as to the rest of the street the charter of the city of Rochester conferred upon the local authorities power to pave it with asphalt, and charge the expense therefor upon the abutting owners and the city at large in the proportions provided; but they had no power to charge any portion of the expense of repairing that portion of the street which the statute says the street surface railroad shall keep in permanent repair upon either the abutting owners or the city at large.

It is our view of the statute, therefore, that the first question should be answered in the negative, and the second question in the affirmative, and thus a reversal of the order of the appellate division is required.

The learned appellate division seems to have been of the opinion that the conclusion reached by it was substantially required by the decision of this court in the case of *Gilmore v. City of Utica*, 121 N. Y. 561, 24 N. E. 1009. The statute which the court then had under consideration was very different, as we read it, from the one now before us. The plaintiff in that action contended that certain provisions of the charter of the city of Utica made it the duty of surface railroad companies to repave between their tracks, and two feet in width outside, whenever the common council should direct a repavement of the street; but this court held that the statute was not mandatory, but permissive; that the local authorities possessed the power to require railroad companies to make such pavement, but that the exercise of this power by the municipal authorities was discretionary. The provision of the charter then considered reads as follows: "The common council is hereby authorized to require all railroad companies operating street railroads in any of the streets of the city to repave between their tracks, and at least two feet in width on each side thereof, whenever the common council shall deem such repavement necessary. But nothing contained in this section shall be so construed as to impair any rights which have heretofore been granted to, or acquired by, the Utica City Railroad Company." Laws 1870, c. 28, § 79, subd. 5. It will be observed that this statute did not provide that the railroad company should keep any portion of the street in repair. It merely attempted to empower the common council to require the railroad companies to repave whenever it should deem repavement necessary. Whether the railroad company should

repave or not was, therefore, a question addressed to the discretion of the common council, and this court held that, having exercised that discretion against requiring the railroad company to repave any part of the street, the plaintiff had no legal ground of complaint. The attention of the court in the *Gilmore Case* was called to section 9, c. 252, Laws 1884, which is substantially like section 98 of the railroad law, and the court decided that section was not applicable to the Utica Belt Line Street Surface Railroad Company, because it was not operating its road under the act, and therefore the section had no pertinency. And the court also considered subdivision 5 of section 28 of the railroad law of 1850, which provided that the railroad company may construct its track "along or upon * * * any street or highway," but that the "company shall restore the street or highway * * * touched to its former state or to such state as not necessarily to impair its usefulness." It was properly said that while that statute requires the railroad company not only to restore the street, but to keep it in such a state of repair as not to affect its usefulness, still it does not enjoin upon the company the duty of repaving the street whenever the municipality shall require it. But the language of that section is very different from that of section 98 of the present railroad law, which does make it the duty of railroad companies to keep that portion of the street described in the statute in permanent repair, and does command that it shall make such repairs, not only whenever required by the local authorities to do so, but also "in such a manner" as they shall prescribe. The language employed by the legislature is broad enough to include repavement as well as repairs, and that it was thus used advisedly is further evidenced by the very next sentence, which provides that "in case of the neglect of any corporation to make pavements or repairs * * * the local authorities may make the same at the expense of such corporation." The order should be reversed, with costs, the first question certified answered in the negative, and the second in the affirmative. All concur. Order reversed, etc.

(157 N. Y. 50)

CITY OF JOHNSTOWN v. WADE et al.
(Court of Appeals of New York. Oct. 18, 1898.)

APPEAL—FINAL ORDERS—VACATING JUDGMENT.

An order denying an application to vacate a judgment entered in condemnation proceedings is not a "judgment or order finally determining an action or special proceeding," under the constitution and Code Civ. Proc. § 190, making only such orders appealable to the court of appeals.

Appeal from supreme court, appellate division, Third department.

Application by the city of Johnstown to vacate a judgment in a condemnation proceed-

ing against Mortimer Wade and others. From an order of the appellate division (51 N. Y. Supp. 763) reversing an order of the special term granting such application, plaintiff appeals. Appeal dismissed.

A. J. Nellis, for appellant. J. Keck, for respondents.

PARKER, O. J. The city of Johnstown, desiring to acquire for the purposes of a street certain real estate, the title to which was in Mortimer Wade, instituted this proceeding for that purpose. Some time thereafter an agreement was reached as to the value of the property; and, in pursuance of a stipulation of the parties, a final order was entered January 27, 1897, and the judgment awarding damages was finally docketed August 10, 1897. Later the municipal authorities reached the conclusion that, in the proceedings taken by the common council to open the street, certain steps had been omitted which the statute required, and therefore the assessment which might be levied upon property benefited to pay the award in the condemnation proceedings and other necessary expenses would be invalid. For the purpose of instituting all the proceedings anew, the city of Johnstown made application to the court at a special term, about November 15, 1897, that this proceeding, including the order and final judgment, be vacated and set aside. The special term so ordered, but on an appeal to the appellate division the order was reversed, and it is from the later order the appeal now before us is taken.

A number of questions are suggested for our consideration relating to the authority of the special term to entertain the application and to the merits of the application, but we cannot consider them for the reason that this court is without jurisdiction to review the order appealed from. While it is true it is the last order made in this special proceeding, it is not a final order in such proceeding, within the meaning of the constitution and section 190 of the Code. This precise question was before this court in *Van Arsdale v. King*, 155 N. Y. 325, 49 N. E. 866, in which case an order denying a motion to vacate a judgment was sought to be reviewed. As the question was exhaustively considered at that time by the court, it will not be reopened for further discussion. The appeal should be dismissed, with costs. All concur. Appeal dismissed.

(157 N. Y. 69)

In re GRAB.

(Court of Appeals of New York. Oct. 18, 1898.)

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS.

An appeal will not lie to the court of appeals from an order made at special term, and affirmed in the appellate division, appointing commissioners to ascertain the amount of dam-

ages sustained by a change of grade of a street, since it is not a final order. Code Civ. Proc. § 190.

Appeal from supreme court, appellate division, Second department.

Application by John Grab for the appointment of commissioners to determine compensation to which he is entitled, as owner of real estate in the incorporated village of New Rochelle, by reason of the change of grade of certain streets in said village. An order of the special term appointing commissioners was affirmed in the appellate division (52 N. Y. Supp. 395), and the village appeals. Appeal dismissed.

J. Addison Young, for appellant. Michael J. Tierney, for respondent.

PER CURIAM. John Grab, the owner of real estate in the village of New Rochelle, claiming to be aggrieved by a change of grade in the street in front of his property, instituted this proceeding for the purpose of securing damages which he claimed to have sustained. Such proceedings were had therein that the court, at special term, appointed three commissioners to ascertain the amount of the damages. From that order an appeal was taken to the appellate division, Second department, where it was affirmed, and from that order a further appeal was taken to this court. The appeal must be dismissed, for, while the order is in a special proceeding, it is not a final order, and therefore this court has not jurisdiction to review it. Code Civ. Proc. § 190. The appeal should be dismissed, with costs. All concur. Appeal dismissed.

(156 N. Y. 459)

**FIRST NAT. BANK OF PATERSON, N. J.,
v. NATIONAL BROADWAY
BANK et al.**

(Court of Appeals of New York. Oct. 4, 1898.)

PLEDGE—RIGHT TO HOLD—TRUSTEE'S POWERS—RIGHT TO TRUST PROPERTY—COLLATERAL ATTACK—LEX LOCI—COMMON LAW—PRESUMPTIONS.

1. Where a trustee of bank stock, in violation of his trust, pledges same for any one's benefit to one constructively notified of the trust, any inquiry short of an actual inspection of the trust deed will not entitle the pledgee to hold the same.

2. A trustee's power to sell and reinvest trust property does not include the power to pledge it.

3. The right of a trustee, judicially appointed, to the trust property, cannot be attacked collaterally.

4. Where a resident of Connecticut created a trust in that state by deed in favor of his children there, the rights of the beneficiaries are governed by the laws of Connecticut.

5. In the absence of proof, it is presumed that a statute of New York prohibitory of a common-law rule has not been enacted in another state, but that the common-law rule prevails.

6. In the absence of a statute prohibiting alienation of their interests by cestuis que trustent, where a trustee pledged bank stock held in trust for his wife for life, remainder to their children, as collateral for her note, dis-

counted by the pledgee, with her written authority and representation that she was the owner thereof, and the pledgee, on nonpayment thereof, sold the pledge to himself at public sale in accordance with the note, it is equivalent to a pledge by her of her separate interest in the trust, estopping her to claim an interest in the stock.

Parker, C. J., and Martin and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by the First National Bank of Paterson, N. J., against the National Broadway Bank and another, to compel a transfer to it of shares of capital stock of the Broadway Bank. A judgment for defendant Tuttle was affirmed by the appellate division (47 N. Y. Supp. 880), and plaintiff appeals. Modified.

The plaintiff commenced this action to compel the Broadway Bank to transfer to its name certain shares of capital stock issued to and standing in the name of Philo P. Hotchkiss, trustee. The defendant bank denied the plaintiff's ownership, and set up the claim of title made thereto by Seth M. Tuttle, as alleged trustee of the shares in succession to Hotchkiss. Tuttle was subsequently brought into the action, and made a party defendant, upon his application, in order to prosecute his claim of ownership. The general history of the trust is that in 1857 William H. Imlay, of Hartford, Conn., deeded certain Michigan lands to Chester Adams, of the same place, as trustee. By the terms of the trust he was to sell the lands, and to invest the net proceeds in good bank stocks in his own name as trustee, with power to sell such stocks, and to reinvest in other bank stocks. He was to pay the net income equally to Imlay's three unmarried daughters, for their sole and separate use, etc. The issue of any daughter was to take in fee the share held in trust for the mother, upon her death; and upon the death of one or more of the daughters, without issue surviving, the trust share or shares were to vest in the survivors or survivor. Adams, the trustee, died subsequently, leaving a will, wherein he appointed one Bartholomew as his successor in the trust, pursuant to a power to that effect contained in the trust deed. Subsequently Bartholomew resigned as trustee, and Hotchkiss was, by an order of the probate court of Hartford, Conn., appointed trustee in succession. At the time of his appointment, Alice, one of Imlay's daughters, had died, without issue, and her one-third share in the trust had vested in her two surviving sisters, Isabel and Georgiana. Isabel had also died, but left issue surviving, to whom her portion of the trust estate was paid. Georgiana married Hotchkiss, and has two daughters. When Hotchkiss was substituted as trustee under the deed of trust, the defendant Broadway Bank transferred the stock in question into his name upon receiving the order mentioned, which referred to the trust deed. Some time after his ap-

pointment, Hotchkiss, who held himself out as manager of Hotchkiss & Co., presented a note for \$12,000 of that firm, which the plaintiff discounted upon the pledge of collateral securities, which included the stock in question, and which were taken up, by means of the proceeds of the discounted note, from the Home Insurance Company, by which company the collaterals had been held to secure a former note of Hotchkiss & Co. The plaintiff received at the time a writing signed by Georgiana Hotchkiss, which authorized her husband to borrow on the "stocks standing in his name as trustee for my benefit, and owned by me." Subsequently, upon default in payment of the note, the plaintiff, pursuant to the terms of the stock note discounted by it, sold the stocks at public auction, and purchased them thereat. Upon requesting of the defendant bank a transfer of the stock and the issuance of a new certificate, the request was refused, and thereupon this action was instituted. Hotchkiss, having been convicted of grand larceny, and sent to prison, was removed as trustee upon the application of Alice Richards, a daughter of Georgiana Hotchkiss, the beneficiary of the deed of trust, and Tuttle was appointed trustee in his stead by an order of the supreme court in this state. The concern of Hotchkiss & Co., whose note was discounted by the plaintiff, appears to have consisted only of Georgiana I. Hotchkiss; the business being managed by Philo P. Hotchkiss.

Charles F. Brown, for appellant. William C. Beecher and George E. Waldo, for respondents.

GRAY, J. (after stating the facts). Upon these facts, which are undisputed, the courts below have held that Tuttle was entitled to the possession and transfer of the stock, and to the accrued dividends thereon. The conclusion as to the title to the property was reached upon the theory that, as the plaintiff received the stock with constructive notice that it was the subject of a trust, no title was acquired thereto which it could enforce, for the pledge was contrary to the terms of the trust. I think that so far we should agree in the decision of the learned justices below. It is clear enough, upon the facts proved, that the transaction with the plaintiff was for the benefit of Hotchkiss & Co., whose business Philo P. Hotchkiss, the trustee, was conducting for his wife as the sole member of the firm. It was a loan or an advance of moneys to that concern upon its note, secured by a pledge of the trust stock, among other things. It is not a material circumstance that the moneys were in fact paid to the Home Insurance Company, and not to Philo P. Hotchkiss, the trustee, or to the firm of Hotchkiss & Co. They were so paid in order that Hotchkiss & Co. might pay and take up their former note, which

had been given upon the Home Insurance Company's loan to them, and to release the collateral securities. Despite the circuitry of payment, it was none the less a loan or an advance of moneys to Hotchkiss & Co.

I do not understand the appellant as disputing the general rule, which imposes upon a party dealing with a trustee, in respect of the estate in his hands, the duty of inquiry as to the character of the trust, and a consequent responsibility for the property received, if it turns out that a reasonable inquiry would have disclosed that the property had been transferred in violation of the duty or power of the trustee. Nor does the appellant appear to dispute that the presence of the word "trustee" upon the stock certificate was, of itself, notice of the character of the property, and sufficient to put the plaintiff upon inquiry as to Hotchkiss' authority to pledge it. The argument is that this is not a case where the appellant can be held under the doctrine of a constructive notice of the terms of the trust created by Imlay's deed, and it is, in effect, argued that, as there was an absence of gross negligence in the plaintiff, in that its duty of inquiry was performed in the way that an ordinarily prudent and careful man would pursue in his own affairs, the rule in this class of cases was satisfied. In support of this contention it is urged that the facts disclose that the trustee was not dealing with the trust property for his own benefit; that the moneys were paid to a third party, whose relations were with Hotchkiss as trustee; and that, as the securities did not suggest an inquiry into the deed of trust, inquiry short of that would show that the securities were, apparently, the property only of Georgiana herself, which she had competently authorized her husband, as trustee for her, to dispose of in this way. My consideration of this case does not lead me to the opinion that the argument is effective. Hotchkiss was not examined as a witness, and the plaintiff's president, who conducted the transaction with him, was dead, so that their evidence is lacking to show what inquiry was made, or what the extent of information disclosed, at the time. The court therefore is more or less remitted to the presumptions which arise from the known facts of the transaction, and which it is bound to entertain in view of the settled rule of law. Any person who receives property knowing that it is the subject of a trust, and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust, but also of the trustee, to reclaim possession of the property. Knowledge of the trustee's violation of the trust conditions will be chargeable to the person dealing with him, if the facts were such as, in reason, to put him upon inquiry, and to require him to make some investigation, as the result of which the true title and authority of the trustee might have been disclosed. He will

then be regarded as having constructive notice of the terms of the trust, whence the trustee derives his power to act. Reference may be had to the following text-books and decisions as showing the general rule under which those dealing with trustees are affected with notice of the terms of the trust: 1 Story, Eq. Jur. § 400; 2 Perry, Trusts, § 831; *Acer v. Westcott*, 46 N. Y. 384; *Wetmore v. Porter*, 92 N. Y. 77; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115; *Kirsch v. Tozler*, 143 N. Y. 390, 38 N. E. 375; *Anderson v. Blood*, 152 N. Y. 285, 46 N. E. 493; *Duncan v. Jaudon*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 382. In *Story, Eq. Jur. § 400*, it is laid down that "a purchaser is * * * supposed to have knowledge of the instrument under which the party with whom he contracts as executor, or trustee, or appointee derives his power"; and quite lately this court has affirmed that doctrine. *Suarez v. De Montigny*, 1 App. Div. 494, 37 N. Y. Supp. 503, affirmed on opinion below, 153 N. Y. 678, 48 N. E. 1107. Such an inquiry was called for in this case as was reasonably possible to the plaintiff, in order to discover what was the character of the trust impressed upon the property, and if there was a right in the trustee to use it by way of pledge for a loan or an advance of moneys for the benefit of Hotchkiss & Co. The proof shows that that the Broadway Bank, whose stock was offered to be pledged, had transferred the title thereto to Hotchkiss as trustee, upon the requirements of an order of the Connecticut court, which appointed him as trustee in succession to a prior trustee. This order referred to "the matter of the Imlay trust, dated January 17, 1857," and also to the will of Adams, wherein Hotchkiss' predecessor in the trust was appointed trustee in succession to Adams, "as provided in said trust deed." An examination of the petition for Hotchkiss' appointment and of Adams' will would, presumably, have disclosed further facts about the trust deed; but, as a muniment of his title and authority, it is to be presumed that Hotchkiss had it in his possession, or could have produced it, or an authenticated copy. Its examination would have shown that the only power which the trustee had to deal with the trust securities was to sell the same, and invest the proceeds thereof in other good bank stocks "in his own name as trustee." It would have shown that Georgiana's interest in them was only that of a life beneficiary, and that the principal of the trust belonged to her issue in remainder, or, contingently, to others. Shall we say that the plaintiff's duty of inquiry terminated when it ascertained what authority the trustee had from Georgiana, the cestui que trust, and that it was not bound to ascertain the extent of the authority conferred by the trust instrument itself? I think that would be a dangerous precedent to establish, and one as unsound in principle as unsupported by authority. The very order directing the Broad-

way Bank to transfer the stock into Hotchkiss' hands as trustee, had it been examined, would have disclosed that Georgiana, who authorized the pledging of the stock, was described as "the only person directly interested in the trust"; and that phraseology, by inference, suggested that there were others who might be interested in its conduct.

I cannot agree with the distinguished counsel, who has presented the case so ably for the appellant, in thinking that his client would have performed its reasonable duty in the matter of inquiry if it had stopped at any step short of the inspection of the trust instrument itself, and that it was warranted in accepting and acting upon the statements and declarations of the trustee and of Georgiana Hotchkiss, the cestui que trust, and in presuming from the order appointing Hotchkiss as trustee that she resumed in herself all the interests in the trust, and was, in fact, the owner of the stock. I think, in the absence of evidence of what was done, by way of inquiry, the court is bound to presume that the plaintiff went as far as there was a clue to lead it which was, in its nature, such as to suggest to a person of ordinary prudence and care in business transactions that proceeding further would settle any question of just what the trust authority was. Had the Broadway Bank been inquired of, the plaintiff would certainly have been put in the way of discovering the facts. I see nothing unreasonable in holding the plaintiff to such a rule of diligence as would require the examination of the trust instrument before it undertook to loan moneys upon trust property in behalf or for the benefit of any person. See *Duncan v. Jaudon*, supra, at page 175. The burden was upon it to prove what inquiry was made, and, failing that proof, the presumption should obtain that it was made up to the instrument of trust itself, an inspection of which would show that the trustee could not pledge the trust securities. Lord Chancellor Cranworth observed, in *Ware v. Egmont*, 31 Eng. Law & Eq. 89-97, that "the question, when it is sought to affect a person with constructive notice, is not whether he had the means of obtaining, and might, by prudence and caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." Adopting that standard of duty, I think we may say of the plaintiff that it was culpably negligent not to investigate the right of the trustee under the trust instrument to pledge property affected upon its face with notice of a trust. Doubtless, the circumstances of each case must determine whether the person has acted prudently and cautiously. Whether he was constructively notified in the transaction with the trustee, may depend upon how far those circumstances pointed out the path of inquiry.

On the face of this stock, the plaintiff's attention was called to the fact that it was

dealing with a trustee, and inquiry of the Broadway Bank would have produced the order appointing Hotchkiss trustee "in the matter of the Imlay trust, dated January 17, 1857." It then became chargeable with the knowledge of such facts about the trustee's duty and power as would have been revealed by such an inquiry as a prudent regard for the rights of others, if not for its own interest, would, naturally, dictate. That a knowledge of the limitations of the trustee's power of disposition would have, or should have, deterred the plaintiff from advancing moneys to a business concern upon a pledge of the stock, is not to be doubted. That such knowledge was obtainable, if not through the trustee himself, then through other available means, is also clear. So that, as it seems to me, we have a case presented where, if the course had been pursued by the plaintiff which was incumbent upon it, under the circumstances, it would have been informed of the trust conditions which forbade the trustee from pledging the property for a loan. The pledge was not for the benefit of the trust on its face, and we may not presume that it was. But there was no power at all to pledge, for such a power is not included in a power to sell and to reinvest. *Insurance Co. v. Bay*, 4 N. Y. 9-19. Nor can any such intention be predicated upon the language of the trust instrument. To the contrary, it seems evident, from the disposition directed to be made of the proceeds of a sale by their reinvestment, that the settlor of the trust did not intend that the trust securities should be pledged. The trustee took the legal title to the trust property on a trust which did not authorize him to pledge it. *Cumming v. Williamson*, 1 Sandf. Ch. 17-25.

So far as the appellant seeks to attack the title of Tuttle, the trustee appointed in succession to Hotchkiss, and his claim to the securities, I think we must agree with the view taken by the court below. Whatever may be argued respecting the validity of Tuttle's appointment as trustee, it is not open to the plaintiff to question it. The appointment is good until it is set aside in a proceeding for the purpose, and may not be the subject of collateral attack. *People v. Norton*, 9 N. Y. 176. If the plaintiff never acquired a good title to the trust property and could not retain it against the claim of the cestui que trust, or the trustee, how is it in a position to complain of any invalidity in the appointment of the new trustee, as against a decree of the court directing the transfer of the property to him? Having no right to compel the transfer to it, certainly it has no interest in the question into whose possession it shall be decreed.

But I do not think we should affirm the judgment below in so far as it denies the plaintiff's claim upon the life interest or Georgiana Hotchkiss in the dividends accumulated and to be declared upon the stock. The learned justices below have denied the

claim upon the ground that her interest as beneficiary of the trust was inalienable under the Revised Statutes (1 Rev. St. p. 729, § 63). That would be perfectly true if the trust could be regarded as governed by the laws of this state, but I am unable to so regard it. The trust was created in Connecticut, by a resident of that state, in favor of his children there. Adams, the trustee named in the deed of trust, was domiciled in Connecticut, and by his will, probated there, he appointed his successor in the trust as directed by the deed. Hotchkiss was appointed trustee, in further succession, by an order of a court of that state. The transaction of loan by the plaintiff itself was in New Jersey. Under these circumstances I do not see how the questions relating to the interests of the beneficiary in the trust are to be dealt with according to the provisions of our statutes. What the law of the state of Connecticut may be concerning them, as affected by any legislative enactments, we are not informed by the proofs in the case. Section 63 of our Revised Statutes (1 Rev. St. p. 729) effected a change in the common-law rule, which permitted the alienation of their interests by cestui que trust; and, in the absence of proof upon the subject, we may not indulge in the presumption that the prohibitory provisions of our statutes have been enacted in Connecticut. *Leonard v. Navigation Co.*, 84 N. Y. 48; *Vanderpoel v. Gorman*, 140 N. Y. 563, 35 N. E. 932. It is to be presumed that the common-law rules in equity still obtain there. Under the common law a wife had complete capacity to dispose of her separate estate, and, if she was the beneficiary of a trust, she was capable of charging her equitable interest to the extent that it was not inconsistent with the terms of the trust instrument. *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34-37; *Yale v. Dederer*, 18 N. Y. 265; *Dyett v. Trust Co.*, 140 N. Y. 54-65, 35 N. E. 341. By this deed of trust the settlor's only apparent intention as to his daughters' enjoyment and disposition of their interests is that they should have the sole and separate use, free from their husbands' control or interference. When the plaintiff made the loan of money upon the note of Hotchkiss & Co., it was upon a written authorization of Georgiana Hotchkiss to her husband that he might "borrow" on certain named stocks "standing in his name as trustee for my benefit and owned by me." She was the person dealing under the firm name of Hotchkiss & Co., and had filed her certificate to that effect, as required by the laws of the state. Thus we have a transaction entered into by the plaintiff presumably in reliance upon the representations of Georgiana, the beneficiary, and for the benefit of a business concern which was legally hers. I think she is estopped by her acts from setting up any claim to the income upon the stock received, and which may be hereafter, during her life, received, by way

of dividends, by the trustee. If this were not so, then the court would be aiding her in the perpetration of a fraud upon the plaintiff. That the writing signed by her, and upon which the plaintiff's officers acted in dealing with Hotchkiss, was a disposition or pledge, by his wife and beneficiary, of her separate interest in the trust, I entertain no doubt, and to hold otherwise would be highly inequitable. I am not without some hesitation upon this phase of the case, because I am mindful of the policy of the state, as declared in the enactment of a statutory provision so beneficent and protective in its character as section 63; but I cannot regard this case as one which comes within the sphere of any state policy. I look upon the question as simply one of a trust created in, and governed by the laws of, a foreign state, as presumed, if not proved, and nothing appears to prevent our giving effect to the act of Georgiana Hotchkiss, the beneficiary, in disposing as she did of her interest. The conclusion I reach, therefore, is that this judgment should be modified so that it shall adjudge that the dividends upon the stock in question, accumulated and to be declared, shall be paid to the plaintiff during the lifetime of Georgiana I. Hotchkiss, and, as so modified, the judgment should be affirmed, without costs of this appeal to any party save to the defendant Broadway Bank, to be paid out of the fund.

O'BRIEN, BARTLETT, and HAIGHT, JJ., concur. PARKER, C. J., and MARTIN and VANN, JJ., dissent.

Judgment modified.

(156 N. Y. 474)

CONABEER v. NEW YORK CENT. & H. R. R. CO. et al.

(Court of Appeals of New York. Oct. 4, 1898.)

RAILROADS—RIGHT OF WAY—FAILURE TO USE—USE OF STREET—ABUTTING OWNER'S CONSENT—EFFECT—INJUNCTION—RIGHTS OF OWNER'S GRANTEE.

1. A railroad company's mere failure to immediately use a grant of right of way to its full extent is not a waiver or abandonment thereof.

2. A landowner granted a railroad company a right of way through her land, and through the center of a proposed street, which was subsequently opened by the municipality, which assumed to acquire title to the property embraced in the grant, making an award therefor, but recognizing the right of the company to use the same. *Held* that, whether or not the city acquired title, and the rights of the railroad company passed with it, the right to use the street for a railroad still existed, and the owner and her grantees were bound by the grant.

3. Where an abutting owner is bound by the consent of his grantor to the use of a street for a railroad, he cannot enjoin the construction of additional tracks on the ground that they would constitute an additional burden, if it does not appear that the same traffic might not be conducted on the tracks already laid.

4. Where one purchased a lot with constructive notice of a right to use the street in front for a railroad, and actually knew the extent of the use, which was unchanged for many years, he is presumed to have bought in contemplation of the burden, and hence cannot claim any loss by being deprived of otherwise appurtenant easements.

Appeal from supreme court, general term, First department.

Action by Hannah Conabeer against the New York Central & Hudson River Railroad Company and the New York & Harlem Railroad Company. From a judgment of the general term (32 N. Y. Supp. 6) affirming a dismissal of her complaint, plaintiff appeals. Affirmed.

This action was commenced on the 20th of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof. In 1807, by chapter 115 of the Laws of that year, three commissioners were appointed, who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April 1, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of the width of 60 feet, and Fourth avenue of the width of 100 feet. That act also provided that the map, plans, and surveys so made and filed should be final and conclusive as to the mayor, aldermen, and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map, these streets remained unopened, and had no existence, except that which resulted from their being designated as such on the map. In 1831, by a special act of the legislature (chapter 263), the New York & Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-Third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad, and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed

upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that, in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city. The provisions of this act were complied with by the New York & Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-Third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its road over Fourth avenue. It obtained the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor December 22, 1831. At that time the locality which included the premises in question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the 18th of January, 1832, Mrs. McGown conveyed to the New York & Harlem Railroad Company and its successors a portion of the land owned by her, consisting of 24 feet of land running through the center of Fourth avenue, between Ninety-Seventh and One Hundred and Sixth streets, for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much further beyond the line of the premises granted as might be necessary to support its work,—not, however, to extend beyond the width of the avenue, which was 100 feet. Some time anterior to 1835 the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased 16 feet on each side, and accommodated two additional tracks. In 1835 the matter of widening Fourth avenue from 100 to 140 feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked, was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to 140 feet.

Fourth avenue was not opened until nearly 20 years after the construction of the defendants' road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each of the lots across which it passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened, in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York & Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legislature passed an act to improve and regulate the use of Fourth avenue, in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels, and openings as were therein described. It provided that from Fifty-Sixth to Ninety-Sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose of facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct, and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-Second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclusively for the uses and purposes of the railroad company, and that the legislature might at any time alter, amend, or repeal that act. This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that

point consisted in taking down the old viaduct, and erecting a new one of the same height, but 56 feet wide. It was completed in 1873, in which year the New York & Harlem Railroad Company leased to the New York Central & Hudson River Railroad Company its railway for 401 years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, 14 years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot, at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832, when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building, used as a dwelling house. Since June, 1887, she has been the owner in fee and in possession and occupancy of the premises thus purchased. Since the lease to the New York Central & Hudson River Railroad Company, it has maintained and operated the railroad upon such viaduct, and runs thereon a large number of trains during the day and night drawn by locomotives; and, in its operation steam, smoke, noxious, and unpleasant gases, vapors, coal, soot, cinders, ashes, and sparks have been and are frequently emitted from such locomotives, which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady, and natural passage of light is interrupted; and dark shadows and bright flashes of light are produced. The viaduct and railway structure are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use, and operate a railroad thereon. The viaduct is about 40 feet from the building line upon Fourth avenue. Of this, 25 feet in width on each side are used as a roadway for teams, carriages, and other vehicles, and 15 feet as a sidewalk. The street line is now 42 feet from such viaduct, while before the widening of Fourth avenue the street line was fully 38 feet from the viaduct, as first constructed.

Joseph Ullman, for appellant. Ira A. Place, Alexander S. Lyman, and Hamilton Harris, for respondents.

MARTIN, J. (after stating the facts). It is obvious that, when the deed by Mrs. McGown to the New York & Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided, not only that the grantee should have 24 feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment

to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus, the property now owned by the plaintiff, which adjoins Fourth avenue, became burdened with the easement or right of the company to maintain and operate its railroad at that place, so that neither the owner nor her grantee could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance. The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light, and air were obstructed, except in the manner stated. Therefore the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would. It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's and the defendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain, and operate its road in the center of the avenue, where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place, to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and there was upon her part an irrevocable grant to the New York & Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances

or injuries resulting from the operation of the road. When that right was granted, Fourth avenue was but 100 feet in width, and the viaduct or embankment first constructed by the defendants was at most but 38 feet from the exterior street line. Since that time the street has been widened to 140 feet, so that the street line is now 42 feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York & Harlem Railroad Company used only 26 feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by nonuser, unless there is a loss of title in some of the ways recognized by law. Mere nonuser, however long continued, does not create an abandonment. *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. 696. Therefore, as between the plaintiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt, and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air, and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendants effected such a release and abandonment is obvious. *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887; *Foot v. Railroad Co.*, 147 N. Y. 367, 42 N. E. 181; *Ward v. Railroad Co.*, 152 N. Y. 39, 46 N. E. 319.

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the Laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorpora-

tion, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights were reserved and granted, subject to the approval of the mayor, aldermen, and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred, the New York & Harlem Railroad Company purchased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street, and opened on each side of the defendants' railroad streets for teams and foot travelers, as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire the title of the New York & Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street, and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and hence that the deed from Mrs. McGown to the New York & Harlem Railroad Company was abrogated, and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was, at least, an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists; and, as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened, in 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never reversed in her, and, consequently, neither she nor her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting a plan for the improvement of Fourth avenue. By that act the railroad

corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers of the municipality were forbidden to obstruct the improvement or the use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose, and to the width of the present structure; so that, unless the plaintiff has some right in the street which is superior to that of the defendants, and to the combined power of the legislature and municipality, this action cannot be maintained. It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and, as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining, and operating their railroads, was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown, and the combined authority of the legislature and municipality. "The legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." *Wormser v. Brown*, 149 N. Y. 163, 171, 43 N. E. 524, 526. As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequential damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. *Fobes v. Railroad Co.*, 121 N. Y. 505, 518, 24 N. E. 919. Where a railroad is built in a public street or highway with proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 436; *Conklin v. Railroad Co.*, 102 N. Y. 112, 6 N. E. 663. The cases of *Reining v. Railroad Co.*, 128 N. Y. 157, 28 N. E. 640, and *Egerer v. Railroad Co.*, 130 N. Y. 108, 29 N. E. 95, in no way impair the doctrine of the *Uline* and *Conklin* Cases; nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that,

before an established street can be closed against such owner, he would be entitled to compensation. In the case at bar, the street, at the place where the defendants' railroad was constructed, was never opened or used as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street, for the purposes for which it was used, and the appropriation of the street was held to be illegal; while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York & Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee to the 24 feet of land deeded by Mrs. McGown to the New York & Harlem Railroad Company. In whomsoever the mere naked title to the 24 feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiff's grantor, was not intended to be affected, but to remain in the defendants as a protection to their right, so long as the road was operated in that avenue, and the time mentioned in the grant had not expired. Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank-Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302, this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air, and access. In *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524, this court determined that an interference with the view from the plaintiffs' windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court

in which the action originated. In *People v. Com'rs of Taxes*, 101 N. Y. 322, 4 N. E. 127, the judgment of this court was to the effect that the tunnels, tracks, superstructure, substructures, stations, viaducts, and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in view of the fact that the city was forbidden to obstruct the improvement or the use of Fourth avenue above Forty-Second street for that purpose. Under the circumstances of this case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York & Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets 42 feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from 26 to 56 feet was an additional burden upon the plaintiff's land, and therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized, and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air, and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties, and covered by her grant. Moreover, when the plaintiff purchased her premises, the defendants' viaduct had existed for many years; had occupied the entire portion of the street where it now stands, and was used substan-

tially as when this action was commenced. She purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and hence lost nothing by being deprived of any of her otherwise appurtenant easements. Under these circumstances, we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court, and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion. The judgment should be affirmed, with costs. All concur, except PARKER, C. J., not sitting. Judgment affirmed.

(157 N. Y. 60)

STANDARD FASHION CO. v. SIEGEL-COOPER CO. et al.

(Court of Appeals of New York. Oct. 18, 1898.)

SPECIFIC PERFORMANCE—CONTRACT REQUIRING EXERCISE OF SPECIAL SKILL—PARTIAL RELIEF—INJUNCTION—BILL—DEMURRER.

1. A contract requiring the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment, but involving no public interest, will not, as a rule, be specifically enforced in equity.

2. A manufacturer of paper patterns entered into a contract with defendant, a dealer, whereby the latter was appointed its agent for a certain term for the sale of its patterns in his store, defendant covenanting not to sell, or allow to be sold, on his premises, during the life thereof, any other make of patterns. *Held*, that while the court might refuse specific performance of the contract in its entirety, as impracticable, it might grant an injunction, on equitable conditions, restraining defendant from selling patterns of another make.

3. Where a bill for specific performance sets forth a cause of action in equity, a demurrer thereto should not be sustained because the court would be justified, in its discretion, in refusing specific performance in view of the nature of the contract, and the difficulties attending its enforcement.

Appeal from supreme court, appellate division, First department.

Action by the Standard Fashion Company against the Siegel-Cooper Company and the Butterick Publishing Company, Limited, for the specific performance of a contract. From an order of the appellate division (52 N. Y. Supp. 433) reversing an interlocutory judgment sustaining separate demurrers to the complaint, defendants, by permission, appeal. Affirmed.

The complaint, after setting forth the corporate character of each party to the action, alleges: That the plaintiff and the defendant the Butterick Publishing Company are rivals and competitors in the business of preparing and selling paper dress patterns and designs. That the defendant the Siegel-Cooper Company is engaged in the business of selling at retail all articles required by people for consumption and use, and that it occupies and carries on the greatest department store in the world, covering half a block in the city of New York. That on the 16th of July, 1897, the plaintiff and the Siegel-Cooper Company entered into an agreement, of which, omitting the formal parts, the following is a copy: "The Siegel-Cooper Company is hereby appointed an agent for the sale of Standard patterns and Standard fashion publications for a term of two years from the date the contract goes into effect, and said term to be extended from year to year thereafter until closed by three months' notice in writing by either party, to be given within thirty days after said two years or any one year thereafter. The Standard Fashion Company agrees to conduct at its own expense and risk a pattern department on the ground floor of the Siegel-Cooper Company's store on Sixth avenue and 18th street, New York City, said Standard Fashion Company furnishing its own employes, such employes to be subject to the employes' rules of the Siegel-Cooper Company. The Standard Fashion Company further agrees to furnish, free of charge, not less than two hundred and fifty thousand eight-page fashion sheets, of the kinds sold at ten dollars per thousand, to the Siegel-Cooper Company, per annum, as long as this contract continues, and to print the advertisements of said Siegel-Cooper Company on front and back thereof without charge, to be changed monthly, if so desired; such fashion sheets to be distributed by the Siegel-Cooper Company from its store, or from pattern counter or any other of the business, without expense to the Standard Fashion Company. The Siegel-Cooper Company to furnish wrapping paper and twine, free delivery, and other store facilities. Said Siegel-Cooper Company agrees not to sell, or allow to be sold, on its premises during the duration of this contract, any other make of paper patterns. Siegel-Cooper Company agrees to pay over to the Standard Fashion Company two-thirds of all the moneys received from the sale of patterns and fashion publications, making weekly settlements with the Standard Fashion Company, said Siegel-Cooper Company to make no charge for cashing. The remaining one-third to be the remuneration of said Siegel-Cooper Company for the permission to the Standard Fashion Company to conduct said department. The said Siegel-Cooper Company agrees to allow the use of the present pattern fixtures and the present position for paper patterns, but, in case a change of location should be deemed advisable, such new loca-

tion not to be less prominent, nor to occupy less space, than the present one, except between Thanksgiving and Christmas of each year. This contract to go into effect either on September 12th or December 12th, 1897, according to the choice of said Siegel-Cooper Company, such choice depending upon the question of whether the contract between the said Siegel-Cooper Company and the Butterick Publishing Company, now existing, will be terminated in September or December of this year. The Standard Fashion Company agrees to assume all risk of loss by fire, water, etc., or risk of theft, or other unforeseen damage to or destruction of pattern stock, and to hold the Siegel-Cooper Company harmless in that respect. Said Siegel-Cooper Company to make, at the expense of the Standard Fashion Company, frequent mention of the fact that they are agents for the sale of the Standard patterns in its daily New York newspaper advertisements, and also to allow reasonable display of attractive show cards and signs furnished by the Standard Fashion Company, and subject to the approval of said Siegel-Cooper Company, at convenient places in its store; the expense of such signs to be entirely borne by the Standard Fashion Company." The complaint further alleges that said agreement "as defendant the Siegel-Cooper Company well knew, at the time it was entered into," was for the purpose of securing to the plaintiff the great advantage and prestige to be obtained from the sale of its paper patterns exclusively in said store, and to prevent the Siegel-Cooper Company from selling or allowing to be sold on its premises any make of paper patterns other than those of the plaintiff. After alleging willingness to perform on its part, the plaintiff alleged refusal to perform on the part of the Siegel-Cooper Company, and that it has entered into an agreement with its co-defendant to sell in said store the paper patterns made by the Butterick Publishing Company, during the whole or part of the term of the agreement made with the plaintiff; that it has given notice that it will not sell the paper patterns of the plaintiff, nor allow the plaintiff to sell its paper patterns in said store, nor permit plaintiff to enter or occupy said store, or any part thereof; that the Butterick Publishing Company knew of said agreement with the plaintiff, and induced the Siegel-Cooper Company to break the same, promising to save it harmless against any recovery by the plaintiff on account of the said breach, and to defend at its own expense any action brought on account thereof; that the plaintiff will be put to irreparable loss and injury if the Siegel-Cooper Company is suffered to break its agreement; that it will be damaged in its business if that company sells the patterns of the Butterick Publishing Company, the rival and competitor of the plaintiff, by loss of the prestige aforesaid, as well as by the loss of receipts from the sales of its patterns in said store in a manner altogether impossi-

ble to be compensated for in an action for money damages, and that in no place can the plaintiff obtain the same advantages for the sale of its patterns as in said store. The relief demanded is that the Siegel-Cooper Company be required to specifically perform its contract with the plaintiff, and that both defendants be restrained from selling in said store any paper patterns except those made by the plaintiff "from December 12, 1897, to December 12, 1899, and for three months thereafter." There is also a prayer for damages and general relief. The separate demurrers interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action were sustained at special term, but upon appeal the appellate division reversed the interlocutory judgment entered below, holding that, while the plaintiff could not have a specific performance of the contract, as it would impose too great a burden upon the court, still it was entitled to an injunction to enforce a negative covenant of the Siegel-Cooper Company that it would not sell, or allow to be sold, on its premises, during the duration of the contract, any other make of paper patterns. The defendants appealed to this court by permission of the appellate division, which certified the following question: "Does the complaint in this action state facts constituting a cause of action against either of the defendants?"

Edward C. Perkins and Thomas M. Debevoise, for appellants. John M. Bowers and James W. Gerard, Jr., for respondent.

VANN, J. (after stating the facts). Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty. *Marble Co. v. Ripley*, 10 Wall. 339, 358; *Beck v. Allison*, 56 N. Y. 366, 370; *Gervais v. Edwards*, 2 Dru. & War. 80; *Blackett v. Bates*, 1 Ch. App. 117; *Fargo v. Railroad Co.*, 3 Misc. Rep. 205, 23 N. Y. Supp. 360; *Pom. Spec. Perf.* § 312; *Fry, Spec. Perf.* § 69. An exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute, and promote the general welfare. *Joy v. St. Louis*, 138 U. S. 1, 47, 11 Sup. Ct. 243; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 144 N. Y. 152, 39 N. E. 17. When the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail. But even if, upon a trial of the action, specific performance of the contract in its entirety were refused as impracticable, still the bill

should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendants from violating the negative and severable covenant of the Siegel-Cooper Company that it would not "sell, or allow to be sold, on its premises, during the duration of this [the] contract, any other make of paper patterns" than those of the plaintiff. The learned appellate division, one of the judges dissenting, overruled the demurrers on this ground, holding that the court should extend its remedy as far as it is able, and thus prevent the principal defendant not only from making money by breaking its agreement, but from inflicting a double wrong upon the plaintiff by depriving it of the right to sell, and conferring that right on a business competitor. We think this is a sound and just conclusion, because it will compel the Siegel-Cooper Company to either perform its agreement or lose all benefit from breaking it, and at the same time will shield the plaintiff from part of the loss caused by the breach, if persisted in. *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Donnell v. Bennett*, 22 Ch. Div. 835; *Montague v. Flockton*, L. R. 16 Eq. 189; *Singer Sewing-Mach. Co. v. Union Buttonhole & Embroidery Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904; *Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516, 521; *Goddard v. Wilde*, 17 Fed. 846; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 423, 429; *Telegraph Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13.

The injunction, when granted, may not be absolute, but may be based on some equitable condition that will prevent either party from taking advantage of the other, such as the waiver by the plaintiff of the breach of the contract by the principal defendant. The question raised by the demurrer does not relate to any matter of discretion or propriety, but to the power of the court to grant any relief, conditional or otherwise. We are satisfied with the opinion below upon the subject, and should adopt it as our own without comment, but for a point, not thus far considered, which seems to us a conclusive answer to the demurrers, and which, if overlooked, might lead to some confusion. The action is for the specific performance of a lawful contract, duly executed by both the parties thereto. It is capable of performance by both, and there is no reason for nonperformance by either. A court of equity has jurisdiction of such actions, and the complaint sets forth the contract,—readiness to perform on one side, a refusal to perform on the other,—and facts showing no adequate remedy at law. A complete cause of action is, therefore, alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require a multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion, to exercise it.

It confers no right upon either party. The court does not refuse to act because the defendants object to its acting, for it would refuse, under the circumstances, if both parties requested it to proceed; but it refuses because the execution of its decree would require protracted supervision. It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate. The office of a demurrer is to sweep away a defective pleading, and in the case before us it attacks the substance of the complaint; yet the complaint is good in substance, for it sets forth a cause of action in equity. While it is true that the court, in its discretion, may not hear the cause, or, after hearing, may refuse relief owing to the difficulty of enforcing its decree, still this does not make the complaint defective, nor authorize a general demurrer, which "must be founded upon the absolute, certain, and clear proposition that, taking the charges in the bill to be true, the bill would be dismissed at the hearing." *Beach, Mod. Eq. Prac.* § 225. Upon the facts before us, it is in the power of the court to enforce the agreement the same as in the case of railroad contracts, but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, as there is no public interest involved. As there was complete jurisdiction and a perfect cause of action against both defendants, the demurrers must be overruled. *Coatsworth v. Railway Co.*, 156 N. Y. 451, 51 N. E. 301. The order of the appellate division should be affirmed, with costs, and the question certified answered in the affirmative. All concur. Order affirmed.

(187 N. Y. 42)

PEOPLE ex rel. CITY OF AMSTERDAM v. HESS et al., Assessors.

(Court of Appeals of New York. Oct. 18, 1898.)

TAXATION—EXEMPTIONS—PROPERTY OF 'CITIES'—WATERWORKS.

Laws 1896, c. 906, §§ 3, 4, making all property in the state taxable unless exempt from taxation by law, and exempting all property of a municipal corporation from taxation except the portion of such property not within the corporation, make a waterworks system owned by a city, and located outside its boundaries, subject to taxation.

Appeal from supreme court, appellate division, Third department.

Action by the people, on the relation of the city of Amsterdam, against Henry E. Hess and others, assessors of the town of Perth. Fulton county. From an order of the appellate division (50 N. Y. Supp. 1132) reversing an order of the special term adjudging that an assessment of relator's property is illegal, relator appeals. Affirmed.

Nisbet & Hanson, for appellant. J. Keck, for respondents.

BARTLETT, J. A single question is presented on this appeal. The assessment sought

to be reviewed was laid under the provisions of chapter 908 of the Laws of 1896, known as the "Tax Law," which took effect June 15th of that year. The property assessed is the waterworks system of the relator, the city of Amsterdam, located in the town of Perth, consisting of water pipe, conduit lines, and about two acres of land used for dams. It is conceded that prior to this statute the property assessed was not liable to taxation, as it was held by a municipal corporation for public use. This exemption rested on no statutory provision, but upon a principle of the common law supported by numerous cases in England and this country. We are of opinion the tax law of 1896 has changed this rule, and that property held by a municipal corporation for public use, but located beyond the boundaries of the municipality is subject to general taxation. Section 3 of the tax law of 1896 reads as follows: "Property Liable to Taxation. All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." This is a substitute for the old statute (1 Rev. St. p. 387, § 1), which reads: "All lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." The old statute was construed as not embracing municipal corporations, and that all property held by them for public use was exempt. *City of Rochester v. Town of Rush*, 80 N. Y. 302, and cases cited; *People v. Board of Assessors*, 111 N. Y. 505, 19 N. E. 90. The present statute is more comprehensive in its terms, and provides that all real and personal property within this state is taxable, unless exempt from taxation by law. This clearly embraces the property owned by municipal as well as other corporations, and subjects it to taxation unless exempt by law. Section 4 of the present law reads as follows: "Exemption from Taxation. The following property shall be exempt from taxation." Then follow 17 subdivisions. It is only necessary in this connection to call attention to the first three. One exempts property of the United States; two, the property of this state, other than its wild or forest lands in the forest preserve; and three, the property of a municipal corporation of the state held for public use, except the portion of such property not within the corporation. We have here disclosed the policy of the legislature to exempt all property of the United States; all property of the state, with a single exception; and all property of a municipal corporation except that not located within its boundaries. Reading sections 3 and 4 together, it is apparent that the former renders liable to taxation all property of a municipal corporation, in its general terms, and the exception of the latter limits the exemption of property held by a municipal corporation for public use to so much of it as lies

within its boundaries. The history of section 4 of the present law is instructive, and discloses the policy of the legislature. The revisers submitted to the legislature the tax law with section 4, subd. 3, reading as follows as to exemptions: "Property of the municipal corporations of the state held for public use." This was merely a codification of the rule of the common law, and evidences the views of the revisers. They proposed to exempt all property held by municipal corporations for public use, without regard to its location. The legislature, after due consideration, added these words to those last quoted: "Except the portion of such property not within the corporation." Report of Commissioners of Statutory Revision, 1896, p. 16. It thus appears the legislature was of opinion that public policy required, if a municipality saw fit to acquire valuable property within the boundaries of another municipality, it was only just to the latter that the former should pay its share of the local taxes. It is only within recent years that municipal corporations have found it necessary generally to acquire title to property beyond their boundaries. The rapid growth of the great cities of the state has made the question of an adequate supply of wholesome water of paramount importance, and all the larger cities have been forced to acquire extensive property rights in the natural water supply of adjacent territory. In many instances cities have condemned or purchased a large amount of real estate within the limits of some neighboring municipality in order to secure a water supply, and, unless liable to local taxation thereon, the taxpayers owning the remaining real estate are subjected to greatly-increased tax burdens. As between these taxpayers and the municipality receiving all the benefits under this transaction, natural justice suggests that the latter should be assessed for the purposes of taxation on the property so acquired outside of its corporate limits. The letter of the statute and the policy upon which it is founded lead to this conclusion. It follows that the property of the city of Amsterdam located within the town of Perth is taxable. The order of the appellate division should be affirmed, with costs. All concur. Order affirmed.

(187 N. Y. 46)

In re THRALL'S ESTATE.

(Court of Appeals of New York. Oct. 18, 1898.)

TRANSFER TAX—EXEMPTIONS—LEGACY TO A CITY.

Laws 1896, c. 908, § 3, making a general revision of all the tax laws, including the transfer tax, provides that all real property within the state, and all personal property situated or owned within it, are taxable unless exempt from taxation by law; and section 4 specifies property of a municipal corporation of the state held for a public use as exempt; and hence a legacy bequeathed to a city for the construction of a public library building is exempt from the transfer tax.

Appeal from supreme court, appellate division, Second department.

In the matter of the legacy and inheritance tax on the estate of S. Maretta Thrall, deceased, an order was made by the appellate division (51 N. Y. Supp. 595) modifying a decree of the surrogate's court so as to subject a legacy to the city of Middletown to the transfer tax, and the legatee appeals. Modified.

John C. R. Taylor, Corp. Counsel, for appellant city of Middletown. Daniel Finn, for appellant executors. Howard Thornton, for respondents comptroller of the state and county treasurer of Orange county.

HAIGHT, J. S. Maretta Thrall was a resident of the city of Middletown, and died, leaving a last will and testament, in which she bequeathed to the city the sum of \$30,000 for the construction of a library building to be open to the public. The surrogate of the county, in his decree fixing the amount of the transfer tax that should be paid, held that this legacy was exempt. The appellate division reversed the decree in this particular, holding that the legacy was not exempt from the tax.

Prior to the revision of the tax laws of the state of 1896 (chapter 908), cities to which bequests had been made under wills were chargeable with the transfer tax. This question was settled by our decision in *Re Hamilton*, 148 N. Y. 310, 42 N. E. 717. The question now is as to whether the statute has been so changed as to relieve cities from the payment of the transfer tax on bequests of this character. The *Hamilton* Case arose under the collateral inheritance tax law of 1887 (chapter 713), by which the tax was imposed on "all property which shall pass by will * * * to any body politic or corporate, * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation." Under the laws then in force, there was no provision of the statutes that exempted municipal corporations from taxation; and, consequently, it was held that they were not relieved from the payment of the transfer or inheritance tax. The decision in the *Hamilton* Case proceeds upon the theory that the right to impose taxes is a part of the sovereign power of the state, which is not extended to the property of the state or of its civil or municipal divisions; that a city is not taxable for the reason that it is a part of the state, and not because it is exempt by the provisions of any statute. Under the changed provisions of the statute, the reasons given for the decision in the *Hamilton* Case no longer exist. In 1896 there was a general revision of all the tax laws of the state, including the collateral inheritance tax, now known as the "transfer tax." Under the revision there may be no material change in the transfer act as to exemptions, but we find a very material change with reference to

the general taxation of property. By section 3 of the act it is provided that "all real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." We here have an express declaration of the statute that all property within the state, real or personal, is taxable unless exempt. This provision was evidently intended to cover state and municipal property, for in the next section the statute proceeds to specify the property that shall be exempt from taxation: "(1) Property of the United States. (2) Property of this state other than its wild or forest lands in the forest preserve. (3) Property of a municipal corporation of the state held for a public use, except the portion of such property not within the corporation." We now have a statute taxing the property of municipal corporations, except such portion thereof as is held for a public use within the corporate limits, which, by the express provisions of the statute, is exempt from taxation. It appears to us that cities are now brought clearly within the provisions of the transfer act, and are exempt as to property held or to be held for a public use within the corporate limits. As to the other item brought up for review, we agree with the conclusion reached by the appellate division. The order of the appellate division should be reversed in so far as it modified the decree of the surrogate with reference to the transfer tax on the bequest to the city of Middletown, and the decree of the surrogate in that particular affirmed; in other respects the order of the appellate division should be affirmed, without costs of this appeal to either party. All concur. Ordered accordingly.

(157 N. Y. 51)

PEOPLE ex rel. NEWBURGH SAV. BANK
v. PECK, Assessor, et al.

(Court of Appeals of New York. Oct. 18,
1898.)

TAXATION—EXEMPTION—SAVINGS DEPOSIT—STATUTES—REPEAL.

1. The surplus fund of a savings bank, which Laws 1892, c. 689, § 123, authorizes to be accumulated for the depositors' security, is exempt from taxation, under Laws 1896, c. 908, § 4, subd. 14, exempting "the deposits in any bank for savings which are due depositors," as said section 123 provides for a division among depositors of excess accumulations above 15 per cent. of the deposits, thereby declaring that the surplus belongs to depositors.

2. Laws 1882, c. 402, repealing Laws 1866, c. 761, making the franchises of savings banks taxable to an amount not exceeding the gross sum of their earned surplus, thereby repeals Laws 1867, c. 861, amending said chapter 761 by allowing a deduction from such surplus of the amount invested in United States securities.

3. Banking Law 1892 and Tax Law 1896 cover the whole subject-matter of the taxation of savings banks, and repeal by implication all prior enactments respecting such taxation.

Appeal from supreme court, appellate division, Second department.

Certiorari by the people, on the relation of the Newburgh Savings Bank, against George W. Peck, assessor of the city of Newburgh, and others, to review an assessment of personal property for taxation. From an order of the appellate division (52 N. Y. Supp. 259) affirming an order of the special term (50 N. Y. Supp. 820) vacating the assessment, defendants appeal. Affirmed.

The relator is a savings bank, incorporated under chapter 252 of the Laws of 1852, and, by virtue of the provisions of the "Banking Law" (Laws 1892, c. 689, § 132), is entitled to all the privileges and is subject to the liabilities created by the latter act. The assessor of the city of Newburgh, in this state, assessed it as the owner of personal property to the value of \$1,176,849.01, which amount was subsequently reduced to the sum of \$414,849.01. The assessment was based upon the report made by the relator to the superintendent of banks of its condition on January 1, 1897, which showed, after deducting from the total resources of the relator the total sum credited to depositors, with interest, an apparent surplus of the amount first assessed. The reduction of the first assessment by the board of review of the city was effected by allowing a deduction from the apparent surplus of the market value of the United States bonds held by the relator and of the value of its real estate.

J. Newton Fiero, for appellants. Charles F. Brown, for respondent.

GRAY, J. (after stating the facts). The important question which this appeal brings up for our consideration, and which, if decided in accordance with the view taken in the court below, will dispose of the whole case, is whether the surplus fund held by a savings bank in this state is liable to taxation or not. The opinion of Mr. Justice Hirschberg, at special term, upon which the justices of the appellate division have, in the main, rested their affirmance of this order, very fully and satisfactorily covers the ground of discussion; but, because of the importance of the case, I think that our reasons for affirming the order should be stated. It is quite apparent that the question is of very considerable importance, inasmuch as the aggregate of the amounts of surplus funds held by the savings banks of this state is upwards of one hundred millions of dollars, and their exemption from taxation necessarily affects materially the body of taxpayers. Its decision turns upon the construction to be given to the provisions of the statute under which exemption from liability is claimed. That construction is not to be influenced by considerations other than those which may tend to elucidate the purpose of the law, and which bear upon its just interpretation. All property, by the tax law of this state, is made liable to tax-

ation, except so far as it is expressly exempted by law. That is the general rule, and, in order that any property shall be taken out of its operation, the legislative enactment depended upon for exemption must be in unmistakable terms. No person or property is impliedly exempt from taxation, and it is the rule that, where exemption is claimed, the statute is to be strictly construed against the claimant. With the rule in view which is applicable to the construction of the statute in question, let us consider the provision for exemption. It was originally contained in section 4, c. 456, Laws 1857, and is now embodied in subdivision 14, § 4, c. 906, Laws 1896, which is known as the "Tax Law." The exemption clause reads as follows: "The deposits in any bank for savings which are due depositors, the accumulations in any domestic life insurance corporation, held for the exclusive benefit of the insured, other than real estate and stocks, now liable for taxation; and the accumulations of any incorporated co-operative loan association upon the shares of such association held by any person." Does this language warrant the view that the legislature, by the language "the deposits in any bank for savings which are due depositors," intended the exemption to apply to only such amounts as were credited on the books of the bank to depositors, and which were immediately demandable by them? Did it intend thereby that the surplus fund held by the bank should be the subject of local taxation? Referring to those provisions of the banking law which govern savings banks, we will ascertain what is the status under the law of a savings bank, and what are its obligations to its depositors. Section 105 of the banking law (chapter 689, Laws 1892) authorizes the corporation to receive deposits of money, to invest the same, and to declare dividends thereon, and to prosecute the business of a savings bank only as provided in the statute. By section 113 it is provided that the sums deposited, together with the dividends, or interest, credited thereto, shall be repaid to the depositors, after demand, under regulations to be prescribed by the board of trustees. Section 123 provides that the trustees shall regulate the rate of interest, or dividends, not to exceed 5 per centum upon the deposits, "in such manner that depositors shall receive as nearly as may be, all the profits of such corporation, after deducting necessary expenses and reserving such amounts as the trustees may deem expedient as a surplus fund for the security of the depositors, which to the amount of fifteen per cent. of its deposits, the trustees of any such corporation may gradually accumulate and hold, to meet any contingency or loss in its business from the depreciation of its securities or otherwise." It is further therein provided that "the trustees of any such corporation whose surplus amounts to fifteen per cent. of its deposits,

at least once in three years, shall divide equitably the accumulation beyond such authorized surplus as an extra dividend to depositors, in excess of the regular dividends authorized." Further, by other provisions, in the event of the dissolution of the corporation (sections 133-135), the moneys not paid to depositors must be paid to the superintendent of banks, to be by him distributed, under direction of the supreme court. These provisions seem to make it clear that every interest in the properties held by a savings bank is vested in the depositors, and that the bank can acquire no interest therein. I think that section 123 can only be regarded as declaratory of the ownership of all the funds by the depositors. They are to receive all the profits, except that expenses are to be deducted, and that there may be accumulated a surplus for their security. Such a corporation has neither capital nor shareholders, and its only resources are the moneys of depositors, and the income which may be received from investments. The bank, necessarily, from the statutory provisions, must be deemed to hold what property it has for the benefit of depositors only. It manages the same through its trustees and officers, and under no circumstances, and in no event, does it, or do its trustees, acquire any interest therein. The assessment in this case necessarily proceeded upon the theory that the surplus fund belonged to the bank itself, and that what was due to its depositors was only the aggregate of the sums credited to them on their pass books. That is the position of the appellants, and they endeavor to support it by the argument that, as the depositors' accounts can be closed at any time, and as they can only demand that which stands to their credit on the books, it must, therefore, follow that as to the surplus fund the bank is not their debtor. This argument depends upon a narrow reading of the exemption clause, and fails to take into consideration the legal status of the savings bank and of its depositors. The bank neither earns nor holds anything for itself or for its trustees, but holds everything for the depositors. The fact that the surplus represents accumulations, and may not be immediately paid out, cannot affect the question of the ownership of the property. The word "deposits," used in the statute of exemption, means, by a just interpretation, the total amount received for which the bank is accountable, and not merely the identical moneys received from particular depositors. The surplus which has accumulated is a part of a fund which represents the original deposits, and its creation is authorized in contemplation that it may be needed to be used to repay the depositors the amounts put in by them. *Lewis v. Institution*, 148 Mass. 235, 19 N. E. 365; *Suffolk Sav. Bank, Petitioner*, 149 Mass. 1, 20 N. E. 331; *Huntington v. Bank*, 96 U. S. 388. These cases, to which

the learned counsel for the respondent refers us, clearly sustain these propositions. It is difficult to see upon what theory the appellants' contention could be sustained that only the actual deposits, which are returnable to depositors upon demand, are exempt from taxation. The surplus does not belong to the bank, for it holds it for the security of the depositors, to whom it is due contingently upon the occurrence of circumstances requiring its payment to them. If it is an asset, it is at the same time to be treated as a liability of the bank. The clause in question evidently regards "deposits" in savings banks in the same light as it does the accumulations of life insurance companies, or of loan associations, and no greater reason exists for taxing the reserves of savings institutions than those of the other institutions mentioned.

We are in no wise embarrassed by our previous decisions in the cases of the New London Savings Bank (135 N. Y. 231, 31 N. E. 1022) and the Groton Savings Bank (154 N. Y. 122, 47 N. E. 1103). In the New London Savings Bank Case, where the assessment was made upon shares of the capital stock of banks in New York City standing in the name of the bank, a Connecticut corporation, the views of Judge Earle, who delivered the opinion which is reported, would certainly support the view which is contended for by the appellants. But only one other member of the court concurred with him in his opinion, while the remaining members of the court concurred in the result, and refused to express any opinion upon the question of the taxation of deposits. In the subsequent case of the Groton Savings Bank, also a Connecticut corporation, where the assessment was also upon that part of the surplus which was invested in the shares of capital stock of New York City banks, the prior case was referred to, and it was observed of it that there was nothing there to show that the depositors had any interest whatever in the surplus, or that they could ever be entitled to it. Judge O'Brien, who delivered the opinion of the court in the latter case, considered the provisions of the Connecticut statute, and observed that it was apparent therefrom that the profits of savings banks belong in equity to the depositors, and are a part of the deposits, in the same sense that the stipulated interest is, or may be. He said that the surplus was within the equity of the statute exempting depositors of savings banks from taxation, and that "this surplus fund is a debt or obligation due to depositors, just as much as the accumulated interest stipulated to be paid to them. There is no more reason, under these circumstances, for taxing the surplus fund of a savings bank, than the accumulations of a life insurance company held for the exclusive benefit of the assured." Neither of these cases may be regarded as concluding us upon this appeal;

but the reasoning of the opinion in the latter case, by reason of the general likeness of the particular features of the Connecticut statute to ours, is quite applicable.

There is another view, which favors the conclusion I think we should reach in holding the surplus fund of a savings bank to be exempt from taxation. By section 7, c. 761, Laws 1866, the privileges and franchises of a savings bank were made liable to local taxation "to an amount not exceeding the gross sum of their surplus earned." Chapter 861 of the Laws of 1867 amended the act of 1866, as to its seventh section, by allowing the deduction from the surplus of the amount invested in United States securities. Both of these statutes were repealed by chapter 371 of the Laws of 1875; but, in 1882, chapter 402 of the Laws of that year repealed the act of 1875 and the act of 1866, but did not, in terms, repeal the act of 1867. The appellants contend that, as a result, the act of 1867 was revived. I do not think that such was the result, inasmuch as the repeal of the act of 1866, which created the liability to taxation, could hardly be said to have left the amendatory act of 1867 in force as an independent enactment. But, however that may be, the revision of the banking law in 1892, and of the tax law in 1896, superseded, as the entire statute law upon the subject, all antecedent provisions affecting savings banks, under the established rule of construction. In *re New York Institution*, 121 N. Y. 234, 24 N. E. 378. Article 3 of the banking law relates exclusively to savings banks, but contains nothing which indicates a revival of the statute of 1867, while section 183 of the tax law expressly exempts savings banks from the payment of a tax on their privileges and franchises. It seems to be a fair, if not a plain, inference, from the course of legislation referred to, that, while the legislature at one time authorized the local taxing authorities to reach the surplus held by savings banks, in subsequently withdrawing that authorization it must be regarded as adopting a policy of nontaxation in the case of savings institutions. The purpose to allow local taxation for the benefit of the community is to be deemed abandoned. It is to be presumed that considerations of public policy have dictated the exemption, and that the legislative body has been actuated by the motive of assuring the protection of depositors against the contingencies of losses or of depreciation in values. The only apparent reason for questioning the policy of such exemption is in the magnitude of the amount of property affected; but that is a reason which must be left to the consideration of the legislature, and which does not bear upon the construction of the law. I think the order appealed from should be affirmed, with costs. All concur (MARTIN, J., in result), except PARKER, C. J., not voting. Judgment and order affirmed.

(172 Mass. 130)

ELLSBURY v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

MASTER AND SERVANT—RAILROADS—NEGLIGENCE.

An experienced brakeman, who could not tell the difference in height in the drawbars in two cars with different kind of coupling until they were close to each other, and could not make the coupling except by link and pin and by going between the cars, was injured, while attempting to couple the cars, by one drawbar passing over the other, and the cars squeezing him between the sills. The car with the higher drawbar was from another railroad. *Held*, that he could not recover of the railroad company, since the difference in height of the drawbars was not a defect for which it was answerable.

Report from superior court, Worcester county; John Hopkins, Judge.

Action by Allen J. Ellsbury against the New York, New Haven & Hartford Railroad Company. Submitted on report. Judgment for defendant.

J. E. McConnell, for plaintiff. F. P. Goulding and W. C. Mellish, for defendant.

HOLMES, J. This is an action of tort for injuries received while attempting to couple two cars together in obedience to orders. The two cars had different kinds of drawbars,—one belonging to the defendant, a Miller; the other belonging to the Pennsylvania Railroad, a Jenny. They could be coupled only by the use of a link and pin. A fellow servant of the plaintiff put a link into the Pennsylvania car, but, according to the plaintiff's story, the drawbar of that car was too high to allow the connection, and when the cars came together it slid over the other one, and the plaintiff, who held the link, was crushed between the sills of the cars. The plaintiff was an experienced man, but testified that he could not have told the difference in height, or, it would seem, the alleged impossibility of the connection, until the drawbars were close to each other. At the trial the judge directed a verdict for the defendant.

We are unable to see any ground on which the plaintiff could be allowed to recover. In *Lawless v. Railroad*, 136 Mass. 1, the defendant furnished a locomotive to be used as a switcher. The drawbar was too low for the cars with which it was expected to be used. The plaintiff did not know it, and was not called on to look out for it. In *Bowers v. Railroad Co.*, 162 Mass. 312, 38 N. E. 508, there was some slight evidence that the drawbar was defective in having too much lateral play, and that the accident was due to that defect. In *Goodrich v. Railroad Co.*, 116 N. Y. 898, 22 N. E. 397, there was no question that the injury was caused by a defect in the bumper. But such cases do not dispose of the present.

It was lawful for the defendant to receive a car from another railroad with a draw-bar different in make and height from that which it used itself. It was lawful for it to couple such a car with its own. So far as appears, both cars were in proper condition. The difference in height was not a defect for which the defendant was answerable, either at common law or by statute. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 43 N. E. 936. The defendant was not called on to make preliminary measurements, and to warn the plaintiff of the possible difference before setting him to work. The possibility was obvious in a car coming from a different road. *Railroad Co. v. Smithson*, 45 Mich. 212, 220, 7 N. W. 791. So far as appears, the cars might have been coupled successfully, if not with a straight link, then with a crooked one. It does not appear that the defendant failed to furnish whatever appliances were necessary to do the work. It was not the defendant's duty to see that the plaintiff or his fellow servants picked out suitable ones, if it furnished them. All that we can say is that an experienced man was set to do a dangerous thing, and met the consequences of failure. We cannot see evidence that the failure was due to the defendant's fault. See *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Railroad Co. v. Gildersleeve*, 33 Mich. 133; *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 43 N. E. 936; *Railway Co. v. Black*, 88 Ill. 112; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Hulett v. Railway Co.*, 67 Mo. 239; *Railway v. Higgins*, 44 Ark. 293; *McDonald's Adm'r v. Railroad Co.*, 95 Va. 98, 27 S. E. 821; *Railroad Co. v. Brown*, 91 Va. 668, 672, 22 S. E. 496; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. Judgment on the verdict.

(172 Mass. 53)

WEEKS v. CURRIER et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

CANCELLATION OF INSTRUMENTS—EQUITY JURISDICTION—VENDOR AND PURCHASER—EXCHANGE OF PROPERTY—FALSE REPRESENTATIONS.

1. Since St. 1877, c. 178 (Pub. St. c. 151, § 4), provides that the supreme judicial court shall have jurisdiction in equity of all cases and matters cognizable under the general principles of equity jurisdiction, such courts have concurrent jurisdiction with courts of law to set aside a deed of real estate procured by fraud, and to obtain a reconveyance of the property.

2. Where a vendor was induced to execute and deliver a deed in exchange for the vendee's property, relying on false representations made by the vendee's agent as to its value, the amount for which it was rented, and the incumbrances thereon, he is entitled to a reconveyance, notwithstanding the expenditure of money on the property by the vendee.

Report from superior court, Worcester county.

Suit by Albert W. Weeks against Israel L. Currier and another to set aside a convey-

ance of real estate. Decree for plaintiff on facts found by the superior court.

J. R. Thayer and A. P. Rugg, for plaintiff.
Herbert Parker, for defendants.

KNOWLTON, J. This case comes before us on a report containing a finding of facts, and showing that the defendants joined an answer in demurrer with their answer in matters of fact. The judge found that the plaintiff made a deed of his land, which was executed without inserting the name of the grantee in the blank spaces left for it, and was delivered to the defendant Currier. Currier was acting as an agent and broker for the defendant Curry, and afterwards he filled the blanks with the name of Curry, caused one Mulvey to write his name as a witness upon the deed, although Mulvey did not see the plaintiff or his wife sign it, and then caused it to be recorded in the registry in the county in New Hampshire where the land was situated. The judge also found that the plaintiff was induced to sign and deliver it by representations of Currier that a house and lot owned by Curry, which were in the hands of Currier for sale, and which were conveyed to the plaintiff in exchange for the property described in the deed from the plaintiff, had recently been sold for \$3,200; that they were rented for \$14 per month; and that there were only certain named incumbrances upon the property. All of these representations were false. They were made by Currier as of matters within his personal knowledge, and they were relied upon by the plaintiff as inducements to make the contract. The plaintiff offered to reconvey the property conveyed to him by Curry, and demanded a conveyance to himself of the property described in the deed delivered to Currier. These facts are all set out in the plaintiff's bill, and the representations are alleged to have been fraudulently made by the defendants.

The principal ground of the demurrer is that the plaintiff cannot have relief in equity, because he has a full, adequate, and complete remedy at law. Since the enactment of St. 1877, c. 178 (Pub. St. c. 151, § 1), relief may be had in this commonwealth in equity to set aside a deed of real estate procured by fraud, and to obtain a reconveyance. The remedy at law by a writ of entry is concurrent. *Billings v. Mann*, 156 Mass. 203, 30 N. E. 1136; *Emerson v. Atkinson*, 159 Mass. 356-361, 34 N. E. 516; *Nathan v. Nathan*, 166 Mass. 294, 44 N. E. 221. Fraudulent representations and oral misstatements made with intent to deceive are not so merged in a written instrument procured by means of them that they may not be made the basis of a decree to set it aside. The demurrer must therefore be overruled.

It follows upon the facts found that the plaintiff is entitled to a decree against the defendants. The false statements found to

have been made were material, and, being relied upon, they entered into the substance of the contract. *Medbury v. Watson*, 6 Mete. (Mass.) 246-260; *Manning v. Albee*, 11 Allen, 520-522; *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 163. If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit, without further proof of an actual intent to deceive. *Litchfield v. Hutchinson*, 117 Mass. 195; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Furnace Co. v. Moffatt*, *ubi supra*; *Milliken v. Thorndike*, 103 Mass. 382. In a suit of this kind, a defendant is affected by a false and fraudulent representation made by another while acting as his agent within the scope of his authority, as if he made it himself. *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14. That Currier has expended some money upon the property fraudulently obtained does not relieve him from the obligation to return it. *Snow v. Alley*, 144 Mass. 546-552, 11 N. E. 764. The facts found by the judge fully establish the right of the plaintiff to a reconveyance. Without considering the effect of the unauthorized changes made in the deed after it was signed, there must be a decree for the plaintiff.

(151 Ind. 679)

STATE ex rel. TAYLOR et al. v. MOUNT et al.¹

(Supreme Court of Indiana. Oct. 14, 1898.)

JUDGES—TERM—ELECTION—APPOINTMENT—STATUTES—VALIDITY—CONSTITUTIONAL LAW—RETROACTIVE LAWS—MANDAMUS—PARTIES.

1. A complaint jointly by candidates nominated for the office of appellate judge, for mandamus to compel the state board of election commissioners to place their names on the official ballot, which was refused on the ground that there was no vacancy in that office, is not defective as for want of a common interest of relators in the result.

2. Acts 1891, p. 39 (Rev. St. 1894, § 1336; Horner's Rev. St. 1897, § 6562a), created the appellate court, and fixed March 1, 1897, as the limit of its existence. Acts 1893, p. 293 (Rev. St. 1894, § 1341), provided that all of the judges then holding should continue to hold their offices for four years from January 1, 1893. *Held*, that the judges elected at the general election of 1896 took their offices January 1, 1897, and held them until March 1, 1897, when the existence of the court was to end, notwithstanding the subsequently enacted Acts 1897, p. 10, extended it for four years.

3. Acts 1891, p. 39 (Rev. St. 1894, § 1336; Horner's Rev. St. 1897, § 6562a), created the appellate court, and fixed March 1, 1897, as the limit of its existence. Acts 1897, p. 10 (Horner's Rev. St. 1897, § 6565a), repealed section 26 of the act of 1891, which limited the life of the court to March 1, 1897, and extended the period of its existence for four years from January 1, 1897. A clause of section 2 of the act of 1897 provided "that the term of office of each of the judges of said appellate court shall be four years from the first day of January next after his election." *Held*, that if said clause was but a formal re-enactment of the provision of the act of 1891, fixing the term at four years, then the clause left the

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law in this respect as it was at the time of the general election of 1896, and therefore did not extend the term of the judges elected in 1896 beyond March 1, 1897.

4. Acts 1891, p. 39 (Rev. St. 1894, § 1336; Horner's Rev. St. 1897, § 6562a), created the appellate court, and fixed March 1, 1897, as the limit of its existence. Acts 1897, p. 10 (Horner's Rev. St. 1897, § 6565a), repealed section 26 of the act of 1891, which limited the life of the court to March 1, 1897, and extended the period of its existence for four years from January 1, 1897. Const. art. 5, § 18, authorizes the governor, when a vacancy occurs in the office of judge of any court, to "fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." *Held*, that the provision of section 2 of the act of 1897, "that all the present judges of said court shall continue to hold their office as such, respectively, for the districts for which they have been elected, for and during the term of four years from the first day of January, 1897," is void, as beyond the power of the legislature, since said office is elective by the people, except in case of vacancy for certain causes.

5. Const. art. 16, § 1, providing that all officers whose appointments are not otherwise provided for therein shall be chosen in such manner as prescribed by law, does not authorize the legislature to appoint or elect judges, or to extend the terms of judges of the appellate court already elected.

6. Under Const. art. 2, § 14, providing for the holding of general elections on a named day, with a proviso authorizing the general assembly to provide for the election of all judges of courts of appellate jurisdiction by an election to be held for such officers only, the people have the right to choose judges at general elections, and hence the legislature could not, even if it had the power of appointment, fill by appointment the office of judge of the appellate court for a longer period than the term of the next succeeding general election.

7. Acts 1897, p. 10 (Horner's Rev. St. 1897, § 6565a) § 2, fixing the term of office of a judge of the appellate court at four years from the 1st day of January next after his election, and section 3, extending the existence of the appellate court, which by law was to expire March 1, 1897, to four years from January 1, 1897, have not the retroactive and incidental effect of prolonging the official terms of the judges who had been elected at the preceding general election to four years.

8. The amendment of a statute does not affect acts done under the statute before such amendment.

Jordan and Monks, JJ., dissenting.

Appeal from circuit court, Marion county; Henry O. Allen, Judge.

Mandamus by the state, on the relation of Edwin Taylor and others, against James A. Mount and others. From a judgment denying the writ, relators appeal. Reversed.

Smith & Korbly and Gavin & Davis, for appellants. Wm. A. Ketcham, Atty. Gen., and Geo. L. Reinhart, for appellees.

HOWARD, J. This was an action brought by the relators, in the name of the state, for a writ of mandamus to require the appellees, who constitute the state board of election commissioners, to place upon the official ballot to be voted at the general election held in November, 1898, the names of the relators as candidates for judges of the appellate court. In the complaint and alternative writ

¹Rehearing denied, 52 N. E. 407.

issued thereunder it is shown that the relators are each eligible to the office of appellate judge, that each was duly nominated thereto, and such nomination properly certified to the said board of election commissioners, but that said board refused to place the names of the relators upon the official ballot, claiming that there were no such officers to be elected at said election. To the complaint and alternative writ the appellees demurred for want of sufficient facts, and this demurrer was sustained by the court. Judgment was thereupon rendered denying the peremptory writ, and for costs against the relators.

As preliminary to a consideration of the case upon its merits, the appellees contend that the complaint is defective, for the reason that it discloses a joint action by the relators, whereas they have no joint or common interest in the result. There is no doubt that each of the relators is separately interested in the outcome of the action, inasmuch as each seeks election for himself to the office of judge of the appellate court. We think, however, that they have also a common interest in the decision of the case. They are all complaining of the one act of the board of election commissioners, who have refused to place their names on the official ballot, claiming that there is no right to fill the office of appellate judge at the ensuing general election. That is the one actual, indivisible issue brought before the court, and each of the relators is equally interested in the decision of that issue. The separate interests of the relators, which follow and depend upon the determination of this issue, are merely incidental, and are not before the court for any decision whatever. Is there a vacancy in the office of appellate judge, to be filled at the ensuing election, and should the election commissioners therefore place the names of the relators on the ballot as candidates for that office? That is the question for decision, and it is too plain for argument that all of the relators, nominees as they are for this office, have a common interest in the decision of the question. They ask only that the court answer the question by saying "Yes" or "No," and in this answer they all have a common interest. Under authority of article 7 of section 1 of the constitution, which provides that "the judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish," the legislature, by an act approved February 28, 1891, created the appellate court. Acts 1891, p. 39; Rev. St. 1894, § 1336 (Horner's Rev. St. 1897, § 6562a), and following sections. By the terms of the act the state was divided into five appellate court districts, one judge to be elected from each district. The first judges were appointed by the governor, "to serve until judges for said court shall be elected and qualified." The term of office of such judges was fixed

at four years from the 1st day of January next ensuing their election, except that the first judge elected in the First district should serve for two years, and the first judges elected in the Second and Third districts should each serve for three years. The limit of the existence of the court was fixed at six years from March 1, 1891. By an act approved March 4, 1893, the term of office of each of the judges first elected was fixed at four years from the 1st day of January, 1893. Acts 1893, p. 293; Rev. St. 1894, § 1341. Thus stood the law at the time the present judges of the appellate court were elected at the general election in November, 1896. They were to take their office on the 1st day of January, 1897, while the period of existence of the court was to end on the 1st day of March, 1897.

It is contended by the relators that, as the judges elected at the general election of 1896 were to take their office on the 1st day of January thereafter, and as the court itself was to end on the 1st day of March following, it therefore results that those judges were elected to serve for two months only; that is, from January 1, 1897, to March 1, 1897. Appellees, on the other hand, contend that, as the law fixed the term of office of the judges at four years from the 1st day of January following their election, it must result that the judges elected in November, 1896, were elected to serve for four years from January 1, 1897. It would seem that the contention of the relators must be correct. The general election of 1896 could be conducted only with reference to the law as it then stood. The term of the then incumbents of the office of appellate judge would expire on the 1st day of January thereafter, while the term of the court itself would expire on the 1st day of the succeeding March. The electors, in casting their ballots for appellate judges in 1896, must therefore have had in mind that the officers to be elected could serve only from January to March, 1897. It would be absurd to say that the electors would or could choose judges to serve for a time after March 1, 1897, when there would be no court in existence, as then provided by law. The people could not elect judges conditionally, on the supposition that the legislature might afterwards extend the life of the court. It would be quite as reasonable to say that the people could elect judges for a court that had not yet been created, on the supposition that such a court might thereafter be created. We can look only to the law in force at the time of the election to know the effect of an election then held. The people conduct an election by means of the machinery of existing law, not by virtue of law that formerly existed, or that may thereafter exist. It is absolutely certain, therefore, that, so far as their election by the people is concerned, the judges elected at the general election in November, 1896, were elected to serve from the expiration of the terms of

their predecessors and until the expiration of the term of the court itself; that is, from January 1, 1897, to March 1, 1897.

Afterwards, by an act approved January 28, 1897, section 26 of the act of 1891, which limited the life of the court to the period of six years from March 1, 1891, was repealed, and the period of the existence of the court was extended for four years from January 1, 1897. Acts 1897, p. 10; Horner's Rev. St. 1897, § 6565a. Section 2 of this last act reads as follows: "Sec. 2. That the term of office of each of the judges of said appellate court shall be four years from the first day of January next after his election; and that all of the present judges of said court shall continue to hold their offices as such, respectively, for the districts for which they have been elected, for and during the term of four years from the 1st day of January, 1897." The first clause of this section is but a re-enactment of the original provision of the law that the term of office of each of the judges should be four years from the 1st day of January next after his election. If by this re-enactment the legislature intended to lengthen the terms of the judges already elected,—which would be the equivalent of appointing them for such extended term,—it is enough to say here, what will more fully appear hereafter, that the legislature had no such power. If the clause, however, was but a formal re-enactment of the provision originally embraced in the statute, as first enacted in 1891, it is to be said that the re-enactment left the law in this respect just as it had been at the time of the election of the present judges in November, 1896; and from what we have already said it is clear that the re-enactment of the provision could have no effect upon the action of the electors in the previous November. By the second clause of the section, however, the legislature attempted to provide: "That all of the present judges of said court shall continue to hold their offices as such, respectively, for the districts for which they have been elected, for and during the term of four years from the first day of January, 1897." Two facts are plain from this clause: First, the legislature explicitly recognized the incumbents as elective officers, elected by the people at the previous general election; and, second, the legislature assumed to itself the right to continue the judges in office for the full term to which the court had been extended. That the office is one elective by the people, save only that in case of vacancy an appointment may be made by the governor, is not only recognized by the various acts in relation to the establishment and membership of the appellate court, but is also clear from the constitution itself. It is provided in article 5, § 18, of that instrument, that "when, at any time, a vacancy shall have occurred * * * in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." "In two

methods, and two only," said this court in commenting on the foregoing provision of the constitution, "can judges be chosen,—by the people and by the chief executive,—and by the latter only where there is a vacancy." *State v. Noble*, 118 Ind. 350, 21 N. E. 244. That the legislature cannot fill the office of judge of any court by its own appointment ought to be so evident as not to be in any manner controverted. If there is one principle that stands out more clearly in our constitution than any other, it is that the three departments of government, legislative, executive, and judicial, are not merely equal, but are exclusive in respect to the duties assigned to each; that is, they are absolutely independent of one another. *State v. Noble*, supra. But if the legislature could appoint, or continue in office after the expiration of the term for which they have been elected, the judges of any court, that would at once, to that extent, subject the judicial to the control of the legislative department. Speaking of the constitutional amendment adopted as a preliminary to the creation of the appellate court, it was said in the case above cited: "We know judicially that our constitution was so amended as to invest the legislature with power to create courts superior to the circuit courts, and that this was done for the purpose of enabling litigants to have appeals disposed of by a constitutional tribunal. It cannot be unknown to any one that all the departments of the government believed that the only method of administering the laws was by courts created under the provisions of the constitution, and this belief the people confirmed by their votes in favor of the constitutional amendment. This supplies strong reasons for holding, as we do, that no body not provided for by the constitution can exercise any part of the judicial power of the state." It was accordingly held in that case that the legislature could not appoint commissioners to assist this court in the discharge of its duties. Still less could the legislature appoint the members of a court itself, or continue such members in office for a time beyond that for which they had been chosen by the people. We are therefore clearly of opinion that the second clause of section 2 of the act in question, by which the general assembly attempted to provide that the present judges of the appellate court should continue to hold their offices for any time beyond the time for which they had been elected, is wholly void. It seems to have been attempted by counsel to draw from the provisions of article 15 of section 1 of the constitution some argument in favor of the power of the legislature to appoint, or, what amounts to the same thing, to extend the terms of, judges of the appellate court already elected. That section of the constitution reads: "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." But a construction has been given

to this section adversely to the theory of counsel, by decisions of this court in *State v. Denny*, 118 Ind. 382, 21 N. E. 252; *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267; *State v. Denny*, 118 Ind. 449, 21 N. E. 274; and *State v. Peelle*, 121 Ind. 495, 22 N. E. 654. It was held in those cases that by the section of the constitution referred to authority is conferred upon the legislature to prescribe by law the manner of electing such officers, but not the power itself to elect them.

Another like contention of counsel may be noticed here. It is, if we understand it, that because the legislature has the power to create an appellate court, and to fix the tenure of office of the judges for any time not exceeding four years, it therefore follows that the legislature might provide for the filling of the offices for that time, by extending the terms of the incumbents to any time within the four-year period, even though that should be beyond the time of a general election, when the people could fill the offices. We have already shown, as we think, that the legislature has no right to fill the offices for any time, no matter how short. In addition, the constitution (article 2, § 14) provides expressly for general elections, to be held on the first Tuesday after the first Monday in November, with a proviso that the general assembly may provide by law "for the election of all judges of courts of general and appellate jurisdiction by an election to be held for such officers only." Here is a plain recognition, if it were needed, of the right of the people to elect judges at general elections, save only in case the legislature has designated some other time for that purpose. It follows, therefore, that, even if the legislature had—as it has not—the power to fill the office of judge by appointment, it could fill such office only until the time of the next general election, when the people could perform that high function for themselves. Counsel, in this connection, contend very stoutly that there was no vacancy in the office of appellate judge, such as the governor could fill, on the 1st day of March, 1897. Whether the extension of the life of the appellate court from March 1, 1897, until January 1, 1901, as made by the act of January 28, 1897, supra, was the creation of a new court, so as to cause an immediate vacancy in the office of the judges, we are not called upon to decide. The incumbents of the office on March 1, 1897, have continued to sit as judges of the court up to this time; and for the purposes of this action it is immaterial whether they continued as holding over under the constitution until their successors should be elected and qualified, or whether they have been filling a vacancy as *de facto* officers. At furthest, and giving to them the benefit of all uncertainties as to their right to sit as judges after March 1, 1897, there can be no manner of doubt that they cannot continue to hold their offices after their successors are elected at the ensuing general

election, and after such successors qualify and demand their offices on the 1st day of January, 1899. But counsel for appellees say that, even if the last clause of section 2 of the act of January 28, 1897, supra, in which the legislature assumed the right and power to appoint the judges of the appellate court, or to continue them in office after March 1, 1897, should be held invalid, yet the first clause of that section, which fixed the term of office of said judges at four years, construed in connection with section 3 of the act, which extended the period of existence of the court for four years from January 1, 1897, had the retroactive and incidental effect of causing the judges who had been elected at the preceding general election to have been chosen for a period of four years. This argument rests on the assumption that the people elected those judges with the knowledge that the legislature might afterwards repeal the section of the law that then limited the life of the court, and so enable the judges to hold for a term of four years. We think we have already said enough to show the absurdity of this argument. The people elect officers with a view to the provisions of the law as it exists at the time of the election. According to the reasoning of counsel, the people might, at any general election, choose judges of a court of conciliation, or of any other court which the legislature might establish, because of the knowledge that the people would have at the time of the election that the legislature might at its ensuing session create such a court. The people choose officers for definite terms,—terms to begin and end at a known time, as fixed by the law in force at the date of the election. The fact that the legislature may thereafter abolish the office, or shorten or lengthen its duration, has nothing to do with the election itself. The constitution and the laws provide for filling vacancies, or for officers holding over until the time when the people may elect. The election itself, however, is independent of those future possibilities and contingencies. The turning point in the case seems to be upon the question, were the incumbents of the office of appellate judge elected in 1896 for a term of four years? Since it must be conceded that the prescribed duration of the office was but two months from the expiration of the term of their predecessors, but one answer would seem possible, namely, that they could be elected for no longer period than the expressed duration of the office. The possibility of holding longer required legislative action which should give the office renewed life. It seems too plain for argument that the right to hold the office, from whatever source that right is derived, depends upon the existence of the office. Just how the people could be deemed to have elected for four years to an office which they had said, through their legislature, should expire in two months, seems beyond comprehension.

The conclusion that they did so intend must rest upon the assumption that they then anticipated that the life of the court would be extended long enough to fill out the four years. The assumption cannot be authorized merely from the circumstance that the act was afterwards passed. It is sufficiently difficult to know what laws have been passed, and the people cannot be held to know what laws will be passed.

In *State v. Long*, 91 Ind. 351, it appeared that Long had been elected to the office of county recorder, and that before his term began his predecessor resigned, and Long was appointed to fill the vacancy, receiving a commission to fill such vacancy, and also a commission for his regular term thereafter. His successor, elected at the next general election, claimed that Long had only one term, which began at the date of the resignation of his predecessor. This court, however, held that the people had elected Long for a regular term to begin at the end of his predecessor's regular term, and that he was entitled to fill out that regular term, notwithstanding he had also been appointed to fill the vacancy occasioned by his predecessor's resignation. "Long's election," said the court, "gave him no right to the office until the expiration of the period for which Small [his predecessor] had been elected. * * * The term for which Long had been elected could not be changed by any act of Small." There, as here, the people voted for the officer for a term provided by the law as it then existed. It is wholly inadmissible, as said by the court in *People v. Palmer*, 154 N. Y. 133, 47 N. E. 1084, that the electors voted for an officer for a term to be thereafter fixed by the legislature. The case was a very plain one when the people assembled at the polls at the general election in 1896. There was an appellate court in existence, whose life was limited by the law upon the statute book to the 1st day of March, 1897. There could then be no such thing as electing any one to fill the office of appellate judge after that date. In order that there be a judge, there must be a court; or, as was said in *State v. Friedley*, 135 Ind. 119, 34 N. E. 872, "There can be no such thing as an office without responsive duties and functions to be performed by the officer." The people, with this knowledge, therefore, could elect no judge of the appellate court for any time beyond the life of the court. Consequently, if the judges then elected had any authority to sit as such officers after March 1, 1897, such authority could not come from the electors, but must come from appointment by the governor to fill a vacancy, or by holding over under the constitution until their successors should be elected and qualified. Any act of the legislature, we have already seen, could give them no official life. Two or three cases have been cited from courts of other states in support of the contention of appellees, but they are either not in point, as based

on constitutional provisions different from our own, or else as being not well reasoned. Cases which abundantly support the conclusions which we have reached are *People v. Palmer*, supra; *People v. Bull*, 46 N. Y. 57; *People v. Foley*, 148 N. Y. 677, 43 N. E. 171; *People v. Burch*, 84 Mich. 408, 47 N. W. 765; and *State v. Arrington*, 18 Nev. 412, 4 Pac. 735.

The contention of appellees that, because the legislature, by amendment of the statute, might have extended the life of the court to four years at any time before the election, and the judges would therefore have been elected for a full term of four years, it follows that the same results must take place when the legislature amends the statute in like manner after the election, for the reason, as counsel say, that an amendment to a statute becomes a part thereof, as if it had been enacted as a part of the original statute, is utterly fallacious, so far as it affects operations under the statute before such amendment. This principle was recognized by this court, as now constituted, in *Walsh v. State*, 142 Ind. 357, 41 N. E. 65, where an amendment to a fee and salary law, though held to be a part of the law, as if originally enacted with it, was yet construed to operate only as to matters occurring after the amendment. The court there cited also from *State v. City of Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, where it was also held that "an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned." In full harmony with this ruling is 23 Am. & Eng. Enc. Law, 284, where it is said, citing numerous authorities: "An amendatory act takes effect from the time of its passage, and has no retroactive effect, in the absence of an expressed intent to the contrary. The original statute governs rights which have accrued before its amendment, but as to future acts the law as amended governs." Here the office was first filled by the people, and the duration of the term was afterwards attempted to be fixed, or rather changed, by the legislature. It is clear that the legislature had no power to do this. "In any proper sense," said the New York court of appeals, in *People v. Bull*, supra, "where the office is to be filled by one authority, and the duration of the term thereof is to be determined by another, the declaration of the duration must go before the filling, so that each authority may have its legitimate exercise." We are therefore of opinion that the period of time for which the present judges of the appellate court were elected came to an end on March 1, 1897, and that, whether appointed or holding over after that date, they can hold only until the election and qualification of their successors; and, therefore, that the state board of election commissioners should have placed the names of the relators upon the official ballot as candidates for said offices. The judgment is reversed, with instructions to overrule the demurrer to

the complaint and alternative writ, and for further proceedings not inconsistent with this opinion. The clerk of this court is directed to certify this opinion and decision to the lower court at once.

JORDAN, J. (dissenting). I am constrained to dissent from the conclusion reached by the majority of the court in this case, and will, briefly as possible, and without elaboration, state my reasons for dissenting. It is conceded, if I understand the position of counsel for the relators, and at least it cannot be successfully denied, that, in the absence of the provision limiting the life of the appellate court in the statute creating it, its existence would have been perpetual, subject only to a legislative change; and under such circumstances the tenure of the present judges, in accordance with the provisions of the same statute, which fixed the term of office and the beginning thereof, would have been four years from January 1, 1897. That the incumbent judges, under their election in 1896, would have held for a term of four years from the same date, had the legislature of 1895 repealed the limitation clause of the original act, and prolonged the life of the court to January 1, 1901, as was done by the legislature of 1897, in the light of well-settled principles cannot be successfully controverted. The inquiry, then, is, if this would have been the effect and operation of a change in the law made by the legislature prior to the election of the present judges, why must a different result follow because the limitation clause in question was repealed, and the life of the court continued or prolonged, under the act of 1897, which was passed and in force a month or more before the date upon which the existence of the court was to terminate as originally provided? That a legislature, in the absence of constitutional prohibition, may repeal, modify, or amend statutes enacted by itself or predecessor, is elementary. It is settled beyond controversy that when a section of an existing law is amended or changed it ceases to exist, and the section, as amended, supersedes such original section, and becomes incorporated in, and constitutes a part of, the original act. *Blakemore v. Dolan*, 50 Ind. 194. Applying this well-settled rule, it becomes evident that when the legislature of 1897 exercised the right to repeal the limitation section of the original act, and to change the time of the court's expiration from March 1, 1897, to January 1, 1901, all of which legislation, as it will be seen, occurred and was in full force and effect before the life of the court had terminated, the law stood precisely as though the legislature had, in the first instance, declared that the court's existence should end on January 1, 1901; and certainly, under such circumstances, in view of the facts in this case, no successors to the present judges could be elected at the ensuing November election.

The fact that the incumbents had been

elected and inducted into office prior to the passage and taking effect of the act of 1897 can make no material difference in regard to their status, for, when the change made by the last enactment is construed with the provision of the original act, which fixed the tenure of office at four years, and each provision is given its full force and effect, it must follow that the present judges would hold for a full term of four years, provided the life of the court was prolonged for that period by legislative action. But the claim or contention is that the incumbent judges were only elected by the people for a term of two months, beginning January 1, 1897, and ending on the 1st day of March following, at which date the existence of the court was to terminate, and at that time, it is contended, their official functions ceased by virtue of the limitation clause, regardless of the act of the legislature in controversy, which repealed the tenure clause of the court, and expressly extended the life of the court, and which act, as heretofore said, was in full force and effect at and prior to the date originally fixed for the expiration of the life of the court. Counsel for the relators seemingly press their argument to the extreme of insisting that vacancies in the offices of appellate judges occurred on and after March 1, 1897, and that the operation of the act in dispute authorized the governor to fill such vacancies by appointment until the next general election; or, in other words, the contention is that the effect of the amendatory law, by which the life of the court was prolonged, was equivalent to the creation of a new office. This argument is certainly strained, and can find support neither in reason nor law. Counsel apparently confuse or confound the tenure of the tribunal with the term of its judges. The legislation of 1897 was not aimed at the term of the office, but was directed at and affected the tenure of the court; and this distinction should be observed. It in no manner changed or affected the provisions which are contained in the act of 1891 and the amendatory act of 1893, whereby the legislature expressly declares that the term of each of the judges of the appellate court shall be four years from the 1st day of January after their election. It is this legislative fiat, as expressed in these previous laws, which operates to make the tenure of the present judges four years from January 1, 1897, in the event the court was so long continued by authority of the legislature, and not the provisions of the act of 1897, which expressly declared that the life of the court should be prolonged for four years from January 1, 1897. Neither can it be maintained that the right of the present judges to continue in office for four years must rest solely upon the provisions contained in section 2 of the act of 1897, upon which relators place so much stress, which declared that the present judges of the court shall continue to hold their offices during a term of four years from January 1, 1897. This sec-

tion is but a repetition, in effect, of what the legislature had declared in the previous acts of 1891 and 1893. This section is surplusage, and may be entirely eliminated from the act, and the operation and effect of the legislation prolonging the existence of the court upon the terms of the present incumbents would be the same.

The argument or claim that the electors of the state elected the present judges for a term of two months only, and that no act on the part of the legislature could in any manner vary or change this result, is futile, and devoid of merit. The people, when they voted at the election of 1896 for appellate judges, are at least presumed to have known the provisions of the law creating the appellate court, and also that the term of the judges, under its particular provisions, was four years, and could be for no longer, subject, however, to the tenure of the court as then fixed, or as it might be limited or fixed by the legislature of 1897, before the expiration of the original limit, and subject, also, to the right and power of the legislature to shorten or abridge the tenure of the judges elected. That the voters were presumed to have known the power with which the legislature was invested, in respect to both the prolongation of the life of the court and the abridgment of the term of its judges after their election, is surely, in the light of the authorities, a well-settled legal proposition. The appellate court is purely one of statutory creation, as authorized by the constitution, and subject only to the restrictions of the latter in three respects, namely, that the judges thereof, generally speaking, must be elected, and their term of office cannot exceed four years, and temporary vacancies occurring therein must be filled by the governor until the next election. Aside from these constitutional restrictions, the office may be said to be wholly under the control of the legislature. The court can be made perpetual, or its existence limited, at the discretion of the legislature, or it, at any time, may abolish the office altogether. The tribunal is therefore completely within the power of the legislature, except so far as the constitution forbids that body to interfere. It could shorten the term of four years to one year or under, or, if the tenure of the office, as originally fixed, was two years or under, the legislature could have lengthened the term to that of four years, and the judges elected and installed into office prior to such action of the legislature would be affected by such change, and their tenure, as the case might be, would undoubtedly be subject to the abridgment or extension of the official term. This power or right of the legislature over offices of its own creation has been repeatedly recognized and affirmed by the decisions of this court. *State v. Hyde*, 120 Ind. 296, 28 N. E. 186, and cases there cited; *State v. Menaugh* (at this term) 51 N. E. 117. See, also, 7 Lawson, Rights, Rem.

& Prac. § 3797. Even though it be conceded that the term of the present judges was but two months, as relators assert, when they are elected and become incumbents of the office they would certainly be subject to either an abridgment of that term or to an extension thereof not over four years; and, as the limitation clause in question was changed and extended before the expiration of the two months, it certainly must be evident, in view of the authorities, that the term of the judges would be subject to that extension which, under the facts in this case, is within the constitutional restriction of four years; and upon this theory of the case the contention of the relators that the election for appellate judges must be held at the ensuing election cannot be sustained.

The legislature, then, being invested with the power to extend the existence of a statutory office beyond its original limit, if this power is exercised during the life of the office, it will result in permitting the incumbent to continue in office for his full term as fixed by law, not exceeding four years, provided the life of the office has been so long continued by the legislature. In support of this proposition, in addition to the authorities above cited, see the following: 19 Am. & Eng. Enc. Law, pp. 562m, 562n; *In re Bulger*, 45 Cal. 553; *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778; *Wilcox v. Rodman*, 46 Mo. 322; *Bruce v. Fox*, 1 Dana, 447; *Christy v. Board*, 39 Cal. 3; *Paine, Elect.* 100, 101; *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941; *State v. Howe*, 25 Ohio St. 588; *Taft v. Adams*, 3 Gray, 126; *Long v. Mayor, etc.*, 81 N. Y. 425; *State v. Neibling*, 6 Ohio St. 40. *Paine on Elections*, in section 130, states the rule as follows: "When a state constitution declares an office to be elective, it cannot be filled in any other mode than that prescribed in the constitution. But where an office has been filled in the mode prescribed in the constitution, the term of the incumbent may be extended, provided the entire term, when so extended, does not exceed the time limited by the constitution. The incumbent, during the addition to his term, holds, not as the appointee of the legislature, but as an elected officer." The case of *Bruce v. Fox*, *supra*, especially controverts the principal contention or argument of counsel for relators. This case arose out of a controversy over the office of commonwealth attorney, each of the parties claiming the office. Fox, the incumbent, held under the appointment of the governor, and Bruce claimed title through a subsequent appointment by the governor of the state. The statute creating this office was limited in its operation to two years, after which, by its own limitation, it was to be no longer in force; but the constitution of the state of Kentucky provided that offices of the grade of the one in question should be held by the incumbent during good behavior. Before the expiration of the two years, during which

period the statute was to be operative, the legislature repealed the limitation clause. Bruce, believing that the vacancy existed in the office, procured himself to be appointed by the governor to succeed Fox, but this appointment was not confirmed, as required, by the senate. Bruce demanded the right in court to qualify, and succeed Fox, which right the latter denied. The case being taken to the court of appeals, the contention of appellant there was, as it is in the case at bar, that the incumbent could not hold beyond the original term of the office as fixed by the law creating it, and that, as soon as the two-years limitation expired, a vacancy in the office existed, which the governor was authorized to fill; the insistence being urged that the subsequent prolongation of the life of the office by the legislature did not operate to continue the then incumbent in office, for the reason that when he was appointed there was no office to be filled for a term longer than two years, and that Fox, the incumbent, was appointed with reference to the fact that the term could not extend beyond two years, and, consequently, it could not be claimed that he was appointed for a longer term than two years. But the court denied this claim or contention of the appellant, Bruce, and decided that Fox was entitled to hold during good behavior, and so long as the office existed. The court in that case held that the prolongation of the life of the office by the legislature was not the creation of a new office, and that no vacancy existed by reason of the continuation of the office. In passing upon the question involved, the court, in the course of its opinion, said: "As the officer may, under the constitution, hold the office during good behavior and the continuance of the office, if the law had been repealed, or been permitted to expire, he would have been out of office; but as it was neither repealed nor permitted to expire, but was continued in force by a subsequent statute, enacted prior to the time fixed for its expiration by its own terms, the officer still has the right to hold the office during good behavior and the continuance of the office. And he holds his office under the law which created it, and under which he was commissioned. *That law was not re-enacted or revived, but was only continued in force by an act which repealed so much of it as prescribed its own limitation.* The continuance of the law, and the consequent duration of the office, depend, not on the law itself, but altogether on legislative will, like all other offices of legislative creation. *The effect of the limitation was only that the office should continue for two years, and no longer, unless the legislature should, in the meantime, repeal the law, or extend its operation for a longer term.* The office might not have continued two years, because the law might, in the meantime, have been repealed. It may continue indefinitely, or so

long as the legislature shall deem expedient. *It cannot, therefore, with any propriety, be denominated or considered an office for two years, or for any other definite period, beyond which it cannot extend.*" (My italics.)

The limitation of the existence of the appellate court, in the act creating it, may be said to be temporary. An act of the legislature may be temporary in some of its parts and permanent in others; and the authorities affirm that if a statute, temporary when enacted, is made permanent by a subsequent act, it is to be deemed permanent ab initio. Suth. St. Const. § 136; 23 Am. & Eng. Enc. Law, p. 155, cl. 6. It would follow, under these authorities and the facts in this case, that the repeal by the legislature of 1897 of the provisions of the original act, which limited the life of the court, would have alone resulted in making the existence of the court permanent, ab initio, had there been no expression of the will of the legislature to the contrary. The claim of the relators that, if the present judges continue in office for a term of four years, they will do so as appointees of the legislature, and not under an election by the people, is without merit. The supreme court of California, in the case of Christy v. Board, supra, in passing upon the powers of the legislature in relation to statutory offices, the official terms of which, under the constitution in that state, as in our own, could not exceed four years, said: "When the constitution declares an office to be elective, it cannot, of course, be filled in any other mode than that provided by the instrument itself. * * *

But where an office has been filled in the method prescribed by the constitution, no reason is perceived why the legislature may not extend the term of the incumbent, provided the whole term, when extended, does not exceed the time limited by the constitution; section 7, art. 11, of which provides that 'when the duration of any office is not provided for by this constitution, it may be declared by law, and, if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this constitution, ever exceed four years.' An officer duly elected by the people, and holding his office for a term extended by the legislature within the constitutional limitation of time, cannot, in any just sense, be held to hold, not as an elected officer, but as an appointee of the legislature. It cannot be denied that he was elected to the office, and that he would not be the incumbent of it except for his election. The people have exercised their constitutional right in selecting him for the office, and, instead of thwarting the popular will by appointing some one else, the legislature has rather ratified it by extending his term. The duration of the terms of office, except as limited by the constitution, is a matter of purely legislative discretion. It may be diminished or extended, at the will of the legislature, within those limits; and this power

in no degree trenches on the constitutional right of the people to select the person who is to fill an elective office. The people select the incumbent of the office, but the legislature has the power to define the duration of the term, provided it is not fixed by the constitution, and is within the constitutional limitation of four years."

The principle asserted in *People v. Bull*, 46 N. Y. 57, under our constitution, which prohibits the legislature from fixing the term of a statutory office beyond four years, is not in point, or applicable to the question involved in the case at bar. Under the constitution of New York, as it then stood, the power of the legislature to fix the term of an office of its own creation appears to have been unfettered, and the holding in *People v. Bull*, supra, proceeds upon the theory that, if the power was conceded to the legislature to extend the term of an incumbent beyond that fixed prior to his incumbency, such power would be without limit, and the legislature could extend the term of an official so as to make the duration of his term, when once elected, permanent, and ever after thereby deprive the people of choosing his successor. It will readily be seen that, under the constitution of this state, such evil results cannot follow an extension by the legislature of the term of an office. This body, under our constitution, is authorized, in the first instance, to fix the term at four years, and no longer. If the term of a statutory office is originally fixed for a term under four years, the legislature certainly has the power, as our own decisions in effect affirm, to subsequently extend it to the maximum of four years, regardless of the fact that such extension may result in keeping an incumbent in office beyond the original term. Without further consideration of the question, I am of the opinion that there can be no election, under the law, for appellate judges at the ensuing November election, and that the judgment below, denying the right of the relators to have their names placed upon the official ballot, is right, and ought to be affirmed.

MONKS, J., concurs.

(21 Ind. App. 55)

SAMPLES v. CARNAHAN.

(Appellate Court of Indiana. Oct. 14, 1898.)

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—PLEADING—JUSTIFICATION—TRIAL—RIGHT TO OPEN AND CLOSE—APPEAL.

1. Error cannot be predicated on the overruling of a demurrer which is not in the record, and the grounds of which are not disclosed.

2. An answer admitting publication of the alleged libelous words, but not alleging that they were true in the sense imputed by the innuendo, is bad as a plea of justification.

3. Defendant voluntarily wrote a business acquaintance, advising him that, if a certain note of the acquaintance for \$50 was in the hands of a certain "jack-leg lawyer," to call it in, as he was in danger of losing it entirely,

and that his money was safer where it was than in the hands of such lawyer. *Held*, that it was not a privileged communication.

4. Unnecessary allegations in an answer do not make the pleading bad, as against a demurrer, for want of facts.

5. An answer containing a plea of justification for libel does not entitle defendant to open and close the argument, when the plea is coupled with a plea directly or argumentatively denying material allegations of the complaint.

6. A complaint for libel alleged that plaintiff was an attorney at law, that certain statements were falsely and maliciously made, and that by reason of them plaintiff was injured in his professional reputation. The answer alleged that plaintiff "pretended to be a lawyer," and "pretended to practice" law, and that he had never made any preparation for such practice; admitted the writing of the statements, but alleged that they were used in a different sense than that imputed by the complaint; and averred that the statements were true, and were made without malice. *Held*, that defendant was not entitled to open and close the argument, since the answer affirmatively denied material parts of the complaint.

Appeal from circuit court, Owen county; G. W. Grubbs, Judge.

Action by George O. Samples against Samuel H. Carnahan. From a judgment for defendant, plaintiff appeals. Reversed.

Willis Hickam, B. H. C. Cavins, and Davis & Moffett, for appellant. Fowler & Spangler, Wm. L. Rude, J. B. Wilson, and J. C. Robinson, for appellee.

ROBINSON, J. Appellant sued appellee for damages for an alleged libel. Upon issues formed, a trial resulted in appellee's favor. The errors assigned are that the court erred in overruling the respective demurrers to the amended second and the third paragraphs of answer, and in overruling appellant's motion for a new trial. A demurrer was sustained to the first paragraph of answer. The transcript recites that a demurrer was filed to the amended second paragraph of answer, and that it was overruled, but we are not informed of the grounds of demurrer, nor is the demurrer itself copied into the record. In this condition of the record, no question is presented by this assignment of error.

The alleged libel consisted of a letter written by appellee to one McNaught, as follows: "One word with you, which I hope will be confidential. If the Halton note you spoke of is in the hands of a jack-leg lawyer here, would advise you to call it in at once, or you may lose it entirely, while, if Mr. Halton is let alone, and not tantalized by him, he will do what is right. Your money is a great deal safer in Mr. H.'s hands than in the aforesaid J. L. L. I know whereof I speak. I have tried it. I say you may as well tear up, or put collection in the fire, and be done with them and this vexation," etc. It is averred that appellee by these words intended to, and did, charge that appellant was dishonest, and was guilty of embezzlement. The amended second paragraph of answer was a plea of justification. The third paragraph of answer

admits the writing and publishing of the letter set out in the complaint, and in addition avers, in substance, that appellee at the time was a farmer and miller, and that at and before said time he had had large business connections with one A. J. McNaught, who was a patron of his, and to whom he furnished large quantities of flour and other produce; that at said time there resided in Worthington one George O. Samples, appellant herein, "who pretended to be a lawyer," and "pretended to practice" the profession of law; that "said Samples had never made any preparation for the practice of law, was ignorant, designing, subtle, and sly, and was regarded among his acquaintances where he resided as being crafty and unreliable, and was by reason thereof known and spoken of by a majority of all who knew him as being a jack-leg lawyer and shyster, and whose reputation for morality was bad." It is further averred that said McNaught held a note for \$50 against one Halton, and had sent the same to appellant for collection; that appellant as soon as he received said note "commenced tormenting, tantalizing, and vexing said Halton, and threatening to sue him thereon, and thereby offended said Halton," who told appellee that, if appellant further pressed him about said note, he never would pay the same; that thereupon, "in view of the business relations between himself and said McNaught, and the duty he owed to said McNaught to keep him advised as to his own interests, and the interest that said defendant had in said McNaught as one of the customers of him, said defendant, and the interest that said defendant had in the business success of said McNaught, and honestly and in good faith, and upon probable cause, intending to inform him of such facts as he, said defendant, was in possession of relating to said note, and the collection thereof, and without malice, gave to said McNaught the facts set forth in said letter, mentioned and set out in said plaintiff's complaint, which are true." This paragraph does plead the truth of the alleged libelous matter, but it does not aver that the language used in the letter was true, in the sense imputed to it in the complaint. The sense imputed by the innuendo was that appellant was, among other things, dishonest, and was guilty of embezzlement. While an innuendo cannot change the natural meaning of language, yet in this case it was necessary to identify the person, and to explain the meaning of the words used, and their application. A plea of justification admits the innuendo, which this paragraph fails to do. *Townsh. Sland. & L.* (4th Ed.) § 215; *Downey v. Dillon*, 52 Ind. 442; *Hays v. Mitchell*, 7 Blackf. 117; *Ward v. Colyhan*, 30 Ind. 395; *Rodebaugh v. Hollingsworth*, 6 Ind. 339.

It is argued by appellee's counsel that the third paragraph of answer was good in bar of the action, as presenting facts showing that the letter complained of was a privileged communication. But with this view of the

pleading we cannot agree. It does not appear that the letter was written in answer to a confidential inquiry, nor does the pleading show that the relationship between appellee and the one to whom the letter was addressed was one which the law deems confidential. It does not appear that they were related, or that they were intimate friends, but simply that they were acquaintances who had had business dealings with each other. See *Krebs v. Oliver*, 12 Gray, 239; *Joannes v. Bennett*, 5 Allen, 169. The letter does not appear to have been written in answer to any previous inquiry, but to have been voluntarily written. And it has been said that, where the matter is not of great or immediate importance, interference may be considered officious and meddling, although, if the party had been applied to, it would clearly have been his duty to give all the information he could; and an answer to a confidential inquiry may be privileged, where the same information, if volunteered, would be actionable. See *Odgers, Lib. & Sland.* (2d Ed.) p. 204, et seq. We are unable to say that the matter mentioned in the letter was of such importance as to warrant the language used in the letter; nor can we say that the circumstances were such as reasonably imposed on appellee the duty to make such statements as those contained in the letter, although he may have believed he was writing the truth. As has been well said, "Although the defendant may feel sure that, if he were in his neighbor's place, he should be most grateful for the information conveyed, still he must recollect that it may eventually turn out that in endeavoring to avert a fancied injury to that neighbor he has really inflicted an undoubted and undeserved injury on the plaintiff." *Odgers, Lib. & Sland.* (2d Ed.) 216, and cases cited. Taking account of the circumstances under which the letter was written, the relation at the time existing between the appellee and the recipient of the letter, the nature of the matter about which the letter was written, and the language used in the letter, we cannot say that the letter was privileged.

There are averments in this paragraph proper to be considered in mitigation of damages,—among others, appellant's reputation as a lawyer, and his general character for honesty. There are averments in the paragraph which do not properly belong in it, but they do not make the pleading bad against a demurrer for want of facts.

Appellant has assigned as error the overruling of the motion for a new trial. The first reason assigned in the motion for a new trial questions the sustaining of appellee's motion to be allowed to take the burden of the issue, and open and close the evidence and argument. If this right was improperly given, it is by reason of certain averments in the third paragraph of answer. The amended second paragraph of answer, standing alone, would give this right; but if, with a plea of justification, there is an an-

swer traversing some material averment or averments of the complaint, the burden of proving such averments is upon the plaintiff, and entitles him to open and close. It is averred in the complaint that the statements contained in the letter were falsely and maliciously made of and concerning appellant, intending thereby to charge that appellant was dishonest, and had violated his obligation as an attorney at law, and that by reason of such false and malicious statements appellant had been injured in his good name and reputation as an attorney. In this third paragraph of answer, as we have seen, appellee admits writing the letter mentioned in the complaint, and after setting out at some length the relation between the parties, and the circumstances under which the letter came to be written, avers that appellant pretended to be a lawyer, and pretended to practice law, and that he had never made any preparation for the practice of the law, and concludes as follows: "And, without malice, gave to said A. J. McNaught the facts set forth in said letter, mentioned and set out in said plaintiff's complaint, which are true." The construction to be given the closing part of this answer has been announced by the supreme court in the case of *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243. In that case a complaint alleged that the defendant had "falsely, maliciously, and slanderously" spoken to certain named persons, of and concerning the plaintiff, certain "false, malicious, and slanderous words" (setting them out), imputing to plaintiff a want of virtue and chastity. An answer was filed, admitting the speaking of substantially the same words, stating what was said, and the circumstances under which they were spoken, and then averring: "The defendant avers that all the statements made by him, alleged in the complaint of the plaintiff, were of and concerning such plaintiff, but without malice." In discussing this answer the court said: "It will be readily seen that this answer does not confess and avoid the cause of action stated in appellee's complaint. On the contrary, it affirms facts which are utterly inconsistent with the truth of facts entering into and constituting a material element in appellee's cause of action. Such an answer is what is generally called an 'argumentative denial pro tanto of the complaint'; and the burden of the issue formed by such denial is, of course, on the plaintiff, and gives her the right to open and close." The reasoning in the case last cited is applicable to the case at bar. But the answer contains other averments denying a material allegation of plaintiff's complaint, although not in express words. The complaint proceeds upon the theory that by reason of the alleged libel appellant had suffered damages in his special calling, which was that of an attorney at law. The very wording of the complaint limits the damages claimed to damage to appellant's good name, reputation,

and business as a lawyer. See *Odgers*, Lib. & Sland. (2d Ed.) 27, 67, and cases cited. If an answer does not make such an admission of the facts alleged in the complaint that the plaintiff would not be required to introduce any evidence in the first instance to entitle him to judgment, the plaintiff is entitled to open and close. If an answer denies, either directly or argumentatively, a material allegation in the complaint, although a justification may also be pleaded, the defendant has no right to open and close the case. *Kinney v. Dodge*, 101 Ind. 573; *Rahm v. Delg.*, 121 Ind. 283, 23 N. E. 141; *Machine Co. v. Gray*, 100 Ind. 235; *Rothrock v. Perkinson*, 61 Ind. 39; *Fetters v. Bank*, 34 Ind. 251; *Railroad Co. v. McWhinney*, 36 Ind. 436. Appellant sought in his complaint to recover because of special injury in the way of his profession as an attorney at law, and has pleaded such profession as a substantive and traversable fact. His complaint alleges that his business is that of an attorney at law. *Pollock v. Hastings*, 88 Ind. 248. The third paragraph of answer does not expressly deny this allegation, but it does deny it argumentatively. When appellee says in his answer that appellant was a pretended lawyer, and pretended to practice law, and that he had made no preparation to practice law, he is not admitting that appellant is a lawyer, but is placing the burden upon him of proving that fact. It cannot be said that, with the above allegations, this paragraph of answer either expressly or impliedly admitted the allegation in the complaint that appellant was a lawyer. It amounted to a denial pro tanto of the essential allegations of the complaint. For the error of the court in granting the appellee the right to open and close the case, the motion for a new trial should have been sustained. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(21 Ind. App. 551)

**NAGLEBAUGH v. HARDER & HAFFER
COAL-MIN. CO.**

(Appellate Court of Indiana. Oct. 11, 1898.)

**ASSIGNMENTS—PLEADING—SUFFICIENCY—PAYMENT
OF EMPLOYEES—BRASS CHECKS.**

1. A petition alleging that plaintiff had purchased brass checks issued by defendant, and representing money due from defendant to his employes, but containing no statement showing the work done by such employes, and giving no reason for not making them parties defendant, does not state a cause of action on an assigned account for work performed by them.
2. Rev. St. 1894, § 7000 (Horner's Rev. St. 1897, § 5200), making it a misdemeanor to issue brass checks to an employe in payment for labor, precludes the purchaser of such checks from making them the basis of an action against the employer issuing them.

Appeal from circuit court, Sullivan county; William W. Moffett, Judge.

Action by John Naglebaugh against the Harder & Hafer Coal-Mining Company.

* Rehearing denied.

From a judgment for defendant, plaintiff appeals. Affirmed.

Otis Parker and Pigg & Brown, for appellant. John S. Bays, for appellee.

WILEY, J. The only question presented by the record is the action of the court in sustaining a demurrer to the complaint. The appellant was plaintiff, and, refusing to amend, judgment was rendered against him for costs. The complaint is in two paragraphs. In the first it is charged that appellee is a corporation; that it owned and operated a coal mine; that it employed a large number of men in mining coal; that for three years appellee issued to and circulated among its employes brass checks, which represented money due such employes for labor; that said checks were payable at the store of Patton & Baldrige, at Grammercy Park, Ind., where said mine was located; that said checks represented an amount due from the appellee to the holders; that appellant was in business near said mine, and, in business transactions with said employes, purchased their claims for a valuable consideration, and received from them, as evidence of their claims, said brass checks; that said checks so purchased represented in the aggregate \$500; that appellant is not now able to give the names of the persons from whom he purchased said checks; that he presented them to said Patton & Baldrige for payment, which was refused; that he also presented them to appellee for payment, which was likewise refused; and that the amount represented by them is due, etc. The second paragraph is identical with the first, except that it does not aver that the checks were presented to Patton & Baldrige for payment.

In the language of the complaint, "a copy of fac simile of the inscription of said checks" are made exhibits. There are three of them, and one is as follows:



The other two are just like the above, except one calls for 50 and the other for 25 cents. On one side of the check above set out are impressed the words and figures "Good for 1.00 in trade," and on the reverse side the words "Patton & Baldrige, Grammercy Park, Ind."

It is difficult to understand upon what theory the complaint proceeds. It is plain, however, that appellant seeks a recovery upon one of two theories: (1) Upon the brass checks, which he describes in his complaint, and which he makes his exhibits thereto; or (2) upon an account for work and labor performed by the employes of appellee, and an assignment thereof to him by such employes. If he relies upon the latter theory, his complaint is radically defective for two reasons: (1) There is no sufficient statement, in the complaint or bill of particulars accompanying it as an exhibit, of the work and labor performed by such employes; and (2) such employes are not made defendants, to answer as to their interests, and no sufficient showing is made why they are not. We must assume, therefore, that this is not the theory upon which the complaint proceeds, but that the plaintiff has grounded his action upon the checks. Upon the latter theory, it seems clear to us, no cause of action is stated. These checks show on their face that they were only good "in trade" at a fixed and definite place, and that was at Patton & Baldrige's. It is also charged in the complaint that they were made payable there. These checks were not commercial in their character, and the appellant took them charged with a full knowledge of their infirmities. The complaint assumes that these checks were valid, and it appears to us that the action is predicated upon them, and must upon this theory either stand or fall. It must be held, under the facts pleaded, that these checks were issued to the employes of appellee in payment, or, at least, in part payment, for labor performed by them. They were redeemable by appellee at the store of Patton & Baldrige. As to whether these checks were purchased by appellant at a discount, as a speculation, we have nothing to do, although counsel have discussed this question.

The issuing of the checks, under the statute, was an unlawful act, and this appellant admits. Section 7060, Rev. St. 1894 (section 5206x, Horner's Rev. St. 1897), provides "that any person, co-partnership, corporation," etc., "who shall publish, issue or circulate any check, card or other paper which is not commercial paper payable at a fixed time in any bank in this state, at its full face value in lawful money of the United States, * * * to any employe of such person, co-partnership, corporation," etc., "in payment for any work or labor done by such employe, * * * shall be guilty of a misdemeanor, and upon conviction shall be fined." etc. The complaint avers that said checks represented money due the employes of appellee for work

and labor done, and did in fact represent amounts due from appellee to the holders thereof. If this is true, then the checks must be regarded as evidences of indebtedness, or, in other words, a promise to pay money. They would constitute the contracts between the parties. "When the object of the contract is to obstruct justice and duty by defeating the letter or spirit of the law, the courts will not enforce the agreement. It would be a travesty upon government. Could its judiciary lend aid to attempts to defeat the very ends of government? It has been repeatedly and most emphatically decided that contracts contrived for the purpose of violating statutes are inoperative and void. When such a contract is in defiance of an absolute provision of the statute, the illegality is more apparent. * * * If an act is forbidden, a contract to do it is void, whether any penalty be attached or not, for no one can use the law to effect its violation." 9 Am. & Eng. Enc. Law, p. 909. It is the rule everywhere that courts will not enforce a contract made to violate a statute of the state. *Smith v. Arnold*, 106 Mass. 269; *Prescott v. Battersby*, 119 Mass. 285; *Barton v. Plank-Road Co.*, 17 Barb. 397; *Tenney v. Foote*, 4 Ill. App. 594; *Caldwell v. Bridal*, 48 Iowa, 15; *Thomas v. City of Richmond*, 12 Wall. 349; *Burkholder v. Beetem*, 65 Pa. St. 496; *Blasdel v. Fowle*, 120 Mass. 447; *Austin v. Markham*, 44 Ga. 161. In *Case v. Johnson*, 91 Ind. 477, the court say: "The general rule of law is well settled that a contract prohibited by statute is absolutely void. The court will not enforce such contracts, but will leave the parties who have contracted in violation of such statute without any remedy at law, where they are in *pari delicto*." In *Deming v. State*, 23 Ind. 416, it was said: "The general rule of law that a contract prohibited by statute is void is familiar, and we do not lose sight of it. It is a wholesome rule in every case where it is properly applicable. The general doctrine as to such contracts is that the courts will not enforce them, * * * but parties who have contracted in violation of law will be left without remedy whenever they are in *pari delicto*. The plain reason and purpose of the rule commends it to any enlightened judgment. It is to secure obedience to the statute which has forbidden the thing to be done, and thereby aid in accomplishing the legislative intention." See, also, *Scotten v. State*, 51 Ind. 52. In *Griswold v. Waddington*, 16 Johns. 438, the following language is used: "There is to my mind something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of the law. It is encouraging disobedience, and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books." See, also, *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230. We have in this state a statute (section 2019, Burns' Rev. St. 1894; section 1942, Rev. St. 1881) making it

a felony for certain public officers to loan public funds; and in the case of *Light Co. v. Veal*, 145 Ind. 508, 41 N. E. 334, and 44 N. E. 353, where a county treasurer loaned money belonging to the county, in violation of the statute, it was held he could not recover. In that case, Howard, J., speaking for the court, said: "It is hence argued that, having engaged in the commission of an act made criminal by the law of the state, the appellee is not in a position to invoke the same law to aid him in the recovery of the money loaned; that, by assisting him to make good his loan, the law would, in effect, be but abetting him in his wrongdoing. In other words, the law cannot help the criminal to reap the fruits of his crime, but must leave him where it finds him,"—citing with approval *Rock v. Stinger*, 36 Ind. 346, and *Lord Mansfield in Holman v. Johnson*, Cowp. 343.

We must assume that the appellant, when he purchased said checks, knew they were issued in violation of a penal statute of the state, and that in his hands they would create no legal liability against appellee. Suppose these checks were still in the hands of the employés, to whom they were issued, and appellee refused to pay them. They could not recover from appellee the amounts represented by the checks, and make the checks the basis of the action. Their sole remedy would be to disregard the checks, and sue on the quantum meruit, as for work and labor performed. The appellant is in no better position to maintain an action on the checks than the original holders; and, as it is manifest that they could not do so, it follows that appellant's complaint does not state any cause of action. If appellant intended to disregard the checks, and sue upon an account for labor of appellee's employés, as upon an equitable assignment, and as an equitable assignee, and ask to be subrogated to the original rights of such assignors, a different question would be presented; but that is not the theory of the complaint, and hence that question is not before us for decision. The demurrer to the complaint was properly sustained. Judgment affirmed.

(22 Ind. App. 617)

DIGGS et al. v. WAY et al.¹

(Appellate Court of Indiana. Oct. 14, 1898.)

CONVERSION—PLEADING—EXHIBITS—MORTGAGES.

1. In an action for conversion of mortgaged goods, a copy of the mortgage filed with the complaint as an exhibit cannot be considered in determining the sufficiency of the complaint, since the mortgage is not the foundation of the complaint, within Burns' Rev. St. 1894, § 365 (Horner's Rev. St. 1897, § 362).

2. Burns' Rev. St. 1894, § 6638 (Rev. St. 1881, § 4913), provides that no chattel mortgage shall be valid against third persons where the goods are not delivered to the mortgagee, and retained by him, unless it is recorded in the recorder's office of the county where the mortgagor resides. A complaint for conversion of mortgaged goods charged defendant with notice of the mortgage, but did not allege

¹Rehearing denied, 54 N. E. 412.

that the county in which the mortgage was recorded was the county of the mortgagor's residence. *Held* insufficient.

Appeal from circuit court, Randolph county; Albert O. Marsh, Judge.

Action by Francis M. Way and others against Frank Diggs and others for the conversion of mortgaged property. From a judgment for plaintiffs, defendants appeal. Reversed.

Engle & Parry and Marsh & Jaqua, for appellants. Newton Ward and S. A. Canady, for appellees.

BLACK, J. It is assigned as error that the complaint did not state facts sufficient to constitute a cause of action. The complaint contained two paragraphs. The court, in its special finding and judgment, treated the case as an action against the appellants for the recovery of damages for the wrongful conversion to their own use of a certain stock of merchandise. The appellants were shown in the second paragraph of complaint to have obtained possession of the goods through purchase from others, not parties, who had bought them and taken possession under a sale on execution against an owner of the goods, one Lindsey L. Ludwick, by whom they had been mortgaged to the appellees, before the issuing of the execution, to secure certain indebtedness of the mortgagor to the mortgagees. A copy of the chattel mortgage was filed with the original complaint, and was referred to in each paragraph as a part thereof, marked as an exhibit; and it was alleged in each paragraph that the mortgage was duly recorded within 10 days after its execution, in the chattel mortgage record, the volume and page being specified, of Randolph county, Indiana, "the county in which said mortgaged property was situated at the time of the execution of said chattel mortgage." In the first paragraph of the complaint no mention was made of the sale on execution, but it was alleged that, subsequent to the execution and recording of the mortgage, the goods passed from the possession of said Ludwick into the possession of the appellants, under a pretended claim of ownership therein. We state no more of the contents of the lengthy pleadings than we deem proper for the decision of the particular question presented in argument before us.

The case having been tried by the court below as an action in tort, the complaint is not to be treated as a complaint on the mortgage, and the mortgage cannot be regarded as the foundation of the action, within the meaning of the statute (section 362, Horner's Rev. St. 1897; section 365, Burns' Rev. St. 1894), which provides: "When any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading. * * * Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record." It is well settled by repeated decisions that an improper exhibit

will not be considered in examining a pleading for the purpose of determining the question as to the sufficiency of the facts stated. Such exhibit cannot supply any averment omitted in the pleading. *Knight v. Turnpike Co.*, 45 Ind. 134; *Wilson v. Vance*, 55 Ind. 584; *Whipple v. Shewalter*, 91 Ind. 114; *Conwell v. Conwell*, 100 Ind. 437; *Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42. However necessary a written instrument may be as evidence in support of a plaintiff's suit, it is not a proper exhibit if the action be not founded on the instrument. *Treadway v. Cobb*, 18 Ind. 36; *Rausch v. Trustees*, 107 Ind. 1, 8 N. E. 25; *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 933. In *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545, it was held that a complaint for the wrongful conversion of personal property, the plaintiff's right in the property being shown by the complaint to be derived by a mortgage, was not based on the mortgage, and that the mortgage could not be made a part of the complaint by filing a copy thereof. It has been suggested by counsel for the appellant that a copy of the chattel mortgage mentioned in the complaint, which was filed with the original complaint, should not be treated as filed with the amended complaint. In view of what has preceded, we need not further notice this suggestion, as we do not look to the contents of the exhibit.

When the facts in this case arose, and when the cause was pending below, it was provided by statute (section 4913, Rev. St. 1881; section 6638, Burns' Rev. St. 1894) that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee, and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within 10 days after the execution thereof. The right of the appellees to maintain the action for conversion depended upon the validity of their pretended mortgage lien. It is not shown directly or inferentially in the complaint that the county in which the mortgage was recorded was the county in which the mortgagor resided. The appellants were persons against whom, by the plain terms of the statute, the mortgage was not valid, unless recorded in the recorder's office of the county where the mortgagor resided, within 10 days after its execution. It was material and essential to the cause of action against the appellants to show the existence of all statutory requisites of the validity of the mortgage on which the right of the appellees depended. The allegation of actual notice to the appellants or their grantor, or both, of the existence of the mortgage, could not render the complaint sufficient, without showing that the statutory requisites of validity had been complied with. See *Scarry v. Bennett*, 2 Ind. App. 167, 28 N. E. 231; *Morris v. Ellis*, 16.

Ind. App. 679, 46 N. E. 41; *State v. Griffin*, 16 Ind. App. 555, 45 N. E. 935. See, also, *Morris v. Ellis*, 16 Ind. App. 679, 46 N. E. 41. For the omission of an averment concerning the residence of the mortgagor, we must hold the complaint insufficient as a complaint for the conversion of the mortgaged goods. Whether the complaint was otherwise deficient we do not decide. The judgment is reversed.

(157 N. Y. 90)

PEOPLE ex rel. LEET v. KELLER, Com'r of Public Charities.

(Court of Appeals of New York. Oct. 25, 1898.)

GREATER NEW YORK CHARTER—CIVIL SERVICE—CONSTRUCTION OF STATUTE—TIME OF TAKING EFFECT.

1. The provisions of the Greater New York charter (Laws 1897, c. 378) relating to the civil service of the new city operated to establish a special local system, and to take the city out of the operation of the general civil service law (Laws 1883, c. 354), and were not repealed or affected by Laws 1898, c. 186, amending the general law.

2. Laws 1898, c. 186, amending the general civil service law applicable to cities (Laws 1883, c. 354), which allowed the mayor of each city two months within which to perform the new duties imposed by the act, and after the expiration of that period the state civil service commissioners one month in which to act upon the same, operated only upon cases which came into existence after its passage, and after the new civil service rules had been approved by the state board.

Appeal from supreme court, appellate division, First department.

Application for mandamus, on the relation of George Edwin Leet, against John W. Keller, commissioner of public charities for the borough of Manhattan. From an order of the special term denying a peremptory writ, affirmed by the appellate division (52 N. Y. Supp. 950), relator appeals. Affirmed.

The relator was appointed in 1896 superintendent of the city hospital by the commissioners of public charities of the former city of New York. By the civil service regulations of the then city, his position was one of those "to be filled by selection from those who have passed highest in open competitive examinations." On January 1, 1898, he was transferred to the employment of the new city, in the department of public charities, to hold the same position; and on March 31, 1898, he was removed from his position, the removal to take effect April 1, 1898. On March 5, 1898, the municipal civil service commissioners of the present city of New York, who had been appointed on January 1, 1898, by the mayor, made certain rules and regulations, which were approved by the mayor, under which the position of the relator was classified in the schedule of positions not subject to competitive examinations. On March 31, 1898, chapter 186 of the Laws of 1898 went

into effect, as an amendment of the general civil service law passed in 1883. Among other things, the amendatory law provided that, if a person holding a position subject to competitive examination shall be removed or reduced, the reasons therefor shall be stated in writing, and the person so removed have an opportunity to make an explanation; and, further, that the civil service regulations of cities should be approved by the state civil service commission. Upon his removal from office, the relator applied for a peremptory writ of mandamus commanding the respondent to reinstate him in the position which he had held, upon the ground that he was removed without the hearing, or an opportunity to make an explanation, to which he was entitled by law. His application was denied at the special term, and upon appeal the order was affirmed by the appellate division of the First judicial department. From the order of affirmance the relator has appealed to this court.

Julius M. Mayer and T. E. Hancock, for appellant. Theodore Connolly, for respondent.

GRAY, J. (after stating the facts). The appellant claims that as his removal took effect a day after the enactment of chapter 186 of the Laws of 1898, amendatory of the general civil service law, the rules and regulations of the New York City civil service commissioners, under which the position held by him was taken out of the competitive class, were ineffectual, because not approved by the state civil service board, as required by that act; and, if ineffectual for that reason, the respondent was without power to remove him without an opportunity to be heard. In support of this claim, he argues that the charter of the new city did not establish a complete and exclusive statutory system of civil service for the city, but that the civil service law of the state was in force there, modified only in certain particulars. The general law was enacted in 1883 (chapter 354, Laws 1883), and applied to all the cities of the state. In framing the charter of the new city of New York, which went into effect on January 1, 1898, there was inserted a plan for appointments to positions in the civil service. Portions of the general law were carved out, and new provisions were made, and all were put together, until a complete system was evolved and incorporated in the charter. There were sharp and fundamental differences between the charter provisions and the general law. Section 123 of the charter provided that the mayor should appoint commissioners, who, subject to his approval, should prescribe regulations for appointments and promotions in the civil service of the city, for classifications and examinations therein, and for the registration and selection of laborers for employment. Section 124 enacted what these regulations should provide. Under the general act of 1883, the duty was devolved upon the may-

or of a city to prescribe regulations, which should conform to the scheme of regulations provided in section 2 of the general law, and the action of the mayor was to be approved by the state civil service board before his regulations should go into effect. It is clear that in these respects there was a striking difference between the civil service system provided for the city of New York, and that provided in the general civil service law for the rest of the state. In the one case a duty of action is imposed upon the commissioners, whose regulations are to be approved by the mayor only, while in the other case a duty is devolved on the mayor, whose action needs the approval of the state civil service board, to be effective. It is evident, from section 125 of the charter, that the legislature was not unmindful, in its enactment, of the existence of the state civil service board, inasmuch as it is therein provided that "it shall be the duty of such persons to make reports from time to time to the state civil service commission, whenever said commission may request, of the manner in which the civil service law, and the rules and regulations thereunder, have been and are administered, and the results of their administration in such city." This was a provision under which the state civil service commissioners might require information, but it gave them no power over the municipal commission. I think that the charter provisions contained a special and exclusive system for the classification and examination of applicants for employment in the civil service, and for its administration. They manifested a deliberate intention on the part of the legislature to take the city of New York out of the general civil service law of the state. Differences, other than the marked one mentioned, make this plain, and they are pointed out in the opinion below. It is to be observed that, in the general law, promotions are on the basis of merit and competition, while, in the charter, they are upon the basis of "ascertained merit and seniority in service, and, upon such examinations as may be for the good of the public service," and, further, that there is a material difference between the charter and the general law, in respect to the examination and employment of laborers.

The act of 1898 only purported to amend sections 8 and 13 of the general act of 1883. It was prospective in its operation, and its effect was to change the general law in the respects mentioned; but while, in terms, it applied to all the cities of the state, it seems to me that the present city of New York was necessarily left under its particular system, for the want of apt language to make the act operative upon the charter provisions. There is no repeal, in express terms, of the civil service provisions of the charter, and no language from which the intention may be inferred that the act should have any application thereto. As amending specific sections of the act of 1883, it could not be deem-

ed to amend the charter of the new city, unless the provisions of the latter are to be regarded as a mere application of the general law. But I do not see how that can be true, not only because of the striking differences in the system, but because, if the general act was to be applicable, its embodiment in the charter was needless. Being a special and local law, how could the charter of the city of New York be repealed or altered by a subsequent general statute, unless such an intent to repeal or alter was manifest? Where a local and special statute covers the entire ground, and constitutes a complete system of provisions and regulations, which the general statute, if allowed to operate, would alter, the settled rule is that it is not to be deemed repealed, except the intent to repeal is clearly manifested. In *re Evergreens*, 47 N. Y. 216; In *re Commissioners of Central Park*, 50 N. Y. 493; *McKenna v. Edmundstone*, 91 N. Y. 231; *Suth. St. Const. § 157*. As it was said in *People v. Quigg*, 59 N. Y. 83, where the question was whether the provisions of chapter 315 of the Laws of 1844, entitled "An act for the establishment and regulation of the police of the city of New York," which authorized summary judgments upon forfeited recognizances, were repealed by chapter 202 of the Laws of 1855, which extended the provisions of the Code to forfeited recognizances: "Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal; and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end." I think the learned justices of the appellate division were clearly correct in their opinion of the effect to be given to the act of 1898.

There is, however, another ground upon which the affirmance of this order can be rested, and that is that the act of 1898 cannot be given a retroactive effect in its operation. It is capable of a construction which, recognizing the regulations existing at the time of its passage, simply required that in the future the regulations prescribed therein shall be approved by the state civil service commission. In amending section 8, it provides that, "within two months after the passage of this act, it shall be the duty of each of said mayors in and by such regulations to cause to be arranged in classes the several clerks and persons employed or being in the public service of the city of which he is mayor," etc., and, further, that "such regulations herein prescribed and established, and all regulations now existing for appointment and promotion in the civil service of said city and any subsequent modification thereof, shall take effect only upon the approval of the mayor of the city and of the New York civil service commission." In the amendment of section 13, it provides that, "if a person holding a position subject to

competitive examination * * * shall be removed or reduced, the reason therefor shall be stated in writing and filed * * * and the person so removed or reduced shall have an opportunity to make an explanation." These provisions clearly have reference to the future, and leave unaffected and in force all regulations which had been lawfully adopted at the time of the enactment of the act. Such regulations as had then been adopted were within the provisions of the charter, and, so far from there being any intention expressed to invalidate them, the contrary is apparent from the language quoted. They provide for a period of time, of two months, within which the mayor is to perform the duty imposed by the act; and after the expiration of that period a month elapses, within which the state civil service commission may act upon the new regulations. This is shown by the provision that "after the termination of three months from the passage of this act no officer or clerk shall be appointed, and no person shall be admitted to or be promoted in either of the said classes now existing or that may be arranged hereunder pursuant to said rules," etc. Thus, up to the expiration of the three months, if meanwhile the new regulations have not been approved as required, the existing regulations apply to appointments and classifications, and there can be no hiatus in the working of the system. Not being a remedial statute, the act of 1898 should not be construed to operate retroactively, but as operating only upon cases which shall come into existence after its passage, when, under its new provision, the civil service rules of the city must receive the approval of the state civil service board, to be effective. It is a familiar and well-established rule that every law operates prospectively, unless the legislative intent that it shall act retrospectively is expressed in clear and unambiguous language. Where, as in the present case, a new rule is laid down by the legislative body for the future administration of the civil service system in cities throughout the state, it must logically follow that acts done under the authority of the law in force prior to the time when the new rule takes effect are valid. The regulations of the New York civil service commission of March 5, 1898, were validly made, and, being existent when the act of 1898 was passed, were in express terms recognized; but they were required to be further approved by the state board. Hence, what had been done under their authority was lawfully done, and was not affected. The classification of the relator's position as noncompetitive, and his subsequent removal without hearing, were lawful acts, because done under the law then in force, and before the act providing for changes in the system took effect. The order appealed from should be affirmed, with costs. All concur on the second ground stated in opinion, except MARTIN, J., who dissents. Order affirmed.

(156 N. Y. 605)

SUTHERLAND v. CITY OF BROOKLYN
et al.(Court of Appeals of New York. Oct. 4,
1898.)TAX SALE—REDEMPTION—SURPLUS—RIGHTS OF
MORTGAGEE.

Laws 1888, tit. 8, c. 583, provides that the purchaser at a delinquent tax sale shall be entitled to a deed one year after the giving of notice to the owner or mortgagee; that any person having an estate in the land may redeem within one year after notice, on payment of 10 per cent. in advance on the price paid at the sale, and 15 per cent. interest, and accrued taxes, assessments, etc.; and that the redeemer, on request, may be credited towards redemption with the surplus price "then remaining in the hands of the treasurer." Also that, when the land belongs to an infant having no guardian, the registrar shall not issue a deed to the purchaser until at least one month after he shall have legal evidence that such disability has been removed or a guardian appointed, and that until the expiration of such month the guardian may redeem, the same as any other. *Held*, that a mortgagee in possession, as to whom the year for redemption has run, is entitled to the surplus, although the purchaser has not applied for a deed, and the owners are infants, for whom a guardian has not been appointed.

Parker, C. J., and Gray and Bartlett, JJ., dissenting.

Appeal from supreme court, general term, Second department.

Action by John Sutherland against the city of Brooklyn and others. From a judgment of the general term (33 N. Y. Supp. 959) reversing a judgment of the special term in his favor, plaintiff appeals. Reversed.

John A. Taylor, for appellant. Almet F. Jenks, for respondents.

HAIGHT, J. This action was brought to recover the surplus moneys arising from a sale of a lot of land in the city of Brooklyn. On the 11th day of April, 1876, Eliza Richardson was the owner of the lot in question, and on that day executed a mortgage with her husband to the plaintiff to secure the payment of the sum of \$4,200. Both Eliza Richardson and her husband have since died, leaving children who were their heirs at law, and who are made parties to this action and appear by guardians. No part of the money secured by the mortgage has ever been paid to the plaintiff, and for some years he has been in possession of the premises. On the 11th day of July, 1888, the defendant the city of Brooklyn sold the lot pursuant to law for unpaid taxes, which had previously been levied and assessed thereon, and received from the purchaser the sum of \$3,500, which was in excess of the taxes imposed in the sum of \$3,407.57, which sum was thenceforth held by the city for disposition and payment to such person or persons as shall be entitled thereto. Thereafter the purchaser, or his assignee, caused notice to be served upon the plaintiff, as such mortgagee, of such sale and purchase, and that he must re-

deem before the expiration of one year. Under such notice, plaintiff's time to redeem from such sale expired on the 2d day of November, 1889. After the notice of such sale had been served upon him, and on or before the 2d day of November, 1889, and after such date, he demanded from the defendant the city of Brooklyn that the surplus be paid over to him, and at the time exhibited to the proper officers of the city his muniments of title thereto as such mortgagee, whose estate and lien appeared of record in the county of Kings, but payment thereof was refused. It appears from the evidence in the case that after or about the time that the plaintiff first demanded the payment to him of the surplus one Tormey appeared at the office of the comptroller, and redeemed the premises from the sale, and that thereupon the surplus was paid over to the purchaser or his assignee. It does not appear whether Tormey was acting for himself or for the purchaser, but it does appear that he was not the owner or a mortgagee, or a person having any interest in the premises which entitled him to redeem under the statute.

The statute under which the sale took place is chapter 583, Laws 1888, tit. 8. The scheme provided for the collection of arrears of taxes is, in substance, a sale by the registrar of arrears of the lands upon which the taxes were assessed at public auction to the highest bidder, but for a sum not less than the aggregate amount of all arrears of taxes unpaid, with the interest accrued thereon. Upon such sale, and the payment by the purchaser into the treasury of the amount bid, the registrar delivers to him a certificate of such sale, containing a covenant on the part of the city to refund the amount paid for the lands, with interest at the rate of 4 per centum per annum from the date of sale, and all sums paid by him for taxes, assessments, and water rates authorized by the statute in case the title shall prove invalid; and that upon presentation of the certificate of sale, and the service of a notice thereof, upon the owner and upon mortgagees of the lands, the registrar, after the expiration of one year from the date of the service of such notice, in case the lands have not been redeemed, shall execute and deliver to the purchaser, his legal representatives or assigns, a deed of the premises, who shall take a good and sufficient title in fee simple absolute in the property. The statute further provides that "any person or persons having an estate in or any mortgagee of any of the lands and premises sold in pursuance of the third section of this title, whose estate, or lien appears of record in the county of Kings, may, at any time before the expiration of one year after notice shall have been given to him of such sale, by the purchaser or his assigns in the manner hereinafter provided, or before a deed of said premises shall have been delivered as provided in section four of this title, redeem said lands and premises by paying

to the registrar of arrears for the use of the purchaser or his assigns the sum paid by him on such sale, and ten per centum on the same, with interest on the aggregate amount at the rate of fifteen per centum per annum from the date of said sale, and one dollar for each notice (not exceeding six) served as hereinafter provided, together with all sums which shall have been paid by such purchaser or his assigns for taxes, assessments or water rates on said lands, levied, imposed or becoming due after the tax, assessment or water rate for which the sale was made, with interest thereon, from the date of such payment, respectively, at the rate of nine per centum per annum. * * *

Any person redeeming any lands from a sale under the provisions of this title, shall, at the request of the person so redeeming, be allowed and credited by the registrar of arrears, toward such redemption, with the amount of surplus moneys received on such sale then remaining in the hands of the treasurer, and upon his presenting to the said registrar a certificate from the comptroller showing the amount of such surplus, such amount shall be applied upon or toward such redemption." The statute further provides that "whenever such registrar shall receive satisfactory information that the land so sold belongs to an idiot or insane person, for whose estate no committee shall have been appointed, or to an infant having no guardian, he shall not execute a conveyance of their land until at least one month after he shall have legal evidence that such disability has been removed, or a committee or guardian of the estate has been appointed. And until the expiration of said month, such committee or guardian, may redeem such land in the same manner as hereinafter provided."

It will be observed that the provisions of this act are somewhat extraordinary. The redemption provided for is made exceedingly burdensome, for it can only be made by paying 10 per centum on the amount of the bid, and 15 per centum interest, which at the end of the first year amounts to 25 per centum, and an additional 15 per centum for every year thereafter. It is an inducement, therefore, for purchasers at tax sales to bid a large sum, and thus increase the amount to be returned to them upon redemption. The owner or mortgagee, however, is not bound to redeem. He may elect to adopt the sale and accept the surplus over and above the taxes paid by the purchaser into the treasury. This is what the plaintiff did in this case. He was the first lienor of record, holding a mortgage unpaid, upon which more than the amount of the surplus was due and owing, and his right thereto was established by the judgment in this action, in which the owners were parties, and about which there is no controversy. He was met, however, with a refusal on the part of the city to pay the surplus to him for the reason that another person had redeemed the premises and the sur-

plus had been returned to the purchaser. It was, however, conceded upon the argument by the counsel representing the city that Tormey, the redeemer, was not an owner or a lienor, or a person entitled to redeem under the statute, and that such redemption must be treated as unauthorized. He claims, however, that up to the time that the purchaser could legally take his deed, and until the deed was delivered, the purchaser had no title to the premises, but the title and possession were with the owner, and that the lien of the mortgage had not been disturbed; that the plaintiff could not claim payment of the surplus, for the reason that it must be retained by the city so long as redemption was possible. It appears that this view was adopted by the court below, Mr. Justice Cullen saying in his opinion: "The sale has not yet become absolute, and may never become such." We do not see our way clear to the adoption of this view. It is true that the owners are infants, and, if they had no guardians, they yet may have the right to redeem; but the plaintiff as first lienor, whose lien is past due, is entitled to the surplus. As to him, the year had run after the service of the notice upon him before the last demand was made, and as to him the purchaser was entitled to a deed absolutely cutting off and discharging the lien of his mortgage upon the premises. The fact that the purchaser neglected to apply for his deed does not, as it appears to us, affect the rights of the plaintiff. To hold otherwise would permit the purchaser, at his option, to tie up the surplus for an indefinite number of years, thus preventing the mortgagee from having any use of the money which clearly belonged to him. Nor does the fact that the owners are infants appear to affect the plaintiff's rights. It is true that the statute provides that persons redeeming may be credited by the registrar with the amount of surplus moneys received on such sale then remaining in the hands of the treasurer, but a former provision provided for the redemption upon the payment of the sum paid by the purchaser on the sale and 10 per centum on the sum, with interest on the aggregate amount at the rate of 15 per centum. These two provisions must be read and construed together, and, when so read and considered, there can be no doubt as to the meaning. A person entitled to redeem must pay the amount of the purchase money, with the 10 per centum in addition and the 15 per centum interest. In making such payment, he must be credited with the amount of the surplus received upon the sale, if any such surplus then remains in the hands of the treasurer. If none so remains, he cannot be credited with it. This construction brings the provisions of the statute in harmony, and sustains the plan of redemption evidently intended. It often occurs, as it has in this case, that redemption may be made by more than one person, but such is not the case with the distribution of surplus

moneys unless the amount is more than sufficient to pay the first lienor. If the owners should hereafter redeem, they would have to pay the amount of the mortgage, for it is past due. If the surplus now remaining in the treasury of the city is applied upon the mortgage, the owners do not suffer thereby, for they still can redeem upon payment of the amounts specified by the statute. They would be entitled to no credit, for there would be no surplus in the treasury, it having been applied in discharging their obligation upon the mortgage. Neither is the purchaser prejudiced or deprived of any of his rights under the statute by thus applying the surplus funds paid into the treasury by him. If no redemption takes place, he is entitled to his deed. If redemption is finally made by the owners, he gets his 25 per centum for the first year, and 15 per centum interest annually thereafter, together with the full amount of his bid. The judgment of the general term should be reversed, and that of the special term affirmed, with costs.

O'BRIEN, MARTIN, and VANN, JJ., concur. PARKER, C. J., and GRAY and BARTLETT, JJ., dissent.

Judgment reversed, etc.

(157 N. Y. 100)

PRINGLE v. LONG ISLAND R. CO.

(Court of Appeals of New York. Oct. 25, 1898.)

ABATEMENT AND REVIVAL—SUBSTITUTION—LACHES
—APPEAL—RECORD—CERTIFICATION
OF QUESTIONS.

1. Code Civ. Proc. § 757, provides that in case of death of a party, if the cause of action survives, the court must, on motion, allow or compel the action to be continued by or against his representative or successor in interest; and section 761 provides that at any time after the death of plaintiff the court may, in its discretion, on notice to such persons as it directs, and on application of the adverse party or of the person whose interest is affected, direct that the action abate, unless it is continued by the proper parties within a time specified in the order. *Held*, that laches in making an application for a revivor in an action for damages for negligence is ground for its denial.

2. Where the order of certification of the appellate division expressly refers to its opinion on the question certified, the court of appeals will consider such opinion a part of the record before it.

Appeal from supreme court, appellate division, First department.

Action by Mary B. Pringle, as executrix of the last will and testament of James E. Pringle, deceased, against the Long Island Railroad Company. From an order of the appellate division (50 N. Y. Supp. 536. See, also, 52 N. Y. Supp. 1148) reversing an order of the special term, and granting a motion to substitute James S. Biddell, as administrator with the will annexed, as plaintiff, defendant appeals. Reversed.

This action was commenced on the 20th of May, 1886, to recover damages from the defendant on account of its alleged negligence, which resulted in the death of James E. Pringle on or about the 8th of March, 1886. Mrs. Pringle died on the second of July, 1894, and letters of administration with the will annexed were issued to James S. Biddell on the 15th of October, 1897. Eight days later a motion was made to substitute Mr. Biddell, as administrator with the will annexed, as plaintiff in the action, and to continue it in his name as such. Upon the hearing of said motion, affidavits were read in behalf of the defendant tending to show laches on the part of the plaintiff, and affidavits were read in behalf of the plaintiff tending to excuse such laches. The special term denied the motion, as appears from the opinion of the justice presiding, on the ground of "laches in making it." Upon appeal the appellate division reversed the order, and granted the motion, without specifying any reason or ground in its order, but in its opinion stating that laches is no answer to such a motion, upon the authority of *Holsman v. St. John*, 90 N. Y. 461. An appeal was allowed to this court, and the following question certified: "Is laches on the part of the plaintiff an answer to a motion for a revivor in an action for damages brought against a defendant by reason of alleged negligence?"

William J. Kelly, for appellant. Isaac N. Miller, for respondent.

VANN, J. (after stating the facts). The decision of this appeal depends upon the construction to be given to sections 757 and 761 of the Code of Civil Procedure. These sections take the place of portions of section 121 of the Code of Procedure, which, as originally enacted, provided that no action should abate by the death of a party, and that "the court must, upon a supplementary summons and complaint, or in its discretion, upon a motion, if made within one year after a decedent's death, in a proper case, allow or compel the action to be continued by or against his representative or successor in interest." In 1877 this section was amended by striking out the provision relating to a supplementary summons and complaint, and directing that "the court must, upon a motion, allow or compel the action to be continued," etc. This is the language of section 767 of the Code of Civil Procedure, as now in force. Section 761 provides that at any time after the death of the plaintiff the court may, in its discretion, upon notice to such persons as it directs, and upon the application of the adverse party, or of the person whose interest is affected, direct that the action abate, unless it is continued by the proper parties within a time specified in the order. In *Beach v. Reynolds*, 53 N. Y. 1, which was an action in equity, it was held that the right of the representatives of a deceased

party to continue an action pending at the time of his death is not absolute, but rests in the legal discretion of the court; that leave to continue the action may be granted or refused according to the particular circumstances of each case; that a long delay in making the application, unexecuted, constitutes laches, and a valid reason for refusing the relief asked for; that in such cases the equitable rule which requires reasonable diligence as well as good faith to put the court in motion prevails; and that the court will not aid a party who has slept upon his rights in the enforcement of stale demands. In *Evans v. Cleveland*, 72 N. Y. 486, where the effort to continue was by supplemental complaint, the court cited *Beach v. Reynolds*, and held that no mere lapse of time would absolutely defeat an application for the continuance of an action at law in the name of the representative of a deceased party, and that if the delay has been unreasonable, or in any way damaging to the defendant, the application may be denied. In *Coit v. Campbell*, 82 N. Y. 509, which arose upon a motion to revive an action in equity, it was held, in substance, that the word "must," as used in section 757, is imperative only so far as to require that, where the right of continuance exists, it must be granted on motion, without putting the party to a supplemental pleading, and that the courts still have a legal discretion to refuse an application in an equity case where there has been laches. The next case in order of time to which our attention has been called is the one upon which the learned appellate division relied (*Holsman v. St. John*, 90 N. Y. 461), which holds that an application for a continuance must now be made by motion; that, upon proper affidavits showing the facts, the court must grant the order; and that no mere lapse of time can defeat the application. When the question was next presented, however, in *Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863, it was held that, as an application to the court is necessary to authorize the revival or continuance of an action, the court may, on the ground of inexcusable laches, and where otherwise irreparable injury will be suffered by the opposite party, deny the application, because the right to the continuance is not of so absolute a nature as to preclude the court, in the exercise of a legal discretion, from denying it. The case of *Holsman v. St. John*, supra, although cited by counsel, was not mentioned by the court in its opinion. *Coit v. Campbell*, and *Evans v. Cleveland*, supra, were reviewed, and the latter expressly relied upon. The last utterance of the court upon the subject was in *Mason v. Sanford*, 137 N. Y. 497, 33 N. E. 548, which was a motion for substitution, and the following rule was laid down: "The rule as to the revival of actions by the substitution of the representative of a deceased party in this state is as follows: In legal actions there is no mere time limitation, but the motion to

revive may be denied for laches in making the motion. In equity actions there is a time limitation of ten years, but in such actions, on account of prejudicial laches, the court may refuse the revivor within the period of limitation,"—citing *Evans v. Cleveland*, *Colt v. Campbell*, and *Lyon v. Park*. *Holsman v. St. John* does not appear to have been cited, and was not mentioned by the court. We feel bound to follow the latest decisions, which require us to answer the question certified in the affirmative.

The order of the appellate division does not state that that court decided the question of fact as to laches in favor of either party, and, according to the general rule, we could not look into the opinion for information upon the subject. *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. 1051. The ordinary presumption, in support of the order appealed from, would be that the court decided the question of fact in favor of the prevailing party. This appeal, however, is certified to us, and our jurisdiction to review depends upon the order of certification, which expressly refers to the opinion of the appellate division rendered in deciding the appeal from the special term. Under these circumstances, we think the opinion becomes a part of the record before us; and hence it appears that the action of the court was based upon the case of *Holsman v. St. John*, and that the court did not consider the question of fact presented by the conflicting affidavits read upon the motion. The defendant, therefore, although entitled to a review of that question by the appellate division, has not yet had the benefit of its consideration by that learned court. We therefore reverse the order appealed from, answer the question certified in the affirmative, and remit the case to the appellate division for further consideration, with costs of this appeal to the defendant to abide the event. All concur. Order reversed, etc.

(157 N. Y. 70)

PEOPLE ex rel. NEW YORK LOAN & IMPROVEMENT CO. v. ROBERTS,
Comptroller.

(Court of Appeals of New York. Oct. 25,
1898.)

TAXATION—ASSESSMENT OF CORPORATIONS
—REVISION.

When limitation has run against right of action against a corporation for a tax and penalties, neither can be "lawfully demanded," within Tax Law, § 195, providing that on the application to the state comptroller for the revision and readjustment of an account of taxes, if it appear that any such account included taxes or other charges which could not have been "lawfully demanded," he shall resettle the same, and charge or credit, as the case may require, the difference resulting from such revision or resettlement, etc.

Bartlett, Martin, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, Third department.

Certiorari by the people, on the relation of the New York Loan & Improvement Company, against James A. Roberts, state comptroller, to review a tax assessment. The determination of the comptroller was affirmed by the appellate division (48 N. Y. Supp. 1112), and relator appeals. Reversed.

Sherman Evarts, for appellant. T. E. Hancock, for respondent.

GRAY, J. The relator is a domestic business corporation. In November, 1894, the comptroller of the state, pursuant to the provisions of the corporation tax law, appraised the value of its capital stock, and stated a tax thereon for the nine years ending November 1, 1895, not including the year ending November 1, 1893. Thereupon the relator made application to the comptroller for a revision and readjustment of the account of taxes for which it was assessed; but, upon the rehearing, which was thereupon had, the comptroller determined adversely to the application. This determination of the comptroller was brought under review by writ of certiorari before the appellate division of the Third department, where it was affirmed. 48 N. Y. Supp. 1112. Upon this appeal, which was taken by the relator from the order of affirmance, the contention of the appellant is limited to the question of whether, within the provisions of the corporation tax law, the statute of limitations may not operate upon the comptroller in assessing taxes for past years and penalties for nonpayment. On its behalf, it is argued that, as the statute of limitations would have been a complete bar to a suit brought by the comptroller for the collection of the taxes imposed for the two years ending November 1, 1886, and November 1, 1887, and for penalties for the six years ending November 1, 1891, the assessment made included taxes and penalties which could not have been lawfully demanded. By the provisions of Tax Law, § 195, upon an application to the comptroller for the revision and readjustment of an account of taxes, if it is made to appear "that any such account included taxes, or other charges, which could not have been lawfully demanded, * * * he shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement," etc. Turning to the Code of Civil Procedure, we find that it provides that certain actions must be commenced within certain periods after the cause of action has accrued. When the action is to recover upon a liability created by statute, the period of limitation is placed at six years, and where the action is to recover a penalty to the people of the state it is two years. It also provides that the limitations so prescribed "apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons." Sections 380, 382, 384, 389. Now, as

the corporation tax law stood prior to its amendment in 1885, the remedy for the collection of a tax upon the capital stock of a corporation was by suit brought by the attorney general at the instance of the comptroller. In the year 1885, by amendment, the comptroller was given the right, in addition to such an action, to issue a warrant directed to the sheriff for the collection of the tax. So that, in the present condition of the law, the comptroller has two remedies to enforce the payment of the tax which he has assessed.

The important question to be determined is whether the statute of limitations is to be given any effect, when the comptroller's assessment is objected to, by way of an application to him for revision and readjustment of the accounts under the tax law. Inasmuch as the limitations prescribed by the Code are expressly made applicable to actions brought in the name of the people, or for their benefit, we are not embarrassed by considerations of any immunity of the state from statutes of limitations. If the limitations prescribed by the Code so operated upon the claim of the state for the taxes in question that the comptroller could not have maintained an action to enforce it, was it not his duty to have resettled the account accordingly, upon the application made to him by the relator? If it included taxes which could not have been recovered for in an action, can it fairly be said that they were the subject of a lawful demand? Is this not true, upon the consideration of the provisions of the act in question? The tax which is imposed upon every corporation is made a liability, the amount of which is fixed by its condition at the close of the business on October 31st of the year, and which is made due and payable into the state treasury on or before the 15th day of January in each year. Tax Law 1896, §§ 189, 194. At the latter date the corporation has incurred an obligation to the state which the comptroller, if nothing in the nature of legal proceedings has occurred to delay him, may enforce by action or warrant. As an officer of the state, charged with the duty to assess and to collect a tax which remains unpaid, he is given very extensive and summary powers in that respect. Is there any reason, in the event of a neglect on his part to perform the duty with which he is charged, that the state should not suffer to the extent that that neglect may subject the claim to the bar of the statute? Although the corporation has a duty to perform in making a report of its condition, upon which the comptroller is to act in assessing the tax to be paid, its failure to do so devolves upon that officer the duty, and he is fully empowered, to examine into its affairs, and thereupon to make the proper assessment. Section 192. It is his duty to take action upon the corporation's obligation. The corporation was under a statutory liability, and if the comptroller does not take the steps to fix the amount of the tax and to demand its payment, until after the lapse of time

which would constitute a bar to a recovery by action, can it be said that it could be "lawfully demanded"? That is the requirement of the statute, and, if the condition cannot be met, how is the comptroller warranted in refusing to resettle an account of taxes, when, as to all or some, the bar of the statute has fallen against their collection? It must be borne in mind that the statute is peculiar in its provisions. The tax which is imposed upon a corporation is not made a lien upon its property, but constitutes an obligation, for the enforcement of which remedies are prescribed, which the comptroller of the state may avail himself of. As an obligation, it should be regarded in the same light as are the obligations of individuals, in view of the general operation of the statute of limitations, and, if not enforceable at law, as in the case of an individual obligation, then it may not be "lawfully demanded," within the just meaning of the corporation tax law. There is no reason why the "statute of repose" should not be given its full and beneficent effect, when the state is a claimant, under the provisions of the act, as fully as in the case of private persons.

When the comptroller of the state was applied to for a revision and readjustment of the account of taxes rendered to the relator, he was confronted with the fact that, as to two of the earlier years in the account, no action could have been maintained for their recovery, by reason of the bar of the statute, and therefore that they could not be lawfully demanded. That is to say, there existed a legal defense to the enforcement by him of the taxes assessed for periods more than six years prior to his official action. It cannot well be maintained, and I do not understand that it is argued on behalf of the comptroller, if the bar of the statute operated to defeat an action, that, by giving the additional remedy by warrant, the time was enlarged within which a tax could be lawfully assessed. This additional remedy was given in 1885, and nothing in the amended law tends to show that it was the intention of the legislature thereby to extend the comptroller's time to fix a tax and to leave that time absolutely unlimited. The statute continues to contain the provision for the bringing of an action by the attorney general at the instance of the comptroller to recover the amount of any account, and it seems to me clear, where two remedies are given for the enforcement of a party's rights, the one by action and the other by a summary method, that the latter cannot be available if an action is barred by statute. No reason appears for inferring from the additional remedy given by warrant an intention to extend the time of the comptroller to assess the tax. The effect of the amendment was simply to afford a summary remedy of collection by the comptroller, not to extend his time to act.

However this question is looked at, it seems to me, as long as the statute of limitations is

made expressly applicable to the state, as well as to private suitors, that it cannot be within the power of the comptroller to fix a tax to the collection of which a legal defense exists under the statute of limitations. That cannot be made the subject of a lawful demand, which is incapable of enforcement by the remedy provided, and that test seems to give point and applicability to section 195, Tax Law, governing the proceedings for revision.

On behalf of the comptroller, it is argued that the statute of limitations does not apply, because the statute authorizing the comptroller to state an account for taxes due the state, and to entertain an application for the revision and adjustment of the account, does not bring such proceedings within the category of actions or special proceedings, under the Code of Civil Procedure. But that does not meet the point of the contention, which is whether it is not made the duty of the comptroller, having stated an account of taxes, in which were included some the liability for which accrued more than six years before, and which, therefore, would be unenforceable by action, by operation of the statute of limitations, upon an application for a revision, when the inability to enforce such taxes is made to appear, to resettle his account "according to law and the facts," by striking off the uncollectible taxes and giving credit to the corporation for the difference, as the statute provides shall be done. The effect of the statute of limitations which is sought to be given here is not that it operated as a bar to the proceedings of the comptroller for the statement of the account of taxes, or upon the application for revision and readjustment, but that it constituted such a legal defense to the recovery of certain of the taxes claimed to be due as made them no longer the subject of a lawful demand when the objection was taken. The construction which I think should be given to the corporation tax law accords with a reasonable and just view of the relative duties and obligations of the state and of corporations formed under its laws. To hold that the time is absolutely unlimited within which the state officer can assess a corporation for taxes would be harsh, and quite without the spirit and the letter of the law. A corporation which, whether for some apparently satisfactory reason or not, has remained in the past unassessed, may be intolerably harassed by future claims, without other reason than under some new view of its obligation.

It results from the views which have been expressed that it was equally incompetent for the comptroller to assess penalties for more than two years prior to the date of the assessment, when a recovery of the same could not be had by action. I think that the order and judgment of the court below and the determination of the comptroller should be reversed, and that it should be remitted to the comptroller to readjust the account of taxes

and penalties in accordance with the principle of our decision. All concur, except BARTLETT, MARTIN, and VANN, JJ., who dissent upon the ground that, assuming the statute of limitations applies to this proceeding, it does not begin to run against the state until the tax is due and the remedy to proceed by action or warrant is complete. Judgment and order reversed, etc.

(59 Ohio St. 28)

WILLIAMS v. STEARNS et al.

(Supreme Court of Ohio. Oct. 11, 1898.)

AUTHORITY OF ALLEGED AGENT — EVIDENCE TO SHOW RATIFICATION.

On the trial of issues involving the authority of an alleged agent to make purchases on account of the defendant, evidence that the defendant became guarantor to others than the plaintiff for the payment of the price of similar articles purchased by the alleged agent upon his own account is not competent for the purpose of showing either a previous authority or a ratification.

(Syllabus by the Court.)

Error to circuit court, Crawford county.

Action by Williams against Stearns & Hoover to recover for materials sold and delivered. From the judgment of the circuit court reversing a judgment in his favor by the common pleas, plaintiff brings error. Affirmed.

The plaintiff filed his petition in the court of common pleas against the defendants, Stearns & Hoover, alleging that on and after July 15, 1892, they were engaged as contractors in constructing the Columbus & Short Line Railway; that one Harmon was employed by them as agent to purchase and pay for all lumber, timber, and ties that might be needed in such construction, and that one Brooks was in their employ, in connection with and under Harmon, "to solicit lumber and timber for said defendants in the construction of said railroad, and to draw written orders and bills in favor of the vendors of such lumber, timber, and ties, upon the said Harmon, for his acceptance and payment thereof over to the holders of such orders and bills"; that Brooks solicited from the plaintiff timber and ties for the purpose of such construction, and that plaintiff, upon application to Harmon for information touching the authority of Brooks, was informed that he (Harmon) was agent and paymaster of the defendants, and Harmon then requested the plaintiff to let Brooks have such material as he might desire, and that he (Harmon) would pay therefor. The first cause of action is for the value of material delivered by the plaintiff, and evidenced by an order drawn by Brooks upon Harmon in favor of the plaintiff, and alleged to have been accepted by Harmon, though his acceptance was not indorsed thereon. The second cause of action is upon an account for ties alleged to have been by the plaintiff "sold and delivered to the said defendants through their said agents, at defendants' spe-

cial instance and request, and which ties were used by said defendants in the construction of said railroad." The defendants by their answer admitted that they were partners, engaged at the time alleged in the construction of said railroad, but they deny every other allegation of the petition. A judgment in favor of the plaintiff followed a verdict, and this was reversed by the circuit court for error in the admission of evidence and in the charge. Other portions of the record are stated in the opinion.

L. C. Feighner, for plaintiff in error. Harris, Sears & Monnett, for defendants in error.

SHAUCK, J. (after stating the facts). The first cause of action, like the second, was for the value of materials sold and delivered by the plaintiff to the defendants through their agents. It may be that the order was mere evidence not properly set out in the petition, and that the petition stated but one cause of action; but the record does not require the consideration of those questions. It is apparent that the real contention upon the trial concerned Harmon's authority, as agent of the defendants; that is, whether his purchases were as their agent, or in fulfillment of his contract to sell and deliver to them construction material at a price agreed upon. Against the objection of the defendants, one Lutz and other witnesses were permitted to testify, on behalf of the plaintiff, that Harmon and Brooks came to them, representing that they had a contract with the defendants to furnish material for the construction of the railroad, and requesting the witnesses to get out the material for the unfinished portion of their said contract; that the witnesses then made an arrangement with the defendants whereby the latter undertook to see that the witnesses were paid for such materials as they might furnish pursuant to this request of Harmon and Brooks.

The purpose for which this evidence was supposed to be competent was probably indicated to the jury by the instruction given at the request of the plaintiff, indicated in the record as his third request. The record contains no other evidence to which the instruction could have been thought applicable. That instruction is as follows: "The jury are further instructed that it is the law of the case that a contract alleged to have been made with defendants' agent on the question of agency, evidence that the alleged agent had made contracts with other persons as such agent, which were ratified by defendants, is admissible to be weighed by the jury." The error in treating the transactions testified to by these witnesses as ratifications is obvious. There can be no ratification by an alleged principal unless authority to represent him has been assumed by the alleged agent. It is of the essence of ratification that the principal confirms and adopts

as his own an act done without his previous authority. In the transaction testified to by these witnesses, Harmon and Brooks did not assume to act as agents for the defendants. To the contrary, their representation was that they were purchasing materials on their own account to fill their contract with the defendants. It was entirely consistent with that representation that the defendants should undertake that Harmon and Brooks should pay for materials so purchased by them. This evidence, therefore, showed neither ratification nor equitable grounds upon which the defendants should be estopped to deny the alleged agency, and the trial court erred both in admitting the evidence and in giving the instruction with respect to it. Evidence of this character is clearly distinguishable from such as tends to show a holding out to others by the alleged principal of the alleged agent as having authority to represent him with respect to a business which includes the transaction in controversy. That such holding out or recognition may be shown is the point decided in *Transportation Co. v. Kavanaugh* (Ala.) 13 South. 233, notwithstanding the inadvertent use of the word "ratification" in the syllabus.

It is also insisted by counsel for the defendants that the trial court erred in admitting the declarations of Harmon to establish his authority as agent. Upon the trial of issues of this character it is competent to show that the alleged agent assumed to act in a representative capacity, but his declarations are not competent to maintain the allegation as to his authority. Perhaps this distinction was not consistently observed in the admission of evidence, but we cannot see that there was prejudicial error, in view of the instruction given to the jury upon the precise point. That the rule might have been stated with more clearness is true, but it was given in the language requested by counsel for the defendants, and the jury could hardly have failed to understand that the authority of an agent cannot be established by his own declarations. Judgment affirmed.

(59 Ohio St. 37)

LEWIS, Auditor, v. STATE ex rel. MULLIKAN.

(Supreme Court of Ohio. Oct. 11, 1898.)

TAXATION—MISTAKE IN VALUATION OF REAL ESTATE—BY ANNUAL OR DECENNIAL APPRAISER—DUTY OF COUNTY AUDITOR.

1. Where, by reason of a mistake made by an annual assessor or by a decennial appraiser of real estate, or in the office of a county auditor, in the course of transferring their reports to the tax list in his office, the appraisement of a new structure is fixed at a sum greater than that intended to be placed on it, by either the annual assessor or decennial appraiser, it is the duty of the county auditor, under section 1038, Rev. St., to correct the error upon the tax list in his office for the current year, and to report the matter to the board of county commissioners for their action, under the same statute.

2. In such case it is the duty of the county auditor to act, when satisfied that an error has occurred, although some of the facts necessary to establish the error do not appear on the records of his office, but are shown by parol evidence only.

(Syllabus by the Court.)

• Error to circuit court, Hamilton county.

This action was brought by the relator, Mrs. Katherine C. Mullikan, against Lewis as auditor of Hamilton county, to require him, as such auditor, to correct an erroneous valuation upon certain real estate owned by her, and to require said auditor to call the matter to the attention of the county commissioners, that they might order a refunding of the taxes paid by her for the five preceding years on this overvaluation. The relator prevailed in the circuit court, and the cause is brought here by the county auditor. Affirmed.

Rendigs, Foraker & Dinsmore, Co. Sols., for plaintiff in error. Frederick Hertenstein, for defendant in error.

BRADBURY, J. There is no dispute in this case over the facts. It is clear that the relator's property stands upon the books of the county auditor at a valuation \$2,000 greater than it should stand. The contention relates—First, as to the power of the county auditor to correct his duplicate for the current year; and, second, as to his duty to call the matter to the attention of the county commissioners, so that the latter body may have before them the question of refunding to the relator the taxes paid by her during the five preceding years on this erroneous valuation of her property. The authority of the auditor to make the correction, and his duty to lay the matter before the board of county commissioners, rest upon the following provisions of section 1038, Rev. St.: "The auditor shall, from time to time, correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of the lands or other property, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments, * * * and if at any time the auditor discovers that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto, at any regular or special session of the board, and if the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer, in favor of the person or persons paying the same, for the full amount of taxes or assessments so erroneously charged and collected, and the county treasurer shall pay the same out of any surplus or unexpended funds in the county treasury. * * *"

A brief history of the transaction discloses that the relator obtained her title to the real estate in question in September, 1889, and soon thereafter began the erection of a dwell-

ing house thereon, which was completed about the 1st day of June following (1890). In March, 1890, that being the year of the decennial appraisement of real estate in Ohio, the decennial appraiser for the district in which the property was situated entered upon his duties. Later on the annual appraiser for 1890 entered upon his duties. It is part of this latter officer's duties, under section 2753, Rev. St., to "return a list of all new buildings," etc., "* * * the value of which shall not have been previously added to * * * the valuation of the land on which such structures have been erected. * * *" And in discharging his duty in this regard he returned the building in course of erection on the relator's lot as an unfinished structure, fixing the tax value at \$1,500; and this sum was added to the previous value of the land (\$800), making a total of \$2,300, upon which she paid taxes for that year. The decennial appraiser, although he entered on the discharge of his duties earlier, did not finish them and make his return until December, 1890, and then returned the value of the building at \$2,800, or \$1,300 more than the annual assessor had valued it. The next year (1891) the annual assessor made the following return as to this property: "Total valuation of structure, \$3,500; partial value reported last year, \$1,500; amount to be added * * * for new structure, \$2,000." The form of this return discloses that the annual appraiser for 1891 in appraising the relator's property entirely ignored the appraisement made the preceding year by the decennial appraiser, whereas he should have taken it as the basis for his appraisement and return; for it is quite clear that the decennial appraisement of 1890 fixed the value of the property, which could not be increased by the annual appraiser for the year following, unless a new building or structure had in the meantime been placed on it. When the county auditor came to make up his tax list, he took the return of the decennial appraiser for 1890 as his basis, and ignored that of the annual appraiser for 1890. The result was that he added the \$2,000 returned by the annual appraiser for 1891 to the value of the decennial appraisement for 1890, thus increasing by \$2,000 the valuation of relator's property over that fixed by the decennial appraiser. On this increased valuation she has paid taxes ever since. Now, it is manifest that this action by the auditor was erroneous; that is, he unwarrantably added \$2,000 to the value of relator's property, unless a building or structure of that value had been placed thereon after it had been appraised by the decennial appraiser in 1890, and before the appraisal by the annual appraiser in 1891. That this was not done is a conceded fact. It is therefore clear that \$2,000 was in the year 1891 erroneously added to the value of relator's property, and still remains, and that ever since it was thus added she has paid taxes thereon. This was not a fundamental error, in any sense of that term. The addition was not made by

reason of any mistaken notion that the relator was legally chargeable with the additional \$2,000. It was the result of inadvertence on the part of some one of the public officers charged with a duty in respect of bringing property on the tax list of the county for taxation. The relator is in no wise chargeable with the error, and the plainest principles of justice plead in her behalf.

Counsel for the auditor, however, without denying either the fact that the relator's property was thus overvalued, or the manner in which it was done, contend that it was not the duty of the auditor, under section 1038, Rev. St., to correct the error, because all the facts necessary to enable him to make the correction do not appear in the records of his office. It is true that some of the facts necessary in this case to show the error must be ascertained from other sources. This objection, however, we do not regard as conclusive. If all the data necessary to correct the error appear on the records of the auditor's office, the duty of correction may, of course, be readily and unhesitatingly discharged, whereas, if some of the facts must be gathered from other sources, the auditor might be warranted in proceeding with caution, and to require convincing proof of the facts on which the alleged error may be based. The statute itself does not require the correction to be founded on facts of record in the auditor's office; and as its provisions, in as far as they authorize relief against unjust taxation, may be regarded as remedial in their nature, we perceive no sufficient reason for restricting their operation in such cases by a construction that would deny relief except on record evidence. It has always been held, in making additions to the tax list, that a county auditor may act upon information obtained from other sources, and we see no sufficient reason why, upon the facts thus obtained, he may not just as well afford relief against unjust taxation; nor can we find anything to militate against this conclusion in the cases of *Ohio v. Montgomery Co. Com'rs*, 31 Ohio St. 271, *Insurance Co. v. Cappellar*, 38 Ohio St. 560, or *State v. Raine*, 47 Ohio St. 447, 25 N. E. 54. Judgment affirmed.

(59 Ohio St. 11)

SPEYER et al. v. BAKER.

(Supreme Court of Ohio. Oct. 11, 1898.)

SALE OF CHATTEL PROPERTY—PAYMENT IN INSTALLMENTS—TITLE TO REMAIN IN VENDOR—RIGHTS OF PARTIES.

1. Sales of chattel property, to be paid for in whole or in part in installments, on condition that it shall belong to the purchaser when the amount paid thereon shall be a certain sum, or the value of the property, the title to remain in the vendor until such amount shall be paid, are, when made subsequent to the act of May 4, 1885 (82 Ohio Laws, 238), now sections 7913-72, 7913-73, of the Revised Statutes, governed by the provisions of that statute; and the rights of the purchaser under the statute are unaffected by the execution of a mortgage on the property at the time of the

sale to secure installments of the purchase price.

2. Where a purchaser at such sale has made payments on the property, he is entitled to its possession, though in default as to other installments, until there shall be refunded or tendered back the amount so paid, less a reasonable compensation for the use of the property and for any damage done to it while in his possession; and the amount which he is so entitled to have refunded should be awarded him as damages when the property is taken in replevin at the suit of the vendor.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

The original action was replevin brought by Speyer & Co. against Margaret Baker before a justice of the peace in Hamilton county to recover possession of a lot of household goods. In the court of common pleas, on appeal, where issue was joined on the plaintiffs' right of possession, the verdict and judgment were in their favor. That judgment was reversed by the circuit court, and plaintiffs bring error. Affirmed.

The record shows that Speyer & Co., whose business was that of selling household furniture on the installment plan, sold in that way to the defendant goods of that kind to the amount of \$885.55 on the 31st day of May, 1893, and on the 3d of July, 1893, other goods of a like kind to the amount of \$18.75. Upon the first of these purchases the defendant paid in cash the sum of \$100, and agreed to pay the balance in weekly installments of \$7.50 each; and upon the other purchase she paid \$5 in cash, the payment of the balance to be made in weekly installments of \$1.50 each. At the time of each sale a chattel mortgage was taken by the plaintiffs on the goods sold, which was duly filed in the proper office. These mortgages are alike in all respects, except in the amounts and the description of the property. The following is a copy of the first one, omitting the description, which is unimportant in the consideration of the case: "This agreement, made and entered into this thirty-first day of May, 1893, by and between Margaret Baker, of Cincinnati, party of the first part, and Speyer & Co., of Cincinnati, Ohio, of the second part, witnesseth that the said party of the first part, in consideration of eight hundred and eighty-five and fifty-five one hundredths dollars to her paid by Speyer & Co., the receipt of which is hereby acknowledged, does hereby bargain, sell, and convey to the said Speyer & Co. and assigns the following described personal property, now situated and being in and located at 104 Garfield place, city of Cincinnati, county of Hamilton, state of Ohio, to wit: [Here follows a description of the property.] To have and to hold the same to the use of the said Speyer & Co., and assigns: provided, nevertheless, that, whereas, the said party of the first part is indebted to the said Speyer & Co. in the sum of eight hundred and eighty-five and fifty-five one-hundredths dollars: Now, if the said party of the first part shall pay to said

Speyer & Co., at their office in said city of Cincinnati, the said sum of eight hundred and eighty-five and fifty-five one-hundredths dollars, one hundred dollars thereof at once, and the balance in weekly installments of seven and fifty one-hundredths dollars each, payable on Saturday of each and every week, commencing for the first payment on June 17, 1893, except as herein mentioned below: It is hereby understood and agreed that, aside from the above agreement, said Margaret Baker, party of the first part, shall on September 1, 1893, pay to Speyer & Co., party of the second part, the sum of one hundred dollars, said amount to be credited to this mortgage,—until the said sum of eight hundred and eighty-five and fifty-five one-hundredths dollars is paid, then this conveyance shall be void, otherwise to be and remain in full force. And the said party of the first part hereby agrees that, in case of default of payment of any weekly installment on the day on which it shall become due, the whole sum then unpaid on this agreement shall in such case immediately become due and payable. And the said party of the first part covenants and agrees that she will insure the said property for not less than eight hundred and eighty-five and fifty-five one-hundredths dollars, and keep the same insured during the continuance of this agreement, and, if she neglects or fails to do so, then the said Speyer & Co. may insure the same at the expense of the undersigned, and in case of loss, if any, payment shall be made to the said Speyer & Co., for the uses and purposes herein mentioned; that she will not permit the said property, or any part thereof, to be injured, spoiled, or damaged; that she will keep the same in good order and repair; and that she will not sell, pledge, or otherwise dispose of said property, or any part thereof, or attempt to do so. And the said party of the first part further covenants and agrees that on default of payment of any of said installments or payments, or on any sale or pledge, or attempt to sell or pledge or dispose of said goods and chattels, or any part of them, or to remove them, or any part of them, from the county, or from their location, or upon any seizure of them, or any part of them, by process of law, or upon any failure to comply with the said provisions as to insurance, or if the said Speyer & Co. shall at any time deem themselves in danger of losing the said property, or any part thereof, or if they shall at any time deem themselves insecure as to the safety or proper treatment of said property, or any part thereof, or upon any failure to keep such chattels in proper order and repair, or in case the said party of the first part shall suffer such chattels to be injured, soiled, or damaged, except the usual wear and tear, or in case said party of the first part shall fail or refuse to permit said Speyer & Co., or any of their agents, at any and all times to see and examine said property, or upon any breach of any covenant or

covenants of this agreement, then the said Speyer & Co. may, without demand, which is hereby waived, take the same into their possession, and dispose of them at any time thereafter, at public or private sale, as in their judgment may seem best, hereby waiving all demands for payment of the amount due on within agreement, and any and all notice of the time and place of said sale; and the said Speyer & Co. are hereby authorized at such sale to purchase such portion of said goods and chattels as they may deem best, and out of the proceeds of sale to pay—First, the reasonable cost and expense of taking and keeping and selling the same, including attorney's fees; second, the amount of principal and interest that shall be due and unpaid thereon; third, the balance, if any, to said party of the first part. And the undersigned waives any and all notice of the exercise by Speyer & Co. of the rights reserved to them under this agreement. In witness thereof the said Margaret Baker has hereunto set her hand the day and year first above written. Margaret Baker."

The record also shows that the defendant paid her weekly installments on both purchases until her payments, including the amounts paid at the times of the purchases, amounted in the aggregate to the sum of \$253.50. The last payment was made on the 1st day of November, 1893, when, becoming unable to pay further, she consulted counsel, who sought an adjustment with the plaintiffs on the basis that she was entitled to a return of part of the amount she had paid before she could be compelled to surrender the property. The plaintiffs declined to entertain the proposition, and, without having paid or offered to pay the defendant any part of the sum they had received from her, brought the suit before the justice.

It appears from the bill of exceptions that, on the trial in the common pleas, evidence was given which fairly tended to prove that when the sales were made to the defendant it was verbally agreed between the parties that the goods should remain the property of the plaintiffs until the purchase price should be fully paid, and should become the property of the defendant only upon such payment being made. Upon the conclusion of the testimony the defendant requested the court to give in charge to the jury each of the following instructions: "(1) If the jury find from the evidence that the transaction between the parties was in the nature of a conditional sale (i. e. that the goods were bought on the installment plan, to be paid for in whole or in part in installments, and that the purchaser, the defendant, was not to become the owner of them until paid for in full), even though she did sign the instrument which purports to be a chattel mortgage, if signed at the time of the transaction, and if the jury find that she did actually pay for them in part in installments, and that the plaintiffs took possession of the goods

without tendering or refunding to the defendant the sum or sums of money so paid, or any part of them, you will find that the defendant was entitled to the possession of the property at the commencement of this suit, and your verdict shall be for the defendant. (2) If the jury find for the defendant, the right of possession in the property being the only interest claimed by the defendant, the jury will further determine the value of this possessory interest; and, in estimating the value of this interest, it will be necessary to consider the total amounts of money paid by the defendant to the plaintiffs in payment of the bill of goods, and deduct therefrom what the jury may consider, from the testimony, to be a reasonable compensation for the use of the goods from the time the goods were purchased to the time they were taken from the defendant's possession, which compensation shall in no case exceed fifty per cent. of the total amount paid. The remainder after the above deduction will be the value of the defendant's interest. (3) If the jury find for the defendant, they will also assess to her such damages for the taking and detention of said property as they think right and proper, and such other damages as the evidence may show were suffered by the defendant." The court declined to give either of these instructions, and charged the jury "that decisions had been rendered in the common pleas court holding that a chattel mortgage of the kind in this case does not come within the purview of sections 7913-72, 7913-73, of the Revised Statutes, and by which decisions the court felt itself bound, and therefore directed the jury to return a verdict for the plaintiffs, with one cent (1c.) damages." The defendant duly entered her exceptions to the charge, and to the refusal of the instructions requested. A verdict was returned in conformity with the charge, a motion for a new trial overruled, and judgment rendered on the verdict. That judgment was reversed by the circuit court for error "in refusing to charge the jury as requested by the defendant below, and in directing the jury to return a verdict for the plaintiffs below." The case is here for review on this record.

Outcalt & Granger and Ramsey, Maxwell & Ramsey, for plaintiffs in error. Charles C. Benedict, for defendant in error.

WILLIAMS, J. (after stating the facts). The contention in this case relates to the applicability to the transactions involved of the act of May 4, 1885 (82 Ohio Laws, 238), now sections 7913-72, 7913-73, of the Revised Statutes. The statute, in terms, applies to all sales of chattels, "to be paid for in whole or in part in installments, on condition that the same shall belong to the person purchasing the same whenever the amount paid shall be a certain sum, or the value of the property, the title to remain in the vendor until such sum, or the value of such property or any part thereof

shall have been paid." And it is made unlawful for any vendor of chattel property so sold, "or his agent or servant, to take possession of said property without tendering or refunding to the purchaser the sum or sums of money so paid after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed fifty per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed." There was evidence at the trial, though it was not without conflict, from which the jury might have found that the sales made by the plaintiffs to the defendant of the property in question were conditional sales, of the character defined by the statute; and the instructions which were requested, but refused by the court, were to the effect that, if the jury should find the sales to be of that nature, the defendant's rights under the statute were unaffected by the mortgages given to secure installments of the purchase price of the property. The refusal to so charge, and the charge given, appear to be placed upon the ground that the mortgages rendered the statute inapplicable; and that is the position taken by counsel for the plaintiffs in error, who express some apprehension that any other holding would discourage sales on credit, and unsettle chattel mortgage securities. We see no good ground for giving the mortgages the effect claimed for them, nor any sufficient cause for the apprehension expressed. Bona fide, absolute sales of chattel property are not within the operation of the statute; neither are mortgages made in good faith to secure the purchase price of property sold at such a sale, nor mortgages made in good faith on property owned by the mortgagor to secure a valid debt arising otherwise than upon a conditional sale of the property. But the rights of parties to all conditional sales of personal property, as defined by the statute, are controlled by its provisions, and we find nothing in the statute which indicates an intention that those rights should be changed or affected in any way by the vendor taking a mortgage on the property. On the contrary, the statute appears to have carefully guarded against that result. It preserves in explicit terms to the purchaser at such a sale the benefits of its provisions, even against express stipulation in the contract to the contrary, and though the contract be put in such form that the conditional character of the sale is not shown. The policy of the statute in this respect seems manifest. Purchasers on this plan are usually persons of small means, and unable to pay except in installments; and such sales are, partly on that account, made at prices in excess of those charged in other cases. Payment of part of the installments may amount to more than the actual worth

of the property; and, on account of the unconscionable advantage which the vendor would otherwise have, by taking the property and retaining the money paid, the legislature deemed it proper to adopt the equitable rule of adjustment prescribed by the statute. That rule, when properly observed, will, we believe, be found fair and just to both parties. At all events, it enters into, and becomes a part of, every contract of conditional sale made after its adoption,—as much so as if expressly embodied therein. And it is obvious that the statute would fall of its purpose, if any instrument which the vendor might choose to exact at the time of the sale could preclude an inquiry into the real nature of the transaction, or deprive the purchaser of the benefit of its provisions.

It is urged that the defendant in this case is sufficiently protected against a forfeiture of the property by accounting clauses in the mortgages, which require the plaintiffs, on sale of the property by them, to pay the defendant any balance that may remain after the satisfaction of their claims. If these clauses were given that effect, it is not perceived how they could prevent the application of the statute to the transactions between the parties, if they were in fact conditional sales, within its meaning, or affect the rights of the parties under it. But the accounting clauses are accompanied by others which authorize the plaintiffs to take the property from the possession of the defendant whenever they deem it necessary, and, without notice of any kind, to sell the same at private sale to themselves for any price, and upon any terms they may choose to fix. These necessarily render nugatory the accounting clauses; for, as the sale would take place without notice, there would be no bid but that of the plaintiffs, and it is unlikely that would exceed the balance of their claim. The formality of a sale could amount to nothing but an idle ceremony. Nor is it apparent how, under any contract of conditional sale, the continued dominion and control of the vendor over the property could be more complete and absolute than was retained by the plaintiffs under these mortgages, nor what beneficial ownership was vested in the defendant, beyond that of any conditional vendee. But these and other clauses of the mortgages are important only as they may serve to throw light on what was the true character of the sales.

The cases of *Wurmser v. Sivey*, 52 Mo. App. 424, and *Dalley v. Manufacturing Co.*, 88 Mo. 301, cited by counsel, do not raise the questions presented in this case. There was nothing present in either of those cases, except an absolute sale, and a mortgage for part of the purchase money. The holding is that "where there is an absolute sale, and the vendor of chattels receives part of the purchase price, and takes a chattel mortgage to secure the unpaid balance, sections 5180, 5181, Rev. St. 1889, have no application to the transaction,

and upon default the mortgagee can replevin the goods without tendering back the sum paid on the purchase price." By our statute, in cases of conditional sales a purchaser who has made one or more payments upon the property is entitled to its possession, notwithstanding his failure to make further payment, until the seller refunds or tenders back the amount so paid, less a reasonable compensation for its use and for any damage to it. The compensation allowed the seller for the use of the property is in no case to exceed 50 per cent. of the amount received by him from the purchaser. The sum which the purchaser is so entitled to have refunded constitutes the value of his right of possession, and should be awarded him as damages when the property is taken in replevin at the suit of the vendor before the amount has been refunded. Judgment affirmed.

(59 Ohio St. 1)

PHILLIPS v. McCONICA.

(Supreme Court of Ohio. Oct. 11, 1898.)

ACTION TO RECOVER MONEY—PAYMENT BY EXECUTOR UNDER MISTAKE—LAPSED LEGACY—ADOPTED CHILD.

1. An action to recover back money paid out by an executor upon distribution, by mistake, is properly brought in the name of such executor in his official capacity.

2. Money voluntarily paid by an executor, upon distribution, to one not entitled to receive the same, under a mistake of his rights and duties as executor, there being no mistake of fact, cannot be recovered back.

3. When a legatee dies before the testator, the legacy lapses unless such legatee was a child or other relative of the testator, and left issue surviving the testator, as provided in section 5971, Rev. St. An adopted child is not such issue.

4. An adopted child is enabled, by section 3140, Rev. St., to inherit from its adopter, but not, through him, from his ancestors.

(Syllabus by the Court.)

Error to circuit court, Morrow county.

Action by William L. Phillips, executor, against Myrtle S. McConica, guardian, to recover money paid out by mistake. From the judgment of the circuit court reversing a judgment in his favor by the common pleas, plaintiff brings error. Affirmed.

On the 8th day of August, 1895, William L. Phillips, as executor of the last will and testament of Thomas H. Madden, deceased, filed his petition in the court of common pleas of Morrow county against Myrtle S. McConica, as guardian of Mary R. McConica, a minor, which said petition is in the words and figures following: "Plaintiff says that Thomas H. Madden died on or about the twenty-first day of August, 1891, leaving a last will and testament, which said will was duly filed and admitted to probate by the probate court of Morrow county, Ohio, on the ninth day of September, 1891. That said will named plaintiff as the executor thereof, and that he was appointed by the said court on the ninth day of September, 1891, as executor of the last

will and testament of the said Thomas H. Madden, deceased, and is now the duly qualified and acting executor of the said will of the said Thomas H. Madden, deceased, and brings this suit as such executor. That said will contained the following clause: 'I hereby give and bequeath all the residue of my property of every description, moneys and credits, due me at my decease, or belonging to my estate, to be equally divided, one-half to the heirs of my daughter Refella, deceased wife of John McConica, namely, Wilbert, Thomas, and Charles McConica, and Minnie McConica Fulton.' That said Wilbert McConica died on or about the tenth day of October, 1888, leaving no heirs of his body. That the said Wilbert McConica, during his lifetime, and on or about the second day of May, 1888, in the probate court of Hancock county, Ohio, and under the laws of Ohio, legally adopted the said Mary McConica, an infant. That the said Myrtle S. McConica was wife of the said Wilbert McConica at the time of his death, and was on or about the seventeenth day of December, 1891, by the probate court of Morrow county, Ohio, duly appointed guardian of the said infant, Mary McConica. That on the twenty-fourth day of December, 1891, under a mistake, to wit, believing the said infant, Mary McConica, adopted as aforesaid, inherited the legacy of Wilbert McConica mentioned in that clause of the will set forth, plaintiff, as executor as aforesaid, paid to said Myrtle S. McConica, as guardian of the said Mary McConica, the sum of \$220.16. That he paid said money under a mistake of his rights and duties as executor, as aforesaid, and which he was under no legal or moral obligation to pay. Plaintiff further says that said infant, Mary McConica, had no right or color of title to said legacy, and the said Myrtle S. McConica, as guardian as aforesaid, has no right in good conscience to retain the same. That plaintiff, on the twentieth day of April, 1893, and as soon as he discovered said mistake, demanded of the defendant a repayment of said sum to him, which demand defendant refused and still refuses, and wrongfully and illegally withholds the same from this plaintiff. Wherefore plaintiff prays judgment against said Myrtle S. McConica, as guardian as aforesaid, for the said sum of \$220.16, the amount so paid as aforesaid, with interest from the twentieth day of April, 1893, and for all proper relief."

To this petition the defendant below filed a demurrer on the grounds—First, that the plaintiff had no legal capacity, as executor, to maintain the action; and, second, that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The court overruled the demurrer, and, the defendant below not desiring to further plead, a judgment was rendered against the defendant below for the sum claimed in the petition; to all of which the defendant below excepted, and filed her

petition in error in the circuit court, seeking to reverse the judgment; and the circuit court, on hearing, reversed the judgment, on the ground that the court of common pleas erred in overruling the demurrer, and remanded the cause to the court of common pleas for further proceedings according to law. Thereupon Mr. Phillips, the executor, filed his petition in this court, seeking to reverse the judgment of the circuit court, and to have the judgment of the court of common pleas affirmed.

McConica & Banker and S. C. Kingman, for plaintiff in error. L. K. Powell and J. A. Garver, for defendant in error.

BURKET, J. (after stating the facts). It is urged by defendant below, defendant in error here, that the plaintiff below had no legal capacity to maintain the action, because the executor is personally liable to the legal distributees for the money which came into his hands as such executor, and for the further reason that he can maintain an action in his own personal right for money of the estate wrongfully distributed, as held in *Rogers v. Weaver*, 5 Ohio, 536. These considerations are not sufficient to cut off his right to maintain the action as executor. The money paid to the guardian was the money of the estate, and an executor is always a proper party to maintain an action to recover money belonging to the estate. Other existing remedies to recover money wrongfully paid out do not exclude the remedy by action in the name of the executor. It may be that the executor and his sureties have become insolvent, and in such cases the only remedy that is effective and available to the proper distributees is by an action in the name of the executor. The action was therefore properly brought in his name as executor.

The demurrer further raises the question as to whether the petition states facts sufficient to constitute a cause of action in favor of the executor against the guardian. Wilbert McConica, the legatee, having adopted Mary McConica, an infant, by legal proceedings in the probate court, died without issue of his body before the death of Thomas H. Madden, the testator. The legacy to Wilbert, therefore, lapsed, unless Mary is to be regarded in law as the issue of Wilbert. Wilbert was the grandson of the testator, and section 5971 of the Revised Statutes provides that when a devise of real or personal estate is made to any child or other relative of the testator, and such child or other relative shall die, leaving issue surviving the testator, such issue shall take the estate. The word "issue" in this section means child of the body, or heir of the body, of the deceased relative of the testator, and does not include a child adopted by such decedent. The issue in such case must be of the blood of the testator and of the deceased child or other relative by birth. Adoption does not make the

adopted child of the blood of its adopter nor of the blood of his ancestors.

True, section 3140, Rev. St., provides that such adopted child "shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person, begotten in lawful wedlock." But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors. It was well said in *Upson v. Noble*, 35 Ohio St. 658, that in passing the adopting statute "the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation." The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit cannot be extended beyond where the statute has fixed it. The statute in this regard must be strictly construed, as held in 35 Ohio St. 658. Adoption does not change the law of descent and distribution as to the property of the ancestors of the adopter. *Quigley v. Mitchell*, 41 Ohio St. 375. The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors.

As Mary McConica, the adopted child, was not the issue of Wilbert, the legacy to him lapsed, and the guardian of Mary was not entitled to receive the money that was paid to her, as such guardian, by the executor on distribution of the estate, and the money should be returned to him by the guardian, unless there is some rule of law to prevent it.

The petition sets out that he believed that Mary inherited the legacy of Wilbert, and that he paid the money to the guardian under a mistake of his rights and duties as executor, and which he was under no legal or moral obligation to pay. This states no mistake of fact, but of law. So far as the petition discloses, he knew all the facts, but was mistaken as to his rights and duties; that is, as to the law of the case. In *Thompson v. Thompson*, 18 Ohio St. 73, it was held by this court that "mistake as to the law of descents, where the intention in making a deed was to vest the estate conveyed in the grantee, affords no ground for relief in equity."

In *City of Cincinnati v. Gaslight & Coke Co.*, 53 Ohio St. 278, 41 N. E. 239, this court held that "a payment made by reason of a wrong construction of the terms of a con-

tract is not made under a mistake of fact, but under a mistake of law, and, if voluntary, cannot be recovered back." The payment, as disclosed in the petition, was voluntary, and not under duress, and not under mistake of fact, and in such cases the holdings of this court have been that no recovery can be had. *Mays v. City of Cincinnati*, 1 Ohio St. 288; *City of Marietta v. Slocumb*, 6 Ohio St. 471; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486; *City of Cincinnati v. Gaslight & Coke Co.*, 53 Ohio St. 278, 41 N. E. 239. The executor had the right to obtain the judgment of the court as to the proper person to receive this money, as was done in *Upson v. Noble*, 35 Ohio St. 655. Rev. St. § 6202. But, knowing all the facts, he did not seek the direction of the court, but, relying upon his own judgment, paid the money at his own peril. If he intended to litigate the matter, he should have litigated before payment. It is now too late, unless he can show that he paid it under a mistake of fact, and this his present petition fails to show. Judgment affirmed.

(172 Mass. 104)

EDWARDS v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

EXPERT EVIDENCE — HIGHWAYS — INTOXICATION — VERDICT — NEW TRIAL.

1. In an action for injuries sustained through a defective country road, expert testimony of its condition is inadmissible, being a matter on which the jury, by its common experience, is qualified to pass.

2. A general verdict will not be disturbed because the court asked the foreman of the jury on which of two grounds it had been rendered, where the circumstances under which the question was asked are not disclosed.

3. Nonexpert witnesses may testify whether a person was intoxicated, that being a statement of fact, and not of opinion.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Daniel Edwards against the city of Worcester for personal injuries. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

There was evidence tending to show that plaintiff was driving at the rate of 10 or 12 miles an hour, and defendant introduced a city ordinance limiting the rate of driving to 8 miles an hour. In answer to a question of the court as to the ground on which the jury found their verdict, the foreman replied, "On the ground that plaintiff was not in the exercise of due care, because of the rate of speed at which he was going." No poll of the jury was taken on this question, and no written question was previously submitted to them.

Wood & Wood, for plaintiff. A. P. Rugg, City Sol., for defendant.

MORTON, J. The plaintiff does not rely upon the exception to the exclusion of the

testimony relating to his habits as to temperance and to his reputation for sobriety, which was offered by him as bearing upon the probability of his intoxication. The ruling was right. *Carr v. Railway Co.*, 163 Mass. 360, 40 N. E. 185; *McCarty v. Leary*, 118 Mass. 509; *Heland v. City of Lowell*, 3 Allen, 407.

The testimony of the alleged expert, which was offered to show whether the road was safe and convenient for travel, was properly excluded. It related to a matter on which the common experience and observation of the jury qualified them to pass when the actual condition of the way had been described to them, and on which they needed no assistance from an expert. *Ryerson v. Abington*, 102 Mass. 526, 531; *Bliss v. Inhabitants of Wilbraham*, 8 Allen, 564; *Hutchinson v. Inhabitants of Methuen*, 1 Allen, 33; *Crane v. Town of Northfield*, 33 Vt. 124; *Graham v. Pennsylvania Co.*, 139 Pa. St. 149, 162, 21 Atl. 151. In *Lund v. Tyngsborough*, 9 Cush. 36, the answers of the witnesses were admitted as describing the actual condition of the road within their personal knowledge, and not as expressions of opinion merely.

There is nothing to show that the court erred in putting to the foreman of the jury the question which it did. The circumstances under which the question was put are not fully disclosed. It is said in the plaintiff's brief that the jury had been out 25 hours, but that does not appear in the exceptions; and, if it did, we do not think that it would render the question improper, or that the foreman necessarily would be unable to state the ground of the verdict. *Spoor v. Spooner*, 12 Metc. (Mass.) 281; *Dorr v. Fenno*, 12 Pick. 521, 525.

The witnesses were rightly allowed to testify whether the plaintiff was intoxicated. It was not a matter of opinion, any more than questions of distance, size, color, weight, identity, age, and many other similar matters are. *Com. v. Sturivant*, 117 Mass. 122; *Stacy v. Publishing Co.*, 68 Me. 279; *People v. Eastwood*, 14 N. Y. 562. Exceptions overruled.

(172 Mass. 58)

COMMONWEALTH v. HUBLEY.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

MUNICIPAL CORPORATIONS—LICENSE—JUNK DEALERS.

Under Pub. St. c. 27, § 15, authorizing towns to make by-laws for directing and managing the prudential affairs, preserving peace and good order, and maintaining the internal police; and chapter 102, § 28, providing for licensing dealers in junk, old metals, or secondhand articles,—a town may prohibit collecting, storing, and dealing in old rags, old papers, and other such refuse within certain thickly-settled districts, without a license; and this, though chapter 80, §§ 18, 84, authorize boards of health of towns to regulate matters affecting the health of the community

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Elijah L. Hubley was convicted of collecting and storing old rags, papers, and other refuse material within a prohibited district, and he brings exceptions. Overruled.

W. J. Taft, for defendant. H. Parker and G. S. Taft, for the Commonwealth.

KNOWLTON, J. The defendant was convicted of a violation of an ordinance of the city of Worcester, which is as follows: "An ordinance to regulate the collecting and storage of old rags, old papers or other refuse material. Section 1. No person shall carry on the business of collecting, storing and dealing in old rags, old papers or other such refuse material in any building within a circle the radius of which is two miles from the intersection of the south line of Front street and the east line of Main street, unless he is duly licensed therefor by the board of aldermen, for which license if granted, no fee shall be charged." The only question in the case is whether the ordinance is valid. By its charter the city of Worcester has all the rights to pass ordinances that are given to cities and towns by general laws. St. 1893, c. 444, § 19. Under Pub. St. c. 27, § 15, towns may make "such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare," for the following purposes, among others, namely: "For directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." By-laws and ordinances looking to the preservation of the public health are plainly within the authority conferred by this section. See *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174. The authority given by Pub. St. c. 80, §§ 18, 84, to boards of health of towns to make regulations and pass orders in reference to certain matters affecting the health of the community cannot properly be construed to prevent the passage of reasonable by-laws by towns, under the authority of Pub. St. c. 27, § 15. *Com. v. Parks*, 155 Mass. 531-533, 30 N. E. 174. Special authority is given by Pub. St. c. 80, § 18, to a board of health, "respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness brought into or conveyed from its town." It is manifest that old rags may be very dangerous in this respect. The case of *Train v. Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, fully recognizes the reasonableness of provisions regulating the business of dealing in rags. Besides the authority found in the statutes already quoted, we have, in Pub. St. c. 102, § 28, a provision for licensing "dealers in and keepers of shops for the purchase, sale or barter of junk, old metals or secondhand articles." There is certainly strong ground for the

argument of the district attorney that dealing in rags is within the express language of this statute.

We are of opinion that it was not unreasonable for the city of Worcester to forbid the business of collecting, storing, and dealing in rags within the thickly-settled portions of the city, except when conducted by licensed persons. The safety of the community might be found to require that only persons who could be trusted to observe proper precautions should be permitted to carry on this business. When the interests of individuals conflict with the rights of the public, the individual interest must yield to the paramount right. Inhabitants of Waretown v. Mayo, 109 Mass. 315; Newton v. Joyce, 166 Mass. 83, 44 N. E. 116; Train v. Disinfecting Co., supra. Exceptions overruled.

(172 Mass. 56)

KEEVAN v. WALKER et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

1. The brake on a molding machine, being out of repair, allowed the die to move upward, and injure plaintiff, who was working the machine. He testified that he had notified defendants of the defect more than a week before, and several times since then, and that they had had a man examine it, who promised to fix it. Defendants' foreman also examined it, and promised to have it fixed, but both failed to do so. *Held*, that there was sufficient evidence of defendants' negligence to go to the jury.

2. Plaintiff was injured by the die of a molding machine, which moved upward, owing to a defective brake. He had discovered the defect and the danger some time before, and had notified defendants' foreman, who examined it, and promised to have it fixed. Plaintiff did not use the machine again for several days until the day of his injury. *Held*, that the question whether he was negligent was for the jury.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by Edward A. Keevan against Melvin H. Walker and others to recover for personal injuries received by plaintiff while in defendants' employ. Verdict was ordered for defendants, and plaintiff excepts. Exceptions sustained.

J. B. Ratigan and M. J. Lyden, for plaintiff. W. S. B. Hopkins and F. B. Smith, for defendants.

KNOWLTON, J. There was evidence that a machine belonging to the defendants, on which the plaintiff was working, was out of repair, so that the lower part of the die, which should have remained at rest until it was moved up by the application of the foot to a treadle, moved upward immediately after it had come down to its place, and struck the plaintiff's finger against the upper part of the die, and cut it off. The plaintiff testified that

51 N.E.—29

on the front, near the treadle, there was a brake made of iron, faced with leather on the inside next to the power. As the treadle was pressed down, the brake pulled away from the pulley, and the machine started. Ordinarily, the machine would not operate unless the treadle was pressed down. He said that on June 4th he noticed that the brake would not stop the power, but that it let the shaft revolve when he took his foot off the treadle. Upon examining the leather upon the brake he found it was worn. He also said that at the same time the cogs were worn and slipped. According to his testimony, he then told one of the defendants, who said he would have one Billings come down and fix it. Billings came down, and put in a screw where one was needed, and the plaintiff said to Billings, "You might just as well fix up that brake, and everything will then be in running order." Billings said he had not time that night, but promised to do it some other time. On the following Monday the plaintiff again called Billings' attention to fixing the brake, and told him "that the mold used to come up part way to the die, and that it was liable to catch him." Billings promised to fix it, and went away. On Wednesday, June 9th, the mold went up and down twice, and the plaintiff found that a screw was loose, and that the brake did not work, and he tightened the screw himself. At the same time he called the attention of the foreman of the room to it. The foreman promised to look after it, and have it fixed. The work in the part of the shop in which the plaintiff was working was stopped from that day until the following Monday. He and the foreman looked at the brake again, and the foreman said: "Yes, that does need fixing. I will have it fixed right off." The plaintiff went away, and did not work on the machine again until the afternoon of the following Monday, when he was injured. If the testimony of the plaintiff was believed, the jury would have been well warranted in finding negligence on the part of the defendant. They might also have found that the plaintiff, when he returned to his work on Monday, had good reason to suppose that the brake had been repaired, and was in perfect condition, and have found, accordingly, that he was in the exercise of due care in working upon the machine without making a particular examination of it. The case should have been submitted to the jury. Exceptions sustained.

(172 Mass. 147)

ALDRICH v. ALDRICH et al.

(Supreme Judicial Court of Massachusetts
Worcester. Oct. 20, 1898.)

WILLS—CONSTRUCTION—PRECATORY TRUST.

Testator devised his residuary estate to his wife, and provided that it was given to her to the end that she might provide a home where she could receive the children, and that he was confident that it would be equally divid-

ed among all of them when she no longer needed it. *Held*, that the wife took the property absolutely, and not on a trust to divide it equally among the children on her demise.

Report from superior court, Worcester county; Justin Dewey, Judge.

Bill by Edward E. Aldrich against Charles F. Aldrich, as executor of the last will and testament of Sarah Aldrich, deceased, and others, for an accounting of property claimed by plaintiff as heir at law of P. Emory Aldrich, deceased, and which defendant executor claims was devised to Sarah Aldrich absolutely by the will of said P. Emory Aldrich. At the request of the parties, questions reserved on the pleadings and on agreed facts were reported for decision. Bill dismissed.

The will in controversy is as follows, viz.: "All my just debts must be paid. All the rest and residue of my estate, after payment of my debts, I give and bequeath to my beloved wife, Sarah Aldrich. I hereby nominate my wife, Sarah, aforesaid, sole executrix of this, my will. As I do not intend to leave any debts unpaid at my decease, I request that my said executrix shall be exempt from giving any surety or sureties on her bond as such executrix, and that she will not be required to file any schedule of property in the probate court. I give all my estate to my said wife, to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that, when she shall no longer need the property, it will be equally divided among our dear children or their representatives."

G. S. Taft, for plaintiff. W. B. Durant and C. F. Aldrich, for respondents.

MORTON, J. If the testator had intended to create a trust in favor of his children at his wife's death, there can be no doubt that he knew how to do it in clear and unmistakable terms; and it is almost inconceivable that, if such was his purpose, he should have expressed himself in the manner in which he has done. There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it. *Hess v. Singler*, 114 Mass. 56; *Lambe v. Eames*, L. R. 10 Eq. 267, 6 Ch. App. 599.

In the present case there is what clearly would constitute in law, if it stood alone, an absolute gift of the estate to the wife. There follows after one or two intervening clauses the one on which the complainant relies. This was intended by the testator, it seems to us, to express his reason for the gift to his wife, and his confidence in her, and not to cut down or affect the absolute character of the gift which he had previously made to her. It is true that he says, in substance, that he expects that the property, when she shall no longer need it, will be divided equally between the children and their representatives. But there is nothing which renders it obligatory on her to do this, and therefore one of the features of a precatory trust is wanting. See *Warner v. Bates*, 98 Mass. 274; *Spooner v. Lovejoy*, 108 Mass. 529; *Hess v. Singler*, supra; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; *Davis v. Malley*, 134 Mass. 588; *Sturgis v. Paine*, 146 Mass. 354, 16 N. E. 21; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *Lambe v. Eames*, supra; *In re Hutchinson*, 8 Oh. Div. 540; *Bank v. Raynor*, 7 App. Cas. 321; *Parnall v. Parnall*, 9 Ch. Div. 96; *Eaton v. Watts*, L. R. 4 Eq. 151; *Meredith v. Heneage*, 1 Sim. 543; *Sale v. Moore*, Id. 534; *Hoy v. Master*, 6 Sim. 568; *Webb v. Wools*, 2 Sim. (N. S.) 267; *In re Adams*, 27 Oh. Div. 394, 406; *In re Williams*, [1897] 2 Ch. 12; *Pennock's Estate*, 20 Pa. St. 268; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; *Randall v. Randall*, 135 Ill. 398, 25 N. E. 780; *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244. The cases which we have cited do not resemble in all respects the one at bar, and there are English and American cases which seem to support the view for which the complainant contends. But the question is whether, taking the will as a whole, it was the intention of the testator to create a trust; and we are of opinion that it was not, and that the construction which we have adopted is in harmony with the more recent English and American cases. Bill dismissed.

(172 Mass. 73)

OLDS v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 20, 1898.)

CARRIERS — INJURIES TO PASSENGERS — MIXED TRAINS.

A passenger who knowingly rides on a train composed of freight and passenger cars, regularly run on a branch road, where no other train is required by the traffic, assumes additional risks incident thereto.

Report from superior court, Franklin county; J. B. Richardson, Judge.

Action by one Olds against the New York, New Haven & Hartford Railroad Company. By agreement of parties, questions were reserved and reported for decision. Judgment for defendant.

Parker F. Martin, for plaintiff. Dana Malone, for defendant.

KNOWLTON, J. This is an action to recover damages for an injury received by the plaintiff while riding in a car of the defendant corporation. The case was tried without a jury. The judge found that the jerking and jolting were "greater and more severe than would occur on an ordinary passenger train running under due care, and ruled that if the liability in respect to preventing injury by jolting and jerking and stopping suddenly is the same, and if the obligations are the same in all these respects, on a freight or mixed train, such as this train was, as on an ordinary passenger train, the plaintiff is entitled to recover; * * * but, if the defendant was not liable for such jolting and jerking as was ordinarily incident to a train of this kind, the plaintiff was not entitled to recover." By agreement of the parties, the case was reported to this court. If the ruling was correct, judgment is to be entered for the defendant; if incorrect, for the plaintiff. It must be assumed that on the findings of fact this is the only disputed proposition of law which was considered at the trial.

The accident occurred on a branch line of the defendant's railroad, about 10 miles in length, extending from South Deerfield to Turner's Falls, in the town of Montague. The trains running on this branch of the railroad are usually made up of freight cars and a car known as a "combination car," one part of which is fitted with seats for the conveyance of passengers, and another part is adapted to carrying baggage. It is reasonably to be inferred that there is not sufficient business over this part of the railroad to warrant the running of trains for carrying passengers only. If under these circumstances the defendant was legally bound to provide for the plaintiff, at the place of the accident, a train made up of passenger cars only, or to conduct its business in such a way as to start and stop its trains with no more jerking or jolting than is common in running ordinary passenger trains, the defendant is liable; otherwise it is not. The nature of the defendant's business on this line, and the mode of conducting it, were well known to the plaintiff, and he must be assumed to have made his contract for carriage in reference to existing conditions. It is obvious that common carriers must adapt their vehicles and methods to the business to be done. There is every kind of business to be provided for in different places, from the carrying of thousands of tons of freight and tens of thousands of passengers per day over a single line, to the maintenance of lines over which only an occasional passenger will pass and a few small articles of merchandise be carried. In some places long passenger trains, with the best possible equipment for safety and comfort, are reasonably required; in others a single horse and a cheap wagon are

all that can be maintained from the income of the business for which provision is to be made, and all that reasonably can be expected. It is the duty of a carrier of passengers to exercise "the utmost care consistent with the nature of his undertaking, and with due regard for all the other matters which ought to be considered in conducting the business." *Dodge v. Steamship Co.*, 148 Mass. 207-218, 19 N. E. 373. If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains. The law is clearly expressed in *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, as follows: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences and all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the conditions provided by the company, subject to all of the ordinary inconveniences and delays and hazards incident to such trains, when made up and equipped in the ordinary manner of making and equipping such trains, and managed with proper care and skill. * * * But, if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibilities for their safe carriage is not otherwise relaxed. From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train, and not to the other; and it is these hazards the passenger assumes in taking a freight train, and not hazards or peril arising from the negligence or want of proper care of those in charge of it." Principles decisive of the present case are stated in *Le Barron v. Ferry Co.*, 11 Allen, 312, and in *Heyward v. Railroad Co.*, 169 Mass. 466, 48 N. E. 773. See, also, *Dodge v. Steamship Co.*, 148 Mass. 207-218, 19 N. E. 373; *Railroad Co. v. Axley*, 47 Ill. App. 307; *Dunn v. Railway Co.*, 58 Me. 187-197; *Lusby v. Railway Co.*, 41 Fed. 181-184; *Railroad Co. v. Dickerson*, 59 Ind. 317.

The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them. We have no occasion to consider the additional fact that the plaintiff was injured

on a part of the railroad which was designed exclusively for freight traffic, beyond the terminus of the line intended for passengers also. There are additional reasons for holding that when the plaintiff went beyond the passenger station over a portion of the freight tracks, where he and other passengers were permitted to ride for their convenience as a favor, he assumed all the risks incident to the ordinary management of a freight train in that place. Judgment on the finding.

(172 Mass. 132)

AVERY et al. v. MONROE et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

**GARNISHMENT—ASSIGNMENTS FOR CREDITORS—
EXECUTION—PRESUMPTIONS.**

1. Pub. St. c. 183, § 26, providing that a grantee of a void conveyance in trust for creditors, being in possession of the property conveyed, may be adjudged a trustee, does not preclude such an adjudication, where such grantee has not obtained possession of the property.

2. A grantee accepting a conveyance of all nonexempt property of a debtor in trust for his creditors has property "intrusted in his hands," within Pub. St. c. 183, § 21 (providing for the attachment of property intrusted in the hands of a person summoned as a trustee), where such grantee has done nothing about taking possession of the property, and no creditors have become parties to the conveyance.

3. A conveyance for creditors executed by several assignors will be presumed to have been executed by all of them on the date of the conveyance, in the absence of evidence to the contrary.

Exceptions from superior court, Middlesex county.

Action by John Avery and others against O. A. Monroe and others, and Thomas H. Goodspeed, trustee. There was an order charging the trustee, and he brings exceptions. Overruled.

F. A. & A. A. Wyman, for plaintiffs. F. W. Blackmer and E. H. Vaughan, for trustee.

HOLMES, J. At the time of the service of the writ in this action, the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies, and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about taking possession of the property. No creditors appear to have become parties to the deed. The question before us is whether these facts warranted the superior court in charging the trustee.

The title had passed as between the parties to the deed. The trustee had the right to the immediate possession. We do not see why he was not as well "able to turn it out to be disposed of on execution" (Andrews v. Ludlow, 5 Pick. 28, 31), as if he had taken possession by a formal act. The case of Viall v. Bliss, 9 Pick. 13, seems probably to have

been similar to this, and in Maine it seems settled that in cases like the present the trustee is to be charged. Lane v. Nowell, 15 Me. 86; Arnold v. Elwell, 13 Me. 261; Peabody v. Maguire, 79 Me. 572, 584, 12 Atl. 630; Glenn v. Glass Co., 7 Md. 287. See, also, Bank v. Waite, 150 Mass. 234, 235, 22 N. E. 915; Cush. Trustee Process, §§ 53-55; Drake, Attachm. (7th Ed.) § 482; Freem. Ex'n (2d Ed.) § 160. Pub. St. c. 183, § 26, is not intended to limit the liability of trustees under deeds like this to cases where they have taken possession, but simply to declare the existing law, that they may be charged by trustee process, under section 21. Rev. St. c. 109, § 35, commissioners' note. We are of opinion that the property was "intrusted in the hands" of the trustee, within Pub. St. c. 183, § 21.

It is suggested that it does not appear from the trustee's answers to interrogatories that all the defendants had executed the deed before service of the writ. It does not appear that they had not. The deed was executed, and, if it be material, may be presumed to have been executed by all three of the defendants on the day of its date, as it certainly was by two of them. Exceptions overruled.

(172 Mass. 84)

BESTON et al. v. AMADON.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1898.)

**PRINCIPAL AND AGENT—EVIDENCE OF AUTHORITY—
QUESTION FOR JURY—RIGHT OF ACTION
AGAINST PRINCIPAL.**

1. Defendant, her husband, and her son-in-law lived together on her property. The son-in-law ordered brick of plaintiff to build a greenhouse on the premises. Defendant knew the work was being done, and some painting on the place was paid for by defendant's husband, who was her general agent. Defendant introduced evidence that she had not authorized the building, and that the son-in-law rented the premises from her. *Held*, that the question whether such material was ordered by defendant's authority was for the jury.

2. Plaintiff sold brick to defendant's son-in-law, who lived with her, for a building erected on her property. *Held*, that the fact that he took the son-in-law's note, supposing he was dealing with him alone, is no bar to an action against defendant, where he had offered the note back.

Exceptions from superior court, Hampden county; Daniel W. Bond, Judge.

Action by Patrick Boston and others against Frances A. Amadon. A verdict was directed for defendant, and plaintiffs except. Exceptions sustained.

J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr., for plaintiffs. W. W. McClench, for defendant.

HOLMES, J. This is an action to recover the price of bricks used in building a large greenhouse on land of the defendant. The bricks were ordered by one Cartter, the defendant's son-in-law. At the trial a verdict was directed for the defendant; we presume

on the ground that there was no evidence that the defendant's son-in-law was her agent.

The defendant, her husband, her daughter, and her son-in-law lived together on the place where the greenhouse was put up. The defendant's evidence was that Cartter hired the farm at \$50 a month, under some oral arrangement; but even this precarious tenure seems not to have been admitted by the plaintiffs. In April or May, 1895, Cartter began the greenhouse, having conveyed pretty much all the personal property which he used upon the place to the defendant in January, and going into insolvency in November, soon after the work was finished. The value of the work done that summer was estimated by the plaintiff, an expert, at from \$10,000 to \$12,000. There was evidence that the defendant knew of the work while it was going on, and it was not disputed that some painting on the place was paid for by the defendant's husband, who was her general agent, with her money. We are of opinion that on these facts the jury would have been warranted in finding that the building was ordered by the defendant's authority. It is true that the defendant introduced evidence which tended the other way, but the jury might have preferred to disbelieve it rather than to suppose that the order was given by Cartter on his own behalf alone, under circumstances where it would have looked very much like a deliberate fraud. In most of the cases like this which have been cited for the plaintiff the order was given by the husband of the owner of the place, and in some—not all—there was evidence that he was the general agent or manager for his wife. *Gannon v. Shepard*, 156 Mass. 355, 81 N. E. 296; *Dyer v. Swift*, 154 Mass. 159, 28 N. E. 8; *Jefferds v. Alvord*, 151 Mass. 94, 23 N. E. 734; *Wheaton v. Trimble*, 145 Mass. 345, 14 N. E. 104; *Arnold v. Spurr*, 130 Mass. 347; *Lovell v. Williams*, 125 Mass. 439. But in *Westgate v. Munroe*, 100 Mass. 227, the report of the judge stated that there was no evidence tending to show who employed or procured the services of the plaintiffs in making the repairs, yet the court, speaking through Mr. Justice Hoar, said that they entertained "no doubt that if a person, with the knowledge of the owner, performs valuable services upon the separate property of a married woman, it is evidence of an employment by her, and may authorize a jury to find a contract by her to pay for it." If, in addition to the evidence in that case, the name of a member of the household had been given as that of the person who gave the order, plainly it would not have changed the opinion of the court, nor could the result be affected if he and the alleged principal should unite in denying that he acted on the defendant's behalf. The jury might disbelieve their testimony, and draw the same inference that they would have had a right to draw if the interested evidence had not

been given. *Dyer v. Swift* and *Jefferds v. Alvord*, *ubi supra*.

It is not argued for the defendant that the fact that the plaintiffs took Cartter's note, when they supposed they were dealing with him alone, is a bar to this action. The note had been offered back. *Lovell v. Williams*, 125 Mass. 439.

Exceptions sustained.

(172 Mass. 71)

SPAULDING v. KENDRICK et al.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 20, 1898.)

MISAPPROPRIATED FUNDS—PAYMENT TO INNOCENT PARTY.

One who, in good faith, receives money from another as security against loss as surety on the bond of the other as trustee, can hold it, though the other had misappropriated it as receiver of a bank.

Exceptions from superior court, Berkshire county; Charles S. Lilley, Judge.

Suit by William O. Spaulding, receiver of the Stockbridge Savings Bank, against George S. Kendrick and another. Bill was dismissed as to Kendrick, and plaintiff excepta. Exceptions overruled.

Charles E. Hibbard, for plaintiff. Hammond, Robinson & Field, for defendants.

KNOWLTON, J. The plaintiff, as receiver of the Stockbridge Savings Bank, seeks to recover the sum of \$5,000, the property of the bank, which is alleged to have been misappropriated by one Hobbs, a former receiver of the bank, who has been removed from his office. It is alleged that this sum was taken by Hobbs from the funds in his hands as receiver, and sent to William A. Dickinson, of Amherst, in the form of a draft, and by him delivered to one James I. Cooper, who received it as the attorney of the defendant Kendrick, and turned it over to him. The plaintiff discontinued his suit as against all the defendants except Kendrick and Hobbs, and Kendrick alone defends. Kendrick and one Stockbridge were sureties for Hobbs upon a bond given by him as trustee under the will of one Dickinson, in the sum of \$8,000, and previous to the receipt of the money Kendrick had filed a petition in the probate court asking to be relieved from further liability on the bond.

We may assume, upon the evidence, that the money belonged to the bank, and was misappropriated by Hobbs. There was evidence to warrant the finding of the judge that the defendant had no knowledge that the money was other than the property of Hobbs, and that he received it through his attorney in good faith, and as security for a liability of greater amount than \$5,000, and on account thereof forbore to prosecute his petition for relief as surety on the bond of Hobbs. The evidence warranted a finding that his receipt of it was the same, in legal effect, as if it had been put into his possession by Hobbs with his

own hand, to be held as security against loss as surety on the bond. The evidence tended to show that the draft was sent to Mr. Dickinson, to be held and used as such security, and that, if the delivery of it to Cooper was not expressly authorized by Hobbs, it was within the general purpose of Hobbs, and was soon afterwards known to him and ratified by him.

The law of the case is settled by numerous decisions. If a thief gives stolen money, or negotiable securities before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or securities as belonging to him, the creditor can hold the property as against the true owner. As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of, or as security for, an existing debt, is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security passing from hand to hand, to one who rightly receives it for a valuable consideration, should carry on its face its own credentials. *Insurance Co. v. Abbott*, 131 Mass. 397; *Bank v. Plimpton*, 17 Pick. 159; *Greenfield School Dist. v. First Nat. Bank*, 102 Mass. 174; *Thacher v. Way*, 113 Mass. 291; *Ex parte Apsey*, 3 Brown, Ch. 265; *Jaques v. Marquand*, 6 Cow. 497; *Dunlap v. Limes*, 49 Iowa, 177. See, also, *Mason v. Waite*, 17 Mass. 560-563; *Worcester Co. Bank v. Dorchester & Milton Bank*, 10 Cush. 488. It has often been decided in this commonwealth that a pre-existing debt is a valuable consideration for a payment made, or a security given, on account of it. *Blanchard v. Stevens*, 3 Cush. 162; *Fisher v. Fisher*, 98 Mass. 303; *Goodwin v. Trust Co.*, 152 Mass. 189-190, 25 N. E. 100; *Merchants' Nat. Bank of Lowell v. Haverhill Iron Works*, 159 Mass. 158, 34 N. E. 93; *Bank v. Morse*, 163 Mass. 383, 40 N. E. 180. Exceptions overruled.

(172 Mass. 78)

COLLINS v. INHABITANTS OF GREENFIELD.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 20, 1898.)

MASTER AND SERVANT—ASSUMPTION OF RISK—
MUNICIPAL CORPORATIONS—PUBLIC AGENTS—
PRIVATE ENTERPRISES—EVIDENCE.

1. Plaintiff's intestate was engaged in defendant's employ in raking stone down a hillside on land belonging to defendant. He was crushed a short time after going to work, by the falling of an overhanging rock, which looked safe from where he was working. Defendant's superintendent, who put plaintiff's intestate to work at the place where he was killed, had been told that the rock could and ought to be barred down without further blasting, and he had promised to see to it. *Held*, that intestate did not assume the risk as a matter of law.

2. Plaintiff's intestate was killed while working, under the direction of the superintendent of streets (a public officer), in gathering rocks

preliminary to macadamizing a particular street, which duty was primarily cast on a street-railroad company by its franchise, but which work the town was doing in pursuance of a contract whereby the railroad company was to pay, and did pay, its portion of the expenses, which was for the body of the work. The town also sold a small amount of the crushed stone to private persons. *Held*, that, assuming that the town did not exercise any control so as to make it liable on the ground of its interference, yet the jury might have found that the superintendent of streets was acting, not as an independent public officer, but for the time being as the agent of the town in its private enterprise, not done under the compulsion of statute, but which might have been left to the railroad company, so as to make the town liable for the negligent acts of the superintendent.

3. On an issue of liability of a town for the negligence of a public officer in charge of work which it was claimed the town had assumed as a private enterprise, and not under the compulsion of law, it is immaterial whether the enterprise proved profitable.

4. Evidence that, in doing such work, the town had sold a small amount of the material prepared by it, to private persons, is admissible as a circumstance, together with other facts, to show that the work was a private enterprise.

Exceptions from superior court, Franklin county; J. B. Richardson, Judge.

Action by Caroline A. Collins, as administratrix of Michael Collins, deceased, against the inhabitants of Greenfield. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

Brooks & Hamilton, for plaintiff. Dano Malone, for defendant.

HOLMES, J. This is an action for injuries suffered by the plaintiff's intestate, Michael Collins, and causing his death, while in the defendant's employ. The case is here on exceptions to a refusal to direct a verdict for the defendant, and to one or two less important rulings. Collins was engaged in raking stones down a hillside upon land belonging to the defendant, that they might be gathered and broken up in a stone crusher for use in macadamizing the defendant's streets. Above him was a large, overhanging rock, which looked safe from where he was at work, but which had a large crack behind it, perhaps in consequence of some blasting done two days before. This rock fell a few minutes after Collins went to work, and crushed him. There was evidence that the superintendent, one Wait, put Collins to work where he was hurt; that Wait had been told that the rock which fell upon Collins could and ought to be barred down without further blasting; and that Wait had said that he would see to it.

The facts stated thus far are all that are material to the argument that Collins took the risk of the rock falling, which is one of the grounds on which the main exception is supported. The jury might have found that there was a special and concealed danger, of which the defendant had notice, but which Collins did not know, and had no chance to find out, and that, therefore, Collins was not

negligent, or did not take the risk, whichever phrase be preferred. *Burgess v. Ore Co.*, 163 Mass. 71, 42 N. E. 501; *McKee v. Tourtelotte*, 167 Mass. 69, 44 N. E. 1071.

Another ground on which the defendant claims immunity is that the work was under the charge of a public officer,—the superintendent of streets. *Clark v. Easton*, 146 Mass. 43, 14 N. E. 795; *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538; *Prince v. City of Lynn*, 149 Mass. 193, 21 N. E. 296; *Hennessey v. City of New Bedford*, 153 Mass. 260, 26 N. E. 900; *McCann v. City of Waltham*, 163 Mass. 344, 40 N. E. 20; *Jensen v. City of Waltham*, 166 Mass. 344, 44 N. E. 339; *Taggart v. City of Fall River*, 170 Mass. 325, 49 N. E. 622; *Mahoney v. City of Boston (Mass.)* 50 N. E. 939. We assume for the purposes of decision that the superintendent was appointed properly, and held his office lawfully, as well as de facto. *Clark v. Easton*, 146 Mass. 43, 45, 46, 14 N. E. 795. We assume, also, that there was no such control exercised by the selectmen as to make the town liable on the ground of their interference. But the jury were warranted in finding that the work which Collins was doing was in aid of macadamizing a particular street,—Federal street,—and this was work which primarily it was the duty of a street-railway company to do, under Pub. St. c. 113, § 82, at least for the most part, and so far as it went beyond the 18 inches on the sides of the track, according to the exceptions, was the duty of the same company, by the conditions of the location of its franchise. The town did the work in pursuance of an arrangement with the railway company by which the railway company was to pay, and did pay, it "the portion of the expense belonging to" the company. It would seem from this language quoted from the town vote, and from the report of the selectmen, that the company did not pay the whole bill; but we must assume from the statement in the exceptions previously quoted that the body of the work was what the company was bound to do. The town also sold a small amount of the crushed stone to private persons.

On these facts the jury were warranted in finding that the town, whatever its public duty as to a portion of the street, did the work voluntarily as a private enterprise, and not under the compulsion of statute, when it might have left it all to the railway company as a duty which the company had assumed. The jury might have found further, as they naturally would if they took the first step, that the superintendent of streets was acting, not as an independent public officer, but, for the time being, as the agent of the town. The question is not whether the town could modify its duty to the public by a private arrangement, or by the terms of its grant to the railway company alone, as matter of law, as may happen in some cases,—for instance, that of landlord and tenant (*Quinn v. Crimmings* [Mass.] 50 N. E. 624),—but

whether, as matter of fact, the town, from private motives, undertook a work which actually it might have left to be done by another, and employed Collins to aid it in that voluntary task. If the jury took this view of the facts, the town was liable for Collins' death. *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111; *Sullivan v. Holyoke*, 135 Mass. 273; *Deane v. Inhabitants of Randolph*, 132 Mass. 475.

It is not material whether the undertaking proved profitable, and evidence on that point properly was excluded. The fact that the town made some small sales of crushed stone was a circumstance to be considered; and although, taken alone, it might not have made out a case, yet, as it was only a portion of the evidence, the judge was not required to rule to that effect, and thus to break, one by one, the sticks which were relied on only when bound together in a fagot. *Whitford v. Inhabitants of Southbridge*, 119 Mass. 564, 575.

A portion of an answer in the deposition of Wait, the superintendent, to the effect that he cautioned Collins about the dangers of the work, was excluded, no doubt on the ground that it undertook to give the effect of what was said, rather than the substance of the words which he used. See *Ives v. Hamlin*, 5 Cush. 534. Possibly, a part of the excluded testimony might have admitted a more liberal construction, but we are not prepared to say that the judge was wrong.

Exceptions overruled.

(172 Mass. 82)

WALKER v. WALKER.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 20, 1898.)

DIVORCE—ADULTERY—DESERTION.

On a libel for divorce for adultery, the libellant's desertion of libelee is no bar, where not continued for a sufficient length of time, prior to the act of adultery, to constitute a ground for divorce.

Exceptions from superior court, Hampshire county; Francis A. Gaskill, Judge.

Libel by Mary N. Walker against Myron P. Walker for divorce. There was decree nisi for libellant, and libelee brings exceptions. Exceptions overruled.

E. H. Lathrop, for libellant. E. C. Bumpus, for libelee.

BARKER, J. If, as the libelee contends, the letter of the libellant to him of December 15, 1891, with her subsequent conduct until he committed adultery in the year 1892, was a desertion, which, if continued for three years, would have given him ground for divorce, the libellant yet had a locus penitentie, and under our decisions, after the adultery of the libelee, was under no obligation to return to him, and he cannot set up the desertion in bar of her libel

for his adultery committed before her desertion had continued so long as to give him a right to a divorce. *Hall v. Hall*, 4 Allen, 41; *Clapp v. Clapp*, 97 Mass. 531. See, also, *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386, 389; *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59; *Watts v. Watts*, 160 Mass. 464, 467, 36 N. E. 479. Exceptions overruled.

(172 Mass. 60)

**NEW ENGLAND THEOSOPHICAL CORP.
v. CITY OF BOSTON.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 20, 1898.)

LITERARY, BENEVOLENT, AND SCIENTIFIC CORPORATIONS—EXEMPTION FROM TAXATION.

1. A corporation organized under Pub. St. c. 115, § 13, having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, is not a "benevolent" or "charitable" institution, within chapter 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting such from taxation.

2. Nor is it a "benevolent" or "charitable" corporation because one of its purposes was "forming the nucleus of a universal brotherhood of humanity," the statement of such purpose being too indefinite to justify a finding to that effect.

3. A corporation having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, is not a "scientific" institution, within Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting such from taxation; since, if there is any connection between theosophy and any kind of science, it is only incidental to the study and promulgation of a system of speculative philosophy.

4. Nor is such a corporation a "literary" institution, within Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting such from taxation, even though, in furtherance of its main object, books are collected, instruction given, and literary work done.

Report from superior court, Suffolk county.

Petition by the New England Theosophical Corporation against the city of Boston for the abatement of taxes assessed on real estate. Submitted on reports. Judgment ordered for respondent.

George D. Ayers, for petitioner. Samuel M. Child, for defendant.

LATHROP, J. These are two proceedings, under St. 1890, c. 127, for the abatement of taxes assessed as of May 1, 1894, and 1895, respectively, on a parcel of land on Mt. Vernon street, in Boston. The case comes before us on reports of the justice of the superior court who heard the cases, and who found and ruled as follows: "I find that the witnesses at the hearing testified truthfully, and rule that, on all the evidence, I am not required to find that the real estate of the petitioner, or any part thereof, was exempt from taxation." The reports state that the only witnesses at the trial were the petitioner's treasurer, called by the petitioner, and its president, who also acted as

counsel, called by the defendant. The reports further state that there was evidence tending to show certain facts, and gives portions of the evidence of the two witnesses. The judge has made no findings of fact, and we are left to gather the facts from the evidence, which is not a satisfactory way of having cases presented to us. The question before us is whether, as matter of law, the justice of the court below was bound to abate the tax assessed in either or both of the years above mentioned.

The petitioner was organized in 1893, under Pub. St. c. 115, and received, under section 13, a certificate from the secretary of the commonwealth, in which the purposes of the corporation are thus set forth: "For the purpose of literary, benevolent, charitable and scientific purposes; more particularly to assist the Theosophical Society in its three objects: (1) Forming the nucleus of a universal brotherhood of humanity, without distinction of race, creed, sex, caste, or color; (2) promoting the study of Aryan and other Eastern literatures, religions, and sciences, and demonstrating their importance; (3) investigating unexplained laws of nature, and the psychical powers latent in man, for mutual improvement in religious and philosophical knowledge, in the furtherance of religious and philosophical opinions, for maintaining a library or libraries of theosophical and cognate books, for printing and publishing theosophical literature." It is further declared in the certificate: "No person can become a member of this corporation without being a member of the Theosophical Society, which was founded in New York, November 17, 1875, and now has its headquarters in India." After this certificate was obtained, the petitioner acquired title to the premises taxed. This is a lot of land, with a building thereon, formerly a dwelling house, containing about 20 rooms, of good size. The reports state: "The evidence tended to show that the work carried on by the corporation and the branch organizations and individuals who assisted the corporation was of a very general character, corresponding to the objects named in the charter, and consisting of editing the 'Theosophical News,' sending out press reports and articles to various papers by means of the 'Press Bureau' of the New England committee for theosophical work; that several branch organizations, engaged in various departments of the same work described in the purposes of the main corporation as shown by the charter, occupied various rooms in said building, some of whom subscribed a certain amount weekly to the support of the parent corporation, the petitioner." One room, in 1894, was occupied by a newspaper reporter, who worked for his newspaper at night, and slept during the day, and, when he was not asleep, did some work for the petitioner, in the way of writing and addressing letters. A large

number of other rooms were let to various theosophical workers, and they respectively paid a small rental for the same, in proportion to their respective means, some of these being engaged in other occupations during the day. In 1894 a man and his wife occupied one of the rooms. On May 1, 1895, the wife, who was a member of the corporation, was temporarily in Europe, and the man, who was not a member, occupied the room, and continued to occupy it.

The petitioner contends that the evidence shows that the corporation was a "literary, benevolent, charitable and scientific institution," and so exempt from taxation, under Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465. We see no ground upon which it can be said that the judge was bound to hold that the petitioner was either a benevolent or a charitable institution. The word "benevolent" may include purposes which may be deemed charitable by a court of equity, and it may also include "acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed 'charitable' in the technical or legal sense." *Chamberlain v. Stearns*, 111 Mass. 267. See, also, *Massachusetts Soc. for Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24, 6 N. E. 840. The word "charitable" refers to hospitals and other charitable institutions for the relief of the poor or the sick. The reason of this exemption is that they render a service to the public, and so relieve the state or municipality from expense. See *Cooley, Tax'n* (2d Ed.) 202.

The purpose of "forming the nucleus of a universal brotherhood of humanity" is too indefinite an expression to enable us to say, on the evidence, that the judge was wrong in holding that the petitioner was not a benevolent or a charitable institution.

The judge was not bound to hold that this was a scientific institution. While the term "scientific" may not be limited to the physical sciences, yet there is nothing in the evidence to show that there is any study or application of science, even in the broadest sense of the word, in theosophy. But, even if there is any connection between theosophy and any kind of science, it is only incidental to the study and promulgation of a system of speculative philosophy. To make an institution scientific, it should be devoted either to the sciences generally, or to some department of science as a principal object, and not merely as an unimportant incident to its important objects.

The word "literary" has no technical legal meaning, and there is some difference of opinion as to what is meant in statutes exempting literary institutions or societies from taxation. In England it is held that a school

for educating teachers organized under 6 & 7 Vict. c. 36, is not a literary society. *Reg. v. Pocock*, 8 Q. B. 729. See, also, *Common Council v. McLean*, 8 Ind. 328; *Philadelphia v. Overseers of Public Schools*, 170 Pa. St. 257, 32 Atl. 1033; *Kendrick v. Farquhar*, 2 Ohio, 189. In *Trustees of Wesleyan Academy v. Inhabitants of Wilbraham*, 99 Mass. 599, it was said by Chief Justice Chapman, in considering the exemption of the academy from taxation: "The academy of the plaintiffs is a literary and scientific institution, duly incorporated, and the only questions that are raised in the case relate to the character of the property which the defendants have assessed." The institution in this case was incorporated by St. 1824, c. 80, "for the purpose of promoting religion and morality, and for the education of youth, in such of the liberal arts and sciences, as the trustees for the time being shall direct." In *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, 13 N. E. 854, it was conceded that the plaintiff was one of the institutions exempt from taxation by Pub. St. c. 11, § 5, cl. 3, and the court said that it was "very properly conceded." The institution in this case was organized, under Pub. St. c. 115, for the "education of boys." We have no occasion, however, to inquire whether a building owned by a corporation formed for the purposes of education is exempt from taxation, when a similar building used for the same purposes would not be if owned by private individuals, as we are of opinion that the judge was not bound to find that the petitioner is a literary institution, within the meaning of the statute. The paramount object of the petitioner is the dissemination of theosophical ideas, and the procuring of converts thereto. Everything else is subordinate. The fact that, in furtherance of this object, books are collected, instruction given, and literary work done, does not make the petitioner a literary institution. To hold otherwise would be to permit any seven men who believed in any particular theory on any subject to live free from taxation, by forming a corporation, buying a house, living in it, editing a newspaper, and writing articles to other newspapers in favor of their views, with the hope of gaining converts. This is not, in our view, the intent of the legislature. According to the terms of the reports, judgment is to be entered in each case for the respondent for its expenses and costs. So ordered.

(172 Mass. 85)

MORRISSEY et al. v. GEISEL et al.
(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1898.)

BUILDING CONTRACTS—BREACH—EVIDENCE.

One about to build an hotel, having stipulated that all labor should be performed by union men, informed a contractor that, if he could produce a certificate from the Laborers' Union that he was acceptable to it, he would give him the contract. That night the labor

union unanimously voted not to work for any contractor on this job who had employed non-union men during the previous two years. This the contractor had done. The contractor then offered to give a bond to the union not to employ nonunion men, but it took another vote, and sustained its former action. *Held* that, in an action for refusal to let the contractor proceed on the alleged contract, these votes were properly admitted, since they tended to show that the contractor could not secure union labor or the certificate from the union required; and this, whether they were communicated to the contractor or not.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action by one Morrissey and others against one Geisel and others. There was a verdict for defendants, and plaintiffs except. Exceptions overruled.

J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr., for plaintiffs. Brooks & Hamilton, for defendants.

HOLMES, J. This is an action for the breach of an alleged oral contract to employ the plaintiffs to build an hotel and bottling establishment in Springfield. The defendants advertised for bids, stipulating that all labor should be done by union men. The plaintiffs made the lowest bid. The parties met on the afternoon of March 17, 1896, and, according to the plaintiffs' testimony, the contract was awarded to them. The defendants, on the other hand, testified that they went no further than to say that if the plaintiffs could produce, to the defendants' satisfaction, evidence or a certificate from the labor unions that the plaintiffs were acceptable to them, the plaintiffs should have the contract. The jury found for the defendants.

At the trial several exceptions were taken, some, if not all, of which, apart from other questions, were made immaterial by the charge of the judge. Only one is insisted upon at the present time, and that is to the admission of two votes by the Building Laborers' International Protective Union, No. 3, of America, otherwise called, in the testimony, the "Masons' Tenders' Union," the "Hod Carriers' Union," or the "Laborers' Union." These votes were: First, "Moved & Sec. that we refuse to work for any contractor that gets this job that has not had all union men for the last two years. Carried,"—passed in the evening of March 17th, after the meeting of the parties to this suit about the contract; and, second, "A special meeting called for the purpose of asking whether we now recede from our former action in regard to this brewery job or not. Moved and seconded that we sustain our former action. Forty-five for and six against. Carried,"—passed on March 21st.

There was evidence that the plaintiffs had employed some nonunion men within two years, and, indeed, it is not a violent inference that the first vote was directed against the plaintiffs especially. On March 20th,

before the second vote, there was a meeting between the plaintiffs, the defendants, and some representatives of labor unions, for the purpose, it might have been found, of trying to arrange matters between the plaintiffs and the laborers. At this meeting the plaintiffs offered to give a bond of \$500 to employ only union men upon the job.

When the votes were put in, it was possible that the plaintiffs might contend that, even if the jury should find that on March 17th the defendants only had made a conditional offer, the plaintiffs had satisfied the condition, reasonably understood, and were able to go on with union labor. The first vote of the Laborers' Union was treated by the parties at their meeting as sufficiently proving that at that time the plaintiffs could not get members of that union to work for them. It proved it very plainly. Such a vote was more than a mere declaration of intention. It was, or might have been found to import, a command by the union to every one of its members not to work for the plaintiffs, and a command which no member of the union would dare to disobey. The existence of such a command, unrevoked, from a superior power, to those whom the plaintiffs would have employed if they could, does not depend upon communication to the plaintiffs for its effect as evidence of what the plaintiffs were able to do with the men. The votes were important, also, as bearing on the position of the unions from which the defendants required a certificate. They were not only declarations of intention, they were acts,—orders carrying out the intention, the second of them seemingly in rejection of the plaintiffs' attempt to conciliate them by a bond. There is no question, that they were serious votes. As such, whether communicated or not, they showed that the plaintiffs were not acceptable to the union that passed them. It is argued that the offer of the bond does not appear to have been communicated to the union. But it was made to their secretary, who was, at the meeting of March 20th, to represent them. If this was not sufficient, the contents of the second vote show plainly enough that the secretary had laid the offer before the meeting.

It is enough that the evidence was admissible in connection with the rest of the defendants' evidence; and it is unnecessary to consider whether, on the plaintiffs' theory, the votes would have been competent to show that no cause of action had accrued, because the plaintiffs were not able to begin work with union men. See *Jones v. Parker*, 163 Mass. 564, 567, 568, 40 N. E. 1044. The judge took the most favorable view for the plaintiffs, and instructed the jury that, if a contract was made on the 17th, the plaintiffs were entitled at least to nominal damages, and thus absolutely excluded a finding for the defendants on the ground of a breach of condition after the contract was made.

The first vote, at least, was admissible also

from another point of view: It was open to the defendants to argue that the meeting of March 20th was more consistent with the defendants' evidence that the contract depended upon the plaintiffs' having come to terms with the labor unions than with the plaintiffs' theory. In order to explain the plaintiffs' conduct, it was proper to put in the vote, which evidently was one of the causes of the meeting.

Exceptions overruled.

(172 Mass. 117)

DIRECTORS OF PROVIDENCE & W. R. CO. et al. v. TOWN OF UXBRIDGE.

(Supreme Judicial Court of Massachusetts. Worcester. Oct 20, 1898.)

APPEAL—REPORT FROM SINGLE JUSTICE—REVIEW
—RAILROADS—CROSSINGS—ABOLITION—
EXPENSES.

1. Pub. St. c. 151, § 20, providing that a report by a single justice, when confirmed by the court, shall be final, does not take away the authority of the justice to report to the full court questions of law arising in equity.

2. Where the point was not raised in the superior court that a party did not file in that court objections to the report by the justice, in accordance with equity rules 31 and 32, it cannot be raised in the full court.

3. The expense of employing counsel to represent the town in the superior court, and before a commission appointed to make separation of the grade crossing and of employing a civil engineer to prepare plans to present to the commission, are not such items of cost or expenses as are contemplated by Acts 1890, c. 428, §§ 3, 7, which provide that railroads shall pay 65 per cent. of the total actual cost of abolishing grade crossings, including the cost of hearing, and the compensation of the commissioners and auditors, and the expense incurred by the town.

Report from superior court, Worcester county; J. B. Richardson, Judge.

Petition by the Directors of the Providence & Worcester Railroad Company and others against the town of Uxbridge for separation of a grade crossing. Claims by the town for counsel fees and fees for engineer disallowed, and the case was submitted on a report. Items disallowed.

John L. Hall, for petitioners. Geo. S. Taft, for Town of Uxbridge.

HAMMOND, J. The items in dispute were disallowed by the auditor and by the justice of the superior court, and the question whether this was correct comes to us upon a report made by the justice. Although the language of the statute is that the report, when confirmed by the court, shall be final, still it is not to be construed as taking away the general authority of a single justice to report to the full court questions of law arising in equity. Pub. St. c. 151, § 20; St. 1883, c. 223, § 2. The petitioners contend that the town has no standing here, because it did not file in the superior court objections to the report, in accordance with equity rules 31 and 32 of that court. But the point does

not seem to have been taken there, and it is too late to raise it now. We are therefore brought to the question in the case, which is whether expenses incurred by a town in employing counsel to represent it in the superior court, and before a commission appointed to make separation of a grade crossing, under chapter 428 of the Acts of 1890, and in employing a civil engineer to prepare plans to present to the commission, should be allowed by the auditor, as part of the "cost of the hearing," under section 3, or as part of the "expense incurred by the town," under section 7 of that act, to be apportioned between the railroad company, the commonwealth, and the town. The legal services consisted in part in appearing at hearings in the superior court in opposition to the appointment of a commission, and representing the town in the selection of commissioners after the decision of the court to appoint; in part in opposing before the commission any abolition whatever; and in part advocating before the commission, after its decision to abolish the crossing, a different plan of separation from that presented by the railroad company. The engineering services consisted in preparing and presenting to the commission the town plans for the abolition. The commission adopted the railroad plan. The town, by vote at a town meeting, appointed a committee with authority to employ counsel and an engineer for the purposes stated. The reasonableness of charges is not in dispute. The seventh section of the statute simply provides the machinery by which the items named in the third section may be apportioned, and cannot be held to vary them in any way. The decision of the question therefore depends upon the interpretation to be given to the following language of the third section: "The railroad companies shall pay sixty-five per centum of the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages including those mentioned in section five of this act." These items cannot be considered as a part of the total cost of the alterations. They were incurred before the decree for alterations was made, and in opposition to the decree, and not for the purpose of performing it. Instead of being incurred in carrying out the decree, they were incurred to prevent it. In these respects the case materially differs from *Boston & A. R. Co. v. Inhabitants of Charlton*, 161 Mass. 32, 36 N. E. 683. In this latter case the expenses were incurred by the town in a bona fide attempt to ascertain the land damages.

Nor do we think these items can be allowed as a part of the "cost of hearing" before the commission. A review of the history of the legislation on this matter is here instructive. When railroads were first established, the acts of incorporation usually authorized them to raise or lower highways so as to

pass under or over them, and forbade the obstruction of highways. St. 1826, c. 183, § 6; St. 1829, c. 26, § 5; St. 1830, c. 93, § 9; Id. c. 94, § 10; Id. c. 95, § 11; Id. c. 4, § 11; St. 1833, c. 187. These provisions were incorporated in Rev. St. c. 39, §§ 66-68. The first statute authorizing proceedings for the abolition of grade crossings was St. 1842, c. 22: "If the selectmen of any town, or the mayor and aldermen of any city, wherein any turn-pike, highway or townway, crossed by any railroad, on a level therewith, is situated, shall be of opinion that it is necessary for the security of the public that said turn-pike, highway or townway should be raised or lowered, so as to pass over or under said railroad, said selectmen, or mayor and aldermen, may, in writing, request the corporation to which said railroad belongs to raise or lower said ways; and if said corporation shall neglect or refuse so to do, said selectmen, or mayor and aldermen, may apply to the county commissioners of the county within which said town is situated, to decide upon the reasonableness of such request; and if said commissioners, after due notice and hearing the parties, shall decide that the raising or lowering of said ways is necessary for the security of the public, said corporation shall comply with said decision, and shall pay the costs of the application; and if the said commissioners shall be of opinion that such alteration of said ways is not necessary, the said selectmen or mayor and aldermen shall be liable to pay the costs of their application." This statute was re-enacted in Gen. St. c. 63, §§ 53, 54. This last was repealed by St. 1872, c. 262. Section 1 provides that if, upon application, the county commissioners decide that no alteration is necessary, "the party making the application shall pay the costs." Section 2 is as follows: "The party by whom such decision shall be carried into effect shall be determined upon the award of a commission consisting of three disinterested persons, one of whom shall be named by the county commissioners, if the way that crosses or is crossed by the railroad is a highway, or by the selectmen or mayor and aldermen if it is a town way; one by the railroad corporation interested; and the third shall be a member of the board of railroad commissioners designated by said board. Said commission shall be named within thirty days after the decision that an alteration is necessary, and shall meet within sixty days; and the said commission shall also determine by what party all charges and expenses occasioned by making such alteration and all future charges for keeping in repair such crossing and the approaches thereto, as well as all costs of the application to the county commissioners, or of the hearing before said commission, shall be borne; or said commission may apportion all such charges, expenses or costs between the railroad corporation and the town, city or county in which

said crossing is situated, and the award of said commission shall be final." And this is substantially re-enacted in St. 1874, c. 372, §§ 96, 98, and in Pub. St. c. 112, §§ 129, 131. Then comes the statute in question,—St. 1890, c. 428. It will be observed that in the previous statutes the costs which were to be apportioned were, until St. 1872, c. 262, "the costs of the application to the county commissioners," but when special commissioners were appointed, and up to St. 1890, c. 428, the costs were the costs of the application to the county commissioners and of the hearing before said special commissioners. Since, under St. 1890, c. 428, the petition was to be made to the superior court there was no occasion to continue the provision concerning costs before the county commissioners, and so that concerning the cost of hearing before the special commissioners only was retained. There can be no doubt that the same general kind of expense is meant by the term "cost of hearing" as by the cost of "application before the county commissioners." Prior to St. 1872, c. 262, the whole matter of alterations was passed upon by the county commissioners, and in that case there were no other costs to be paid but those of the application to them; but, when a part of the work was delegated to a special commission, then it became necessary to include the cost of hearing before the latter, in order to cover some of the cost which had theretofore come in under costs of application to the county commissioners. A similar provision is contained in the act for laying out highways. Pub. St. c. 49, § 2. But these provisions concerning costs before the county commissioners never have been held to relate to costs between the parties, or to the costs incurred by the respective parties in the preparation and trial of their respective sides of the controversy, but merely to the costs incurred by the county commissioners or the tribunal as a court, and they are simply intended to protect the public treasury from the expense of holding the court and of investigating the questions presented. *Gifford v. Inhabitants of Dartmouth*, 129 Mass. 135. No part of the items in question were incurred for that purpose, and they were rightly disallowed. Items disallowed. Decree accordingly.

(172 Mass. 50)

GLEASON v. SMITH.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION
OF RISK—EXPERT EVIDENCE.

1. Plaintiff had been a molder for 10 years, and had worked for defendant for four years. He had worked two years on a machine for molding piano tops, similar to that on which he was injured, except as to the guard, which on the first machine and on the one on which he was injured was a contrivance made by the workmen themselves, without direction from

the employers, and was not a part of the machine. The machine on which he had first worked had a guard covering the whole sweep of the knives, but the guard on the machine on which he was injured did not, and the revolutions were so rapid that the knives were invisible; but, when he was first put at the latter machine on the day of the injury, it was at rest, and he could have seen that the knives were not wholly covered. While running a board through the machine, he observed a defect, and was injured by the knives while examining it with his hand. *Held*, that he could not recover of his employer.

2. The question whether a machine with rapidly revolving knives is dangerous is not one for experts.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by Frank D. Gleason against F. G. Smith. A verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

J. R. Thayer and A. P. Rugg, for plaintiff.
E. P. Pierce and J. A. Stiles, for defendant.

KNOWLTON, J. The plaintiff was employed by the defendant as a molder in a woodworking shop, where piano cases were manufactured; and while working upon a machine, molding the top of a piano, his thumb and two fingers were cut off. He contends that the defendant was negligent in setting him to work upon a dangerous machine without warning him of the danger. The only objection which he now makes to the machine is that a guard used upon it was not so wide as it should have been. The plaintiff testified that he had been a molder ten years or more, and had worked for the defendant in this shop about four years prior to the accident, and, before working for the defendant, had worked in four other shops where work was done similar to that done by the defendant. In these shops he had worked two years upon a machine like that upon which he was injured, except in respect to its guard. In the defendant's shop he had worked molding pieces of wood smaller than piano tops, upon machines whose working was similar to that upon which he was injured, but he had never worked upon that particular machine until the day of the accident. He testified that he knew that guards or springs are not made or furnished by manufacturers of molding machines, and that the machines made no provision for the attachment of guards or springs; that they are not ordinarily provided by employers for use upon machines; that in every instance, so far as he knew, they were made by the workmen, without request or direction of employers, when they could use them; that, when he worked in another shop molding piano tops, he had made one similar to that upon the defendant's machine, except that it covered the whole sweep of the knives, and that he made it from his own experience and judgment, without request from his employer. The guard on the defendant's machine had been made five or six years before the acci-

dent, by some workmen employed in the defendant's shop, and had been used as the work done there required ever since. It was there when the plaintiff entered the defendant's service, and was the only one that had been in the shop during the time that he worked there. It was used only when piano tops were being molded. It was not imperfect or defective in form or material, except that it did not cover the entire sweep of the knives, and did not furnish so much protection to the workmen as if it had been wider. The plaintiff, while working upon the machine, saw a defect in the board that was being molded, and put his hand along the outer edge of the guard, to examine the defect, and to discover by the sense of feeling just what it was. His fingers came in contact with the rapidly revolving knives, and were cut.

We need not consider the question whether there was any evidence that the plaintiff was in exercise of due care, for we are of opinion that there was no evidence of negligence on the part of the defendant. The plaintiff contracted to work as a molder, and he impliedly agreed to assume the risk of working upon ordinary molding machines. The machine on which he was injured was an ordinary machine, in perfect condition. A guard, which was no part of the machine, but was an appliance made by the workmen using the machine, was not so wide as one which the plaintiff had previously made, before he was employed by the defendant. If there was negligence in that part of the business which is ordinarily done by employes in connection with the use of their machines, it was one of the risks of the business assumed by the plaintiff in entering the service. Even if the machine and its guard be considered together as something to be furnished complete by the defendant for the particular work which the plaintiff was doing, the defendant was not bound to change the construction of the machine, if its condition was open and obvious when the plaintiff contracted to work in the business, and if there were no concealed dangers which one about to enter the service could not readily discover. That the plaintiff did not in fact know of the particular danger when he made his contract is immaterial, if, with the exercise of due diligence, he might have known it. *Murch v. Thomas Wilson's Sons & Co.*, 168 Mass. 408, 47 N. E. 111; *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119; *Fisk v. Railroad Co.*, 158 Mass. 238, 33 N. E. 510; *Goodridge v. Mills Co.*, 160 Mass. 234, 35 N. E. 484; *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500.

Although the plaintiff could not see the knives when the machine was in operation, there is nothing to indicate that an examination of the machine when it was at rest would not have shown that the guard did not fully cover the knives. If the plaintiff had chosen to use them, he evidently had all the means

of seeing the relation of the guard to the knives which the workmen had who made the guard. He put his thumb and fingers against the knives without making an examination. The defendant had no reason to suppose that he needed instruction in regard to this danger, and owed him no duty either to change the guard, or to give him instruction or warning about it. The testimony of experts to show that this machine was in their opinion very dangerous was rightly excluded. The elements and the degree of the danger involved in using it could be understood by persons of common intelligence without the aid of experts. Exceptions overruled.

(172 Mass. 87)

PARKER v. GRIFFITH.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1898.)

APPEAL—HARMLESS ERROR—NEW TRIAL.

1. Error in excluding evidence competent only on the question of damages is cured by a verdict that the party is not entitled to damages.

2. Refusal to grant a new trial is not ground for exception.

Exceptions from superior court, Hampden county.

Action by Wallace A. Parker against Amazo Griffith. There was a judgment for defendant, and plaintiff excepts. Exceptions overruled.

Bowdoin S. Parker, for plaintiff. Tom Fitzgibbon, for defendant.

KNOWLTON, J. The only exceptions taken at the trial of this case relate to the exclusion of evidence. The plaintiff offered to show his general reputation as a man of skill in his profession, and to prove that his practice as a physician was profitable, and also to prove specific acts and operations performed by him tending to show his professional ability. He also offered to show by his own testimony the diminution of his business since the utterance of the alleged slander by the defendant. The presiding justice excluded the testimony.

Upon the question of liability, the issue was whether the words uttered by the defendant were true. It seems clear that the testimony excluded would have had no tendency to show that the plaintiff was not guilty of the crime charged against him in the words set out in the declaration. The only issue upon which it could have had any bearing was the amount of the damages. Some of it was plainly incompetent upon any question in the case. Without deciding whether any part of it properly might have been admitted in connection with other evidence upon the question of damages, it is enough to say that the finding of the jury that the defendant's justification was established made it unnecessary for them to consider the subject of damages, and render the exceptions immaterial. *Thompson v.*

Dickinson, 159 Mass. 210-212, 34 N. E. 262; *Lawler v. Earle*, 5 Allen, 22; *Cunningham v. Parks*, 97 Mass. 172.

Upon a motion for a new trial, the plaintiff asked the judge to rule that there was error in the instructions which permitted the jury to find for the defendant upon insufficient evidence, and excepted to his refusal so to rule. No exception had been taken to the instructions, and the question had not previously been raised. A motion for a new trial is addressed to the discretion of the court, and a refusal of the judge to grant such a request on the hearing of such a motion is not a matter of exception. *Kidney v. Richards*, 10 Allen, 419; *Whittaker v. Inhabitants of West Boylston*, 97 Mass. 273; *Com. v. Morrison*, 134 Mass. 190.

This is a sufficient answer to the plaintiff's argument. But we may add that, whatever may be thought of the credibility of the principal witness for the defendant, there was enough in her testimony to warrant the judge in submitting to the jury the question decided by their verdict. Exceptions overruled.

(172 Mass. 145)

TAYLOR v. TUSON.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1898.)

TENANCY AT WILL—TERMINATION.

A tenancy at will is not terminated by the mere act of the tenant in vacating the premises, where the landlord does not accept their surrender, but there must also be a proper legal notice given by the tenant of his intention to terminate the tenancy.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Ransom C. Taylor against Albert Tuson for the use and occupation of an office rented to defendant. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

The only question of fact submitted to the jury was whether any notice to terminate the tenancy at will was given by defendant to plaintiff, it not being contended by defendant that the plaintiff accepted the surrender of the premises prior to the bringing of the suit.

Sullivan, O'Connell & Hubbard, for plaintiff. Willis E. Sibley, for defendant.

FIELD, C. J. The defendant was a tenant at will of the plaintiff. The presiding justice rightly ruled that if the tenant did not give "a proper and legal notice sufficient to determine the tenancy," as the plaintiff did not accept the surrender of the premises, the tenancy at will was not determined by the tenant vacating the premises. *Walker v. Furbush*, 11 Cush. 366; *Batchelder v. Batchelder*, 2 Allen, 105; *Whicher v. Cottrell*, 163 Mass. 351, 43 N. E. 114. Exceptions overruled.

(172 Mass. 134)

FLAHERTY v. NORWOOD ENGINEERING CO.(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 21, 1898.)**MASTER AND SERVANT—INJURIES TO SERVANT—QUESTIONS FOR JURY.**

Whether an injured servant exercised due care or was negligent with respect to the appliances, whether he knew and appreciated the dangers of his employment, and whether the appliances were reasonably safe and proper, are questions for the jury.

Exceptions from superior court, Hampshire county; H. Wardwell, Judge.

Action by William Flaherty against the Norwood Engineering Company. Verdict for plaintiff. Defendant excepts. Exceptions overruled.

J. B. O'Donnell, for plaintiff. Wm. G. Bassett, for defendant.

HAMMOND, J. Considering, among other things shown by the evidence, the dangerous character of the molten iron, what was to be done with it, the nature of the appliances to be used in handling it, the infrequency of their use, the degree of knowledge of the plaintiff, and the general scope of his duties, we are of opinion that the questions whether the plaintiff was in the exercise of due care, whether the appliances were reasonably safe and proper, whether there was any negligence on the part of the defendant as to those appliances, and whether the plaintiff knew and appreciated, or ought to have known and appreciated, the danger, were all questions of fact for the jury. Exceptions overruled.

(172 Mass. 154)

TRIMBLE v. WHITIN MACH. WORKS.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1898.)**INJURY TO EMPLOYE—LIABILITY OF MASTER.**

1. Where a gang plank is necessary to load machinery, and the master furnished a suitable one, he is not bound to see that it was properly placed.

2. Where it was not shown that a foreman's principal duty was that of superintendence, or that he was to see that a gang plank was properly placed while employes were using it, the master is not liable for an injury to an employe caused by the gang plank not being properly placed by him.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by one Trimble against the Whitin Machine Works for damages for personal injuries. Judgment in favor of defendant, and plaintiff brings exceptions. Overruled.

Sheehan & Cutting, for plaintiff. W. S. B. Hopkins and F. B. Smith, for defendant.

MORTON, J. We understand that the only defect complained of was the want of a gang plank at the side door of a car, while the plaintiff was helping to load the machine.

If we assume, without deciding, that a gang plank was a part of the ways, works, and machinery, there is nothing to show that the defendant had not furnished a suitable gang plank. If the defendant furnished a suitable gang plank, it was not bound to see that it was properly placed at the door while the men were putting the machine into the car. It would have performed its duty in furnishing the gang plank. *Robinson v. Manufacturing Co.*, 143 Mass. 523, 10 N. E. 314; *Ashley v. Hart*, 147 Mass. 573, 18 N. E. 416; *Thyng v. Railroad Co.*, 156 Mass. 13, 30 N. E. 169; *Carroll v. Telegraph Co.*, 160 Mass. 152, 35 N. E. 456; *Allen v. Iron Co.*, 160 Mass. 557, 36 N. E. 581. Under the circumstances indicated, the putting of the gang plank in place was the work of the men themselves, or it belonged to some superintendent or foreman of the defendant to see to it. If it was the former, then it is clear that the defendant is not liable to the plaintiff for an injury occurring through the failure or neglect of the plaintiff or his fellow workmen to do something which he or they ought to have done. Nobody is referred to in the exceptions as superintendent, and the only person who is referred to in them as a foreman is Mr. Cram. But there is nothing to show whether his sole or principal duty was that of superintendence, or whether it was a part of his duty to see that the gang plank was in place at the side door of the car while the men were loading the machine. It does not even clearly appear that he was a foreman of the defendant, though perhaps that might be fairly presumed. Therefore, even though we make in the plaintiff's favor the assumption which we have made, he falls on this branch of the case. The result is that the exceptions must be overruled. So ordered.

(170 Mass. 493)

PARKS et al. v. COOKE.(Supreme Judicial Court of Massachusetts.
Suffolk. March 11, 1898.)**DEPOSITIONS—ADMISSIBILITY.**

A second deposition of a witness, taken on a subsequent hearing, is not objectionable because part of it related to matters on which he had testified in the first deposition.

Exception from superior court, Suffolk county.

Action of contract by L. K. Parks and another against Edward O. Cooke on an account annexed. There was a verdict for plaintiffs, and defendant excepts. Exceptions overruled.

This case was originally brought in the municipal court of Boston, and on an appeal was tried several times in the superior court before a jury. At the trial in the superior court before Blodgett, J., it appeared in evidence that, before any trial of the case was had, the deposition of Barbour, one of the plaintiffs, was taken, on June 24, 1894, upon

a commission issuing from the municipal court, and to the interrogatories put to him no cross interrogatories were filed by the defendant. This deposition was used at the trial of the case in the municipal court, and at the first trial of the case in the superior court. After the case had been once tried in the superior court, the plaintiffs' attorney again filed interrogatories to Barbour in that court, for the purpose of taking his deposition a second time. The only cross interrogatories filed by the defendant were inquiries to the witness concerning whether or not he had given the deposition first mentioned. The defendant filed with these cross interrogatories his objections to the plaintiffs giving this deposition, for the reason, substantially, that they had already given the first deposition. A commission was issued, and Barbour gave, on January 17, 1896, his second deposition, which related to the same subject-matter, with some additional testimony, and contradicted a portion of the testimony given by the defendant at the former trial. At the present trial the plaintiffs offered in evidence the second deposition, and the defendant objected thereto, and asked that at least so much of the deposition as related to matters upon which the said Barbour had given testimony in his first deposition be excluded. The judge overruled the objection of the defendant, denied his request, and allowed the whole of the second deposition to be read to the jury. The defendant alleged exceptions.

W. P. Hale, for plaintiffs. E. O. Cooke, pro se.

FIELD, C. J. The exceptions in this case do not raise the question whether any of the interrogatories contained in the second deposition called for incompetent evidence, or whether any of the answers thereto were incompetent. The single exception is to the admission of the second deposition in evidence, or at least of "so much of the deposition as related to matters upon which the said Barbour had given testimony in his first deposition." We think that the ruling was right. *Akers v. Demond*, 103 Mass. 818. Exceptions overruled.

(171 Mass. 568)

KENDALL v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Aug. 31, 1898.)

APPEAL—PERSONS AGGRIEVED—RECORD—REVIEW—LIFE INSURANCE—PLEDGE OF POLICY—RIGHTS OF BENEFICIARY—NOTES—PAYMENT—PAROL EVIDENCE.

1. Under Pub. St. c. 151, § 13, restricting the right of appeal from final decrees to parties aggrieved thereby, a party filing requests in the alternative is not precluded from arguing the correctness of those not given, if the case is removed on exceptions.

2. Where a case is reported after appeal by both parties, all questions of law are open to review.

3. Where insured assigned a life policy as security for a debt by assignment guarantying his title, in which the beneficiary joined, and gave a note for the debt, which was renewed without the beneficiary's knowledge, the beneficiary was not entitled to a reassignment of the policy without paying the debt, since she was not a surety, and the legal effect of the assignment was not affected by the extension.

4. The question whether a note was paid by the giving of a renewal note is a question of fact, depending on the intention of the parties and the circumstances surrounding the transaction.

5. The consideration and purpose of a beneficiary's written assignment of her interest in a policy may be shown by parol, though the assignment be absolute in terms.

6. Where the pledgee of an insurance policy had to pay the premiums to keep it alive, the beneficiary, who joined in making the pledge, could redeem the policy only on paying the pledgee the premiums paid by him, with interest, in addition to the debt.

Report from superior court, Suffolk county; J. B. Richardson, Judge.

Action by Elizabeth Kendall against the Equitable Life Assurance Society of the United States and others to redeem an insurance policy pledged by plaintiff and another for a debt. From a decree fixing the terms on which plaintiff may redeem, plaintiff and defendant pledgee appeal, and the case is submitted on a report.

The assignment of the policy was in part as follows: "We hereby assign, transfer, and set over all our right, title, and interest in said policy, and all money which may be payable under the same, to Frank A. Russell, trustee, of Brookline, Massachusetts; and, for the consideration above expressed, we do also, for ourselves, our executors and administrators, guaranty the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend."

S. L. Whipple and W. R. Sears, for plaintiff. R. M. Morse and M. Johnson, for defendants.

LATHROP, J. The defendants other than the assurance society contend that, as the justice who heard the case decided it in favor of the plaintiff's third contention, she is not a party aggrieved, within Pub. St. c. 151, § 13, and has no right of appeal. For this position, *Copp v. Williams*, 135 Mass. 401, and *Downs v. Society*, 149 Mass. 135, 21 N. E. 294, are cited. These cases state the familiar rule that if a party asks for a certain ruling, and it is given, he has no ground of exception. But the requests in the case before us were in the alternative, and the plaintiff would not be precluded from arguing the correctness of the other requests if the case came here on exceptions. The case is here on a report, after an appeal by both parties, and all questions of law are open.

The first contention of the plaintiff is that, on the facts of the case, the plaintiff is entitled to a reassignment of the policy without

paying any amount to the defendants, or any of them. The argument in support of this contention is that the contract on the part of the wife was one of suretyship, and that the note was paid by the renewal of it without her knowledge. We are of opinion, however, that the wife did not stand in the relation of a surety to her husband. Both she and her husband, at the time of the assignment, had an interest in the policy. By its terms, if he were alive on July 25, 1897, provided the policy had not been terminated by lapse or by his death, he had the option—First, to withdraw in cash the policy's entire share of the assets of the insurance society, namely, the accumulated reserve, which was expressed to be \$3,535.40, and, in addition thereto, the surplus apportioned by the insurance society; or, secondly, to convert the same into a paid-up policy. The interest of the wife was contingent upon her husband's death before July 25, 1897. Each could assign his or her interest, but neither could assign the interest of the other, or defeat it in any way. The fact that it was payable to him in a certain contingency, which did not happen, is immaterial. *Pin-grey v. Insurance Co.*, 144 Mass. 374, 383, 11 N. E. 562. The husband and wife having these interests in the policy, the husband wished to pledge it for his debt, and obtained the assignment of the policy by the wife, absolute in form. We see in this alone no contract of suretyship. While the guaranty contained in the assignment may have been lost by the giving of time, it does not affect the legal consequences of the assignment.

We are also of opinion that the note given for the original debt cannot, as matter of law, be said to have been paid by the second note. Whether this note operated as payment of the first note was a question of fact, depending on the intention of the parties and the other circumstances attending the transaction. *Bank v. Downing*, 169 Mass. 297, 47 N. E. 1016.

The plaintiff's second contention in the court below was that, if she was liable to pay anything to redeem her policy, she was entitled to an assignment upon paying the aggregate amount of the quarterly premiums paid by the Russells, together with interest thereon from the date of the payment thereof, at 6 per cent. per annum; and the third, that in no event was she bound to pay more than the amount of the original loan, with interest at 6 per cent., and the quarterly premiums, with interest thereon at 6 per cent. from the date of payment. The judge entered a decree in favor of the plaintiff, based upon her third contention. The findings of fact do not make it entirely clear whether the plaintiff pledged her interest in the insurance policy as security for the original debt or for the original note. The judge finds as a fact "that she did not ever consent or agree that the policy should be pledged or held by said Russell as security for any debt other than the note of \$1,900 and interest thereon. She had no knowledge or

notice that the said Russell claimed to hold said policy as security for any debt other than the original debt of \$1,900 and interest thereon, until after the death of said Josiah B. Kendall, nor did she authorize her husband to pledge it for any other debt." The note was for \$1,900, payable six months from date, with interest after maturity at the rate of 2 per cent. a month. This was a legal contract by the plaintiff's husband, who signed it. Pub. St. c. 77, § 3. And he, at least, was bound to pay the interest stipulated until payment, or until the claim for principal and interest was judicially determined. *Brannon v. Hursell*, 112 Mass. 63; *Union Institution for Savings v. City of Boston*, 129 Mass. 82; *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. 351; *French v. Bates*, 149 Mass. 73, 79, 21 N. E. 237; *Handy v. Tracy*, 150 Mass. 524, 23 N. E. 226; *Schmidt v. Bank*, 153 Mass. 550, 27 N. E. 595; *McDonald v. Faulkner*, 154 Mass. 34, 27 N. E. 883. If, therefore, the finding of the judge is to be construed as a finding that the plaintiff pledged her interest in the policy as security for the note, a different rate of interest should have been allowed. But we do not so construe the finding. The latter part of the finding refers directly to the original debt, and the decree is based upon this finding. The next question is as to the effect of the assignment of the policy, which was in form absolute. If the only authority which the wife gave the husband was to pledge her interest in the policy for the original debt, he was not her agent either to make the original note in the form in which it was made, or to make new notes; and the fact that the assignment was absolute in form is immaterial.

The consideration and the purpose of the transaction could be shown by oral evidence. *Riley v. Bank*, 164 Mass. 482, 486, 41 N. E. 679. The first part of the decree was therefore right.

The remaining question is as to the correctness of the last part of the decree, which obliges the plaintiff to repay the amount of all the premiums paid by Daniel W. Russell or his estate, with interest on each premium from the date of its payment to the date of repayment, at the rate of 6 per cent. per annum. We are of opinion that the decree in this respect was right. The plaintiff joined in pledging the property as security for a debt. The pledgee had to pay the premiums in order to keep the policy alive. We have already said that she must pay the debt with simple interest thereon; and it is only equitable that she should repay the premiums paid by the pledgee, with simple interest from the time of each payment. This is not the case of a mere volunteer paying the premiums, or the part owner of a policy, as in *Re Leslie*, 23 Ch. Div. 552. Nor is it the case of a payment made by a mortgagor to preserve the property, as in *Falcke v. Insurance Co.*, 34 Ch. Div. 234. It is the case of a payment by a pledgee, who had a right, as against the pledgor, to keep the pledge alive. See *Warnock v. Davis*,

104 U. S. 775; *Scobey v. Waters*, 10 Lea, 551; *Harley v. Helst*, 86 Ind. 196; *Raley v. Ross*, 59 Ga. 862. Decree affirmed.

(151 Ind. 413)

NO. 2 INDIANA MUT. BUILDING & LOAN ASS'N v. CRAWLEY et al.

(Supreme Court of Indiana. Nov. 3, 1898.)

BUILDING AND LOAN ASSOCIATIONS—PLEADING—COUNTERCLAIM—LOANS—ACTIONS.

1. In an action by a building and loan association on a note and mortgage of a member, a plea admitting their execution, and that plaintiff issued stock to defendant, on which certain payments have been made, and praying to have such stock canceled, and the amount of the payments, with interest, applied on such loan, is bad as a counterclaim, as it does not state facts on which defendant would be entitled to maintain an independent action.

2. It is bad as an answer, because it is pleaded as a complete defense to a cause of action to which it is only a partial defense.

3. An answer in an action to foreclose, by a building and loan association, which is permitted by Burns' Rev. St. 1894, § 4449, and Burns' Rev. St. 1894, § 4451 (Horner's Rev. St. 1897, § 3414), to provide by its by-laws for the charging of a premium on loans in addition to the legal interest, which merely alleges that the "premium was not paid for a preference in procuring said loan, but the whole of said ten per cent. was charged without bidding for said money," and that defendant had paid a certain sum, part of which was for usurious interest, and which prays for a recoupment, is insufficient on demurrer, as it should set out facts, and not conclusions.

Appeal from circuit court, Sullivan county; William W. Moffett, Judge.

Action by No. 2 Indiana Mutual Building & Loan Association against Charles E. Crawley and others. Judgment for plaintiff, who appeals. Reversed.

McBride & Denny, W. W. Lowry, and O. B. Harris, for appellant. W. A. Douthitt, for appellees.

JORDAN, J. Appellant, as the plaintiff below, commenced this action to recover a judgment upon a note, and to foreclose a mortgage. The note was executed alone by the appellee Charles E. Crawley, and the mortgage to secure it was executed by him and his wife. The complaint alleges that the plaintiff is a mutual building and loan association, organized under the laws of the state of Indiana; that the defendant Charles E. Crawley upon the 26th day of October, 1892, by his note bearing date of October 1, 1892, promised to pay to plaintiff \$1,200, with attorney's fees, and 6 per cent. interest per annum, and 4 per cent. premium per annum thereon, together with monthly dues upon 12 shares of stock at the rate of \$9.60 upon said shares, all of which (interest, premium, and dues), it is averred, are payable monthly, or or before the last Saturday in each month, at the office of said association, at Indianapolis, Ind. The complaint also alleges that at the time of the execution of the note the defendant Charles E. Crawley pledged to the plaintiff, as collateral security for the pay-

ment of the note, the said shares of stock which he held in the association, and, as further security, that he and his wife executed the mortgage upon the real estate therein described, etc. The complaint alleges that by the terms and stipulations of said mortgage the failure of the defendant Crawley to pay for a period of three months any installment of interest, premium, or dues, or his failure for 60 days after they became due to pay the premiums for insurance, or taxes, would authorize the plaintiff to declare the said note due, and that the same upon such default would become due and collectible. The default of the defendant Charles E. Crawley for a period of four months in the payment of installments of dues, interest, premium, and taxes is alleged; and by reason of such default the plaintiff, it is averred, avails itself of its right or option, under the mortgage, to declare the entire debt due, including principal, interest, and premium, etc. It is alleged that the stock pledged by the defendant as security is worth \$445.52, and no more, and plaintiff offers to allow and apply said stock to that amount in payment of the debt. A judgment is demanded for \$2,000, and for a cancellation of the stock, and a foreclosure of the mortgage, etc. Copies of the note and mortgage are filed as exhibits with the complaint. The note in suit, as disclosed by the exhibit filed, is as follows: "No. ——. First Mortgage Note. Nonnegotiable. Indianapolis, Ind., Oct. 1st, 1892. For value received, I promise to pay to the No. 2 Indiana Mutual Building and Loan Association, a corporation duly organized under the laws of the state of Indiana, the sum of twelve hundred dollars, and reasonable attorney's fees, with six per cent. interest per annum, and four per cent. premium per annum thereon, from date until paid, and monthly dues as provided in the by-laws of said association; all payable monthly, on or before the last Saturday of each month. Principal, interest, premium, and dues payable at the office of the said association, at Indianapolis, Ind., all without any relief from valuation and appraisement laws. Any failure to pay the monthly dues, interest, or premium when due shall make principal, interest, and premium at once due, and any waiver of the right to enforce the same shall not prevent the payee from enforcing the right upon any recurrence of the default. The shares of stock in the said association held by the undersigned, as shown by certificate of stock No. 3,360, are hereby transferred and pledged to it as collateral security for the performance of the conditions of this obligation, and of the mortgage securing the same. Charles E. Crawley." The defendant Charles E. Crawley separately answered the complaint, his answer containing two paragraphs, the first being a general denial. A demurrer was sustained to the second, and subsequently he filed an additional third and fourth paragraphs to his answer, and also filed an amended second paragraph. Appellant demurred to each

of these for insufficiency of facts. The court, over the exceptions of appellant, overruled this demurrer to each paragraph, and appellant replied by a general denial. Under the issues as joined, a trial by the court resulted in appellant obtaining a judgment against Charles E. Crawley for \$684.60, and a foreclosure of the mortgage against all of the appellees; and it was further adjudged by the court that the building and loan stock set up in the complaint be canceled, and forfeited to the plaintiff.

The error discussed by appellant, and principally relied on by it for a reversal, is the overruling of its demurrer to each of the three paragraphs of the answer. The third paragraph of the answer, in part, is as follows: "The defendant Charles E. Crawley, for additional third paragraph of his separate answer, and for counterclaim against the plaintiff, says that he admits the execution of the note and mortgage sued on, and says that the same were given in consideration of a loan of \$1,200 made by plaintiff to this defendant on October 26, 1892." The paragraph then proceeds to aver that the plaintiff "is a building and loan association organized and doing business under the laws of Indiana, and as such association it issued to the defendant the shares of stock mentioned in the complaint; that the defendant has paid on the said twelve shares of stock \$422.40, and is entitled to interest on said dues at the rate of 6 per cent. per annum for twenty-five months, which interest amounts to \$54.86, making in all \$477.26. Defendant says that he is entitled to have his said stock canceled, and applied as a credit on said loan." The paragraph closes with a demand for judgment for \$477.26, and for a cancellation of said stock. It will be seen that in the paragraph in question the defendant expressly admits the execution of the note and mortgage, and that the consideration therefor was a loan of \$1,200. It is also alleged that the plaintiff is a building and loan association organized and doing business under the laws of this state, and as such association it issued to the defendant the building and loan stock mentioned in the complaint. The only averment of facts in addition to those mentioned above is that defendant has paid on his stock \$422.40 as dues, and the pleading then states, as a conclusion, that he is entitled to 6 per cent. interest per annum on said dues for 25 months; and the pleader further concludes that the defendant is also entitled to have his stock canceled, and the sum of \$477.26 applied as a credit on his loan. The pleading certainly is not good as a counterclaim, for it states no such facts as would entitle defendant to a recovery against the plaintiff. A counterclaim, as our decisions affirm, is not a defense to a plaintiff's action, but it is a cross action by the defendant; and it must state facts sufficient in law to constitute a cause of action; otherwise it will be held bad on demurrer. Neither can such a pleading

perform the office of both an answer and counterclaim. The defendant does not deny, in this paragraph, that he is a delinquent borrowing member of the association, but by his silence in this respect he tacitly admits that he is, as the complaint alleges, and that his stock is pledged as a security for the loan. It cannot be successfully contended that the paragraph alleges facts that would entitle the defendant to avail himself of the provisions of section 4450, Burns' Rev. St. 1894; being the section of the statute relating to the repayment by a borrowing member of a building and loan association of his loan, and his right to withdraw and secure a cancellation of his stock. The paragraph, if considered as an answer, is bad, at least, for the reason that it is pleaded as a complete defense to the cause of action, while the facts alleged therein, if sufficient in any respect, could only avail the defendant as a partial defense. Viewed, then, either as an answer or a counterclaim, the paragraph is not sufficient to withstand a demurrer. The appellee, as stated by his counsel in his brief, relied upon the additional fourth paragraph of the answer to operate as a plea of usury. By this paragraph the defendant also expressly admits the execution of the note and mortgage in suit, and says that the consideration thereof was the loan of \$1,200 mentioned in the complaint. It is then alleged that by the "terms of the note and mortgage a greater rate of interest was contracted for than that allowed by law, to wit, ten per cent., six per cent. of which was called 'interest,' and four per cent., 'premium.'" The answer then alleges that the note "is a usurious and unlawful contract; that the said four per cent. called 'premium' was not to be paid for a preference in procuring said loan, but the whole of said ten per cent. was charged without bidding for said money." The paragraph then ends with the following averment: "Said defendant before the bringing of this suit was required to pay on the account of interest on said loan the sum of \$373.60, which is \$55.60 in excess of the legal rate." The prayer is that this amount be recouped against any sum found due the plaintiff. By this paragraph the pleader apparently attempts to raise the question of appellant's right to charge a premium upon a loan of money to a member of the association in the absence of any bidding for a preference in procuring such a loan, as provided under section 4449, Burns' Rev. St. 1894. But the only thing tending to show that the 4 per cent. premium in controversy is not in the nature of a bonus bid by the defendant as a preference in obtaining his loan is the averment of the pleader "that the said four per cent. per annum called 'premium' was not to be paid for a preference or priority in procuring said loan, but the whole of said ten per cent. was charged without bidding for said money." Section 4449, supra, provides, "The by-laws of the association shall prescribe the manner of awarding loans to its

members, the time or times when the premium, if any, shall be paid, the rate of interest to be charged, not exceeding the then legal contract rate, * * * but said association may provide in its by-laws that the loans shall be made to the members of the association who shall bid the highest premiums for the preference or priority in procuring loans [the premium to be payable at one time or in installments, etc.].” The eighth section of the building and loan law, being section 4451, Burns’ Rev. St. (section 3414, Horner’s Rev. St. 1897) provides that no premium in addition to the interest on any loan shall be deemed to be usurious, and it is provided that the same may be collected. If the 4 per cent. which the defendant agreed to pay was not legally exacted, but was simply an attempt to evade the law against usury, the burden was on the defendant to disclose such illegality by the averment of facts, and not by bare assertions. If the plaintiff had not adopted by-laws relative to awarding loans, and controlling the matter of premiums upon the same, as authorized by section 4449, *supra*, such facts ought to have been disclosed by the pleading. If the plaintiff had adopted such by-laws, but had failed to conform to them in making the loan to the defendant, then that fact ought to have been shown. Again, if the premium in dispute is but a guise to cover up an illegal charge, the payment of which the plaintiff has exacted from the defendant, then the amount which the latter has paid upon such premium, or which has been reserved by the former, should be shown, in order to authorize a recoupment. The only averment as to payment is that “before the bringing of this suit the defendant did pay on account of interest on said loan the sum of \$373.60.” This amount, the pleader states as a conclusion, was \$55.60 in “excess of the legal rate.” The note in suit upon its face only professes to draw 6 per cent. interest, and, if the defendant paid usurious interest, it, under the circumstances, must have resulted from his paying what, as is claimed, was an illegal premium. Under the limited facts, as they are stated in the paragraph in question, this feature of the case is left to conjecture. The defendant relied upon a charge of usury to entitle him to the recoupment which he seemingly demanded under the provisions of section 7046, Burns’ Rev. St. 1894. Consequently, upon his theory that the premium in dispute was unlawful, he was required to show that fact by his pleading, and further to disclose that he had paid, in whole or in part, the money which the plaintiff had unlawfully exacted. Stripped of the conclusion that the amount of \$55.60 was in excess of the legal rate, it may be said that there are no facts going to show the payment by the defendant of any usurious interest. It is elementary that a pleading must state facts, not conclusions. Elliott, Gen. Prac. § 425. The question as here presented is one relative to good pleading, not

what the appellee might be permitted to prove under proper pleadings and facts assailing the methods of the plaintiff in regard to the loan in controversy.

The second amended paragraph of the answer, which is improperly termed by the pleader a “counterclaim,” is so replete with evidence, conclusions, and verbosity that it is difficult to ascertain upon what particular theory it proceeds. If it is intended to operate as a defense of partial payment of the cause of action, it ought to be held bad upon demurrer, for the reason, at least, that it is not limited as a partial defense, but professes to answer the entire complaint. The court erred in overruling appellant’s demurrer to the third and fourth additional paragraphs of the answer, and the judgment is therefore reversed, and the cause remanded, with instructions to the court to sustain appellant’s demurrer to these paragraphs, and to grant leave (if desired) to either party to reform the issue.

(151 Ind. 368)

NATCHER v. CLARK.

(Supreme Court of Indiana. Oct. 27, 1898.)

DIVORCE—SEPARATION—SETTLEMENTS—EFFECT ON PROPERTY RIGHTS.

A husband agreed to pay his wife \$2,000 in consideration of a separation, and, on his obtaining a divorce, alimony was granted in the sum of \$1,800. Shortly after separation she became insane, symptoms of which she had manifested before separation. She had a daughter by a former marriage, who had been treated by the husband as his own child. The court, in awarding alimony, considered a payment of \$200 made by him on the \$2,000. *Held*, that the divorce must be deemed to have settled all property rights then existing between the parties, and therefore moneys paid to said wife after separation, and before divorce, and expended separately for the daughter’s use, should not be allowed as a credit on the said \$2,000.

Appeal from circuit court, Clinton county; J. V. Kent, Judge.

Action by Harry D. Natcher against John G. Clark, guardian. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Guenther & Clark, for appellant. H. C. Sheridan, for appellee.

HOWARD, J. In September or October, 1895, the appellant began negotiations with his wife, looking to the terms of a separation between them. It was finally agreed that he should pay her \$2,000, and that she should not appear against him at the trial for divorce. In the succeeding November he sent her and her child by a former marriage to Pennsylvania. Appellant and his wife had been married for ten years, and the child was four years old at the time of the marriage. She had always been treated by him as his daughter. On March 16, 1896, a divorce was granted, on default made by the wife; alimony being allowed in the sum of \$1,800. No action was taken as to the child. About two weeks thereafter the divorced wife returned

with her child from Pennsylvania, and a few days subsequently insanity proceedings were instituted against her. On April 18, 1896, she was admitted into the Asylum for the Insane at Indianapolis. Testimony given at the inquest indicated that she had manifested symptoms of insanity as early as September, 1895. After the wife had been committed to the asylum, appellant sent his stepdaughter back to Pennsylvania, where she seems to have been placed in care of his mother, who lived there. On December 15, 1896, the appellee was appointed guardian of the estate of appellant's divorced wife, which estate consisted only of the judgment for alimony in her favor. On March 1, 1897, appellant instituted this action to have credited on the judgment for alimony certain sums alleged to have been paid by him both before and after the divorce. The court found that \$50 only should be so credited; being a payment of that amount made by appellant to his wife on April 8, 1896, after the divorce, and before the bringing of the insanity proceedings. The contention of appellant is that all moneys paid to his wife, or for her use, after the agreement for divorce, should, in equity and good conscience, be credited on the sum of \$2,000 to be paid to her. It is admitted by him that, in awarding alimony in the sum of \$1,800 only, the court allowed a credit of \$200 for moneys paid by him to his wife before the date of the divorce. But he says that \$171 besides should have been so allowed, and evidence is adduced to show the payment of that amount to or for her before the divorce, in addition to the \$200 allowed by the court. We think, however, that the judgment of the court in awarding alimony must be held to have finally determined all property rights between the parties up to the date of granting the divorce. This is not an action to set aside the judgment, but only to allow certain credits upon it; and we must conclude that the court, in entering its decree, took into account everything that ought to affect the amount allowed. The court was not required to be governed by any agreement made by the parties. Besides, with the additional light we now have on the enfeebled mental condition of this woman, and the circumstances under which she made the so-called agreement relied on, we should not be disposed to aid the appellant in diminishing the scant estate left her after her 10 years' experience in wedlock. There is little grace in appellant's appeal for an equitable application upon the judgment of moneys given by him to his wife during a time while he was yet under legal obligation to provide for her support. As to amounts claimed by appellant to have been paid to his wife, or for her use and the use of his stepdaughter, during the time his wife was adjudged insane, there is, of course, no obligation against her whatever. In addition, appellant's own bill of particulars shows that the items were, to a large extent, for moneys paid for railroad fare, music, board, and a

bicycle furnished the 14 year old child, that he says he had for 10 years treated as his own daughter. Nothing in the decree of the court affected the filial relation which had for so long a time existed between them. Even when he sent her from his household, it was to his mother's, in Pennsylvania. It seems like an afterthought to charge against the insane mother's estate what were seemingly the free offerings of a father's good will towards a daughter. One should learn to be just before he is generous, particularly with another's money. It is true that contracts with insane persons for necessities will be upheld, but there is here no satisfactory evidence of any necessities furnished appellant's wife. While she was in the asylum the state furnished all that she needed; and, had appellant been anxious to transfer to her use a part of the money awarded her as alimony, he could have secured the earlier appointment of a guardian, who would, under direction of the court, have more carefully guarded her rights,—as her present guardian is doing, in defending her estate against this unconscionable action. If ever there was a case which showed that the prosecuting attorney should exercise his statutory duty in resisting an undefended petition for divorce, it was this one. The proceedings which resulted in the casting off of an unhappy wife at a time when she was in the incipient stages of insanity, followed by this appeal to the equity side of the court to take from her a part of the allowance made for her support, are such as to arouse the indignation of all moral and fair-minded people. It was a righteous judgment of the court that refused to sanction this last proposed outrage. Judgment affirmed.

(151 Ind. 332)

TUCKER et al. v. HYATT.

(Supreme Court of Indiana. Oct. 25, 1898.)

CONSPIRACY—INSANITY OF CONSPIRATOR—PROOF OF CONSPIRACY—APPEAL AND ERROR—JOINT EXCEPTION—VERDICT—WEIGHT OF EVIDENCE—GENERAL OBJECTION—TRIAL—REMITTITUR—MALICIOUS PROSECUTION—SPECIAL VERDICT.

1. In an action for conspiracy, the unsoundness of mind of one conspirator at the time of the trial is no defense either for him or the other conspirators sued.

2. Where an offer to prove the unsoundness of mind of one defendant in an action for conspiracy was made by the defendants jointly, and on separate motions for a new trial the error assigned in each case was the refusal to permit "defendants" to make such proof, no question is presented on appeal as to whether it would have been error to have excluded the offer if made on behalf of such defendant alone.

3. The fact that wrongful acts in furtherance of a conspiracy were performed by a defendant of unsound mind does not exempt the other defendants sued as conspirators from liability to the person injured.

4. A conspiracy may be established, though there be no direct evidence of any agreement.

5. A verdict will not be disturbed on appeal as against the weight of the evidence when supported by competent evidence.

6. The trial court may permit a remittitur of part of the damages assessed, and render judgment for the remainder.

7. No question concerning a judgment can be presented on appeal, unless the objection thereto in the trial court particularly points out the mistake or defect therein, and asks for its correction.

8. A special verdict in an action for malicious prosecution need not find that such prosecution was without probable cause, in order to support a judgment thereon for plaintiff, it being the duty of the jury to find the facts, and of the court to determine from the facts found whether or not there was probable cause.

9. Nor need such verdict find the evidence and all the surplusage contained in the complaint.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Imogene Hyatt against Albert Tucker and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John D. Wideman and Saml. W. Royse, for appellants. Frank D. Butler, Chas. E. Averill, and Fertig & Alexander, for appellee.

MONKS, J. Appellee brought this action against appellants. The complaint was in two paragraphs. It is alleged in the first paragraph, among other things, in substance, that the appellant Tucker had been sued by appellee for breach of promise to marry, and that the trial of said cause had resulted in a judgment in her favor, and the same was pending in this court on appeal; that there was another action pending in the state of Mississippi against said Tucker; that the interest of said Tucker in said cause was great, involving many thousand dollars, and prior to the commissions of the wrongs complained of by appellee she had testified as a witness in each of said causes against said Tucker, and was an important witness against him; that said cause in the state of Mississippi was set for a retrial before a jury on the 26th day of February, 1895, a day subsequent to the commission of the wrongs complained of, and she had promised and agreed to be present and testify as a witness in said cause in the state of Mississippi, all of which was well known to said Tucker prior to the formation of the conspiracy by him and his co-appellants; that some time prior to January 28, 1895, appellants conspired together to unlawfully kidnap and decoy appellee from her residence in Peru, Ind., to the city of Indianapolis, and there inveigle and entrap her into a house of prostitution, where she should be found, and to cause the fact to be made known and published in the newspapers, and thereby to blacken and defame her character and name, and to degrade and disgrace her, and subject her to the contempt and ridicule of society,—all of which was done and carried out for the purpose of, and with the intent to, destroy the character and standing of appellee as a witness in said cause, and to destroy the force and effect of her testimony so far as the same should be adverse to said

Tucker; that appellants did afterwards, in pursuance of said conspiracy, and in furtherance of their said corrupt design, inveigle and entrap her into a house of prostitution in the city of Indianapolis, where she was arrested on the charge of being a prostitute, and taken to the police station; that she had no knowledge or means of knowledge of the character of said house until after her arrest. The second paragraph sets forth the same facts in regard to the suits against Tucker, and the fact that appellee was an important witness against him in said causes; and when the cause was set for trial in Mississippi, and the conspiracy to destroy her character, and thereby destroy the weight and effect of her testimony in said actions against appellant Tucker, the same as the first paragraph. It is then alleged that in pursuance of said conspiracy appellants did, on the 21st day of January, 1895, at the city of Indianapolis, falsely and maliciously cause and procure appellee to be arrested by the police of said city, and to be by them transported through the streets of the city, and to be imprisoned and incarcerated in, and to be slated upon the records of, said police station, as a prostitute; that said prosecution was instituted maliciously, and without any probable cause whatever, in pursuance of said conspiracy; that upon the trial of said cause she was acquitted by the police court in which said charge was tried. A general denial to the complaint was filed by each appellant, and upon the issues so joined the cause was tried by a jury, and a special verdict returned, upon which, over a separate motion for a new trial by each appellant, judgment was rendered in favor of appellee. Each appellant has assigned errors, which are substantially the same: (1) That the court erred in overruling the separate motion of appellant for a new trial; (2) that the court erred in overruling said appellant's motion for a judgment in his favor on the special verdict; (3) that the court erred in permitting appellee to remit \$3,000 of the verdict, and rendering judgment for \$5,000.

It is assigned as one of the causes for a new trial in the motion of each appellant that "the court erred in refusing to allow defendants to prove by the deposition of Robert Anderson that the defendant Eller was, at the date of the commission of the alleged offense set forth in the complaint, a person of unsound mind, and that he was still a person of unsound mind at the time of the trial." The bill of exceptions recites that "the defendants, by counsel, offered to introduce in evidence the deposition of Robert Anderson to prove the unsoundness of mind of William Eller." The bill of exceptions shows that appellee objected to the introduction of the deposition, and that the objection was sustained. It will be observed that the offer was to prove the unsoundness of the mind of William Eller. No time was mentioned. The offer so made had reference

to the time of the trial. His unsoundness of mind at that time was no defense, either for Eller or his co-appellants. But, if the offer to prove the unsoundness of the mind of Eller referred to the time of the commission of the wrongs complained of, does the record show that the court below committed reversible error in excluding the same? It will be observed that the offer to prove the unsoundness of mind of Eller was made by appellants jointly, and the ruling of the court excluding the evidence offered was excepted to by the appellants jointly; that it is assigned in the motion of the appellant Eller, as well as in each of the motions of the other appellants for a new trial, not that the court erred in not allowing the one making the motion to prove the unsoundness of the mind of Eller, but that the court erred in "not allowing the defendants to prove the unsoundness of the mind of Eller." No question is presented by the record, therefore, as to whether or not it would have been error to have excluded such evidence if it had been offered on behalf of Eller alone. The only question presented by the record is whether such evidence was competent on behalf of all the appellants. It is clear that the unsoundness of the mind of Eller at the time of the commission of the acts complained of, if a defense for him to either or both paragraphs of the complaint, was no defense for his co-appellants. They were liable for his acts, as well as their own, in furtherance of the alleged conspiracy, the same as if he was a person of sound mind. No man can shield himself from liability for his wrongful acts on the ground that the person who assisted in carrying out and executing his wrongful purpose, or the wrongful purpose of himself and others, was a person of unsound mind. One who aids or abets or otherwise procures a person of unsound mind to commit a wrongful act or acts to the injury of another is liable in damages therefor to the person injured, whether the person of unsound mind is or not.

It is next insisted that there was no evidence connecting appellant Tucker with said conspiracy, and that he is not, therefore, liable for the acts done by his co-appellants in pursuance of said conspiracy. There was no direct evidence that said appellant Tucker was a party to said conspiracy, but there was circumstantial evidence which, considered in connection with the other evidence in the cause, was sufficient to sustain the special verdict of the jury against said appellant. In order to establish a conspiracy it is not necessary that there should be direct evidence of any agreement. 6 Am. & Eng. Enc. Law (2d Ed.) 864, 865. It is true that appellant Tucker testified that he had nothing to do with the acts complained of, but the jury were the exclusive judges of the credibility of the witnesses, and, for all that appears from the record, may have been justified in disregarding his evidence. As there was

competent evidence which satisfied the jury, we cannot disturb the verdict on the weight of the evidence.

No motion was made by either of appellants for a judgment in his favor on the special verdict. No question is presented, therefore, by the second error assigned.

Neither is the question whether appellee was entitled to a judgment in her favor on the special verdict presented by the third error assigned. That error challenges the right of the court to permit \$3,000 of the damages assessed to be remitted, and to render a judgment for \$5,000, instead of the whole amount, \$8,000. There was no error in permitting a remittitur by appellee of a part of the damages assessed, and rendering judgment only for the remainder. 23 Am. & Eng. Enc. Law, 309-317; *Railway Co. v. Beckett*, 11 Ind. App. 547, 552-554, 39 N. E. 429, and cases cited. Even if the assignment of error had been that "the court erred in rendering judgment on the verdict in favor of appellee," no question could have been presented, because only a general objection and exception were taken in the court below to the judgment, and no defect or mistake was specifically pointed out to the rendition of said judgment, nor was any motion made to modify or otherwise change it. It is settled law that, unless the objection particularly points out the defect or mistake in the judgment, and asks that the same be corrected, in the court below, no question concerning the same can be presented on appeal. *Evans v. State*, 150 Ind. 651, 655, 656, 50 N. E. 820, and cases cited; *Jarrell v. Brubaker*, 150 Ind. 260, 49 N. E. 1050, and cases cited; *Cockrum v. West*, 122 Ind. 372, 377, 23 N. E. 140, and cases cited; *Rardin v. Walpole*, 38 Ind. 146, 150; *Smith v. Dodds*, 35 Ind. 452, 460; *Buell v. Shuman*, 28 Ind. 464, 466; *Elliott, App. Proc.* §§ 345, 346. We have, however, examined the special verdict, and every fact essential to a judgment on said verdict in favor of appellee is set forth therein. It was not necessary to find as a fact that the prosecution alleged in the second paragraph was without probable cause. When a special verdict is returned in an action for malicious prosecution, the jury must find the facts, and the court determines from the facts found whether or not there was probable cause. *Helwig v. Beckner*, 149 Ind. 131, 133, 46 N. E. 644, and 48 N. E. 788, and cases cited. Neither was it necessary that the special verdict should find the evidence and all the surplusage contained in the complaint. Finding no available error in the record, the judgment is affirmed.

(51 Ind. 371)

PHILLIP ZORN BREWING CO. et al. v. MALOTT.

(Supreme Court of Indiana. Oct. 28, 1898.)
CONTRACTS — REFORMATION — BOUNDARIES — AD-
JOINING LANDOWNERS.

Where parties agree that a certain line, which both suppose is the correct one, shall

be the dividing line between lands, which line is afterwards discovered not to be the true line, a court of equity cannot reform the contract, since it cannot decide what the parties would have agreed to if they had known the true line.

On rehearing. Reversed.

For former opinion, see 46 N. E. 23.

James F. Gallaher, for appellants. H. B. Tuthill, A. V. Brown, and John G. Williams, for appellee.

HACKNEY, C. J. This was a suit by the appellee against the appellant and others, whose interests are not here involved, for the reformation of a written contract in which the parties agreed upon one of the boundary lines dividing lands of the appellee from the tract of the appellant in the city of Michigan City. The cause was tried upon several paragraphs of complaint, and resulted in a special finding of facts and conclusions of law in support of the third paragraph of complaint as amended. While the sufficiency of the several paragraphs of complaint is attacked by the appellant, there is no disagreement upon the proposition that, under the practice, the questions raised upon the conclusions of law dispense with any question upon the sufficiency of the complaint. *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Scanlin v. Stewart*, 138 Ind. 574, 37 N. E. 401, and 38 N. E. 401; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 831; *Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355. The contract in question, which was set out in the findings, was, in its essential features, "that for the purpose of establishing the division line between certain real estate owned by the parties" it was agreed, "each with the other, that the line" described "shall be, and the same is hereby, established and confirmed as the division line supporting and dividing the real estate owned by Malott on the northerly side of said division line from the real estate owned by the other parties hereto lying on the southerly side of said division line." Said line is then particularly described by courses, distances, and monuments, and is made more particular by reference to a plat accompanying the contract, and to be recorded with it, "for the purpose of describing and establishing said division line." This contract and map were acknowledged by the parties, and recorded in the Miscellaneous Record of La Porte county. That part of the line described in the contract and now in dispute is that which begins at a point 550 feet southeast from the southeast corner of Division and Michigan streets, on the north side of the latter street, and extends in a northeasterly course 168 feet.

The first 22 of the court's findings of fact relate to the source of the title, and descriptions of the lands owned by the several parties. It is further found that neither the appellant nor the appellee knew the location of

the true dividing line between their respective tracts; that the true line was 103 feet southeast of the line designated in said contract,—that is to say, that the line described in the contract gave the appellant a strip of ground west of the true line 103 feet wide, and took that much from the appellee; that in the year 1887 Phillip Zorn, appellant's grantor, purchased the lands east of the true line, and procured a survey to be made, to ascertain the line dividing them from the lands of the appellee, which survey erroneously located the division line on the line described in the contract, and said Zorn thereupon built a fence upon said line, which fence existed at the time of the contract. Of said survey and the erection of said fence Malott had no knowledge until just before the execution of said contract, in August, 1894; that the appellant and the appellee "each and both honestly intended and believed that the line so run and embodied in said contract was the true dividing line dividing their properties," and "each and all were mistaken in the location of the line stated in said contract as dividing" their lands; that appellee is the owner of the land lying west of said true line; that in the summer of 1894, by the filling of a creek at the north of the lands of appellant and appellee, all traces of a dividing line were obliterated. It is found also that the appellee demanded reformation of the contract before this suit, which was instituted October 13, 1894. In repetition of facts once found, as we have stated them, the court stated that no doubt existed that the line described in the contract was not the true line, and that, while there was conflict in the evidence as to the location of the true line, a preponderance of the evidence showed it to be as already indicated. There are also findings as to certain improvements made by the appellant, but, since no importance is attached to such findings in the argument, they are omitted. The court concluded as a question of law upon the facts found that said contract should be reformed so as to embrace a description of said true line as found to exist, instead of the line therein described. The case made by the findings does not include an agreement between the parties, which agreement was not properly expressed in the writing. There is no finding of fraud or misrepresentation. The most that can be said for the facts is that both parties believed the fence to be on the true line, and that the true line was described in the writing. In this belief the parties were honestly and mutually mistaken.

It is not found as a fact that the parties intended or agreed to arbitrarily recognize, establish, and perpetuate the fence line as the true line. All that we learn of such possible intention is from the words of the writing, from which we are not to infer a fact, and at most could rest a conclusion of law,—a con-

clusion as to its legal effect. The writing, therefore, was upon a mutual mistake that the line described was the true line. What is the rule in such cases? Equity cannot reform, as there is no agreement to reform by. The mistake involves a fundamental error,—an error as to the existence of the thing concerning which the writing was entered into. Of such mistakes it is said in Prof. Pollock's admirable treatise on the Principles of Contract (6th Ed.) p. 442: "Next, it may happen that there does exist a common intention, which, however, is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is, from the outset, incapable of taking effect. But for their common error, it would never have been formed, and it is treated as nonexistent. Here there is, in some sense, an agreement; but it is nullified in its inception by the nullity of the thing agreed upon. And it seems hardly too artificial to say that there is no real agreement. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts, which state of facts not existing the agreement destroys itself. In the latter class of cases the error must be common to both parties. They do agree to the same thing, and it would be in the same sense, but that the sense they intend, though possible, as far as can be seen from the terms of the agreement, is in fact nugatory. As it is, their consent is idle. The sense in which they agree is, if one may so speak, insensible." The basis of the contract, the existence or identity of the thing contracted about, resting in mutual mistake, equity would be feeble if it afforded no relief. What is the relief? As we have intimated, it cannot be reformation, since there was no agreement. The minds of the parties did not meet because of the mutual mistake about the subject of the agreement. An attempted reformation must result only in making an agreement for the parties,—in ascertaining and stating the agreement which they would have made had they not mistaken the subject of the agreement. Equity cannot decide what the parties would have done if they had understood correctly the location of the true line. In granting reformation, therefore, the circuit court erred. It is urged, however, that upon the prayer for reformation the court may grant rescission, or that the reformation, granted, but leaves the parties where they would stand without an agreement.

We would not diminish the powers of the chancellor to administer full and exact justice in disregard of mere fruitless technicalities, where the parties submit their grievances to a court of equity; but, since the evidence was in marked conflict as to the location of the true line, the court feeling called

upon to state that his finding was upon a mere preponderance of the evidence, we feel that the ends of justice will be the better subserved by permitting a new trial upon more comprehensive pleadings. The decree of the circuit court is reversed, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

(151 Ind. 404)

STATE v. FRIEDLEY.

(Supreme Court of Indiana. Nov. 2, 1898.)

REVIEW ON APPEAL—EXCEPTIONS—DISTRICT ATTORNEY—AUTHORITY—TRIAL—HARMLESS ERROR—WRIT OF MANDATE.

1. Under Horner's Rev. St. 1897, § 626, requiring the party objecting to a decision to except thereto at the time it is made, an order discharging a prosecuting attorney from further service in a divorce suit in which he had been admitted to defend on the ground of collusion between the parties, cannot be reviewed where no exception was taken when it was rendered.

2. A prosecuting attorney, who has been discharged by the court from further service in a divorce suit which he had defended on the ground of collusion between the parties, has no authority to move for a new trial, or to tender a bill of exceptions.

3. Where the grounds of a motion for a new trial are not in the record, and there is no showing that the exceptions reserved by the bill of exceptions were included in such motion, it cannot be said, on review, that the trial court's refusal to entertain the motion for a new trial was prejudicial.

4. Under Horner's Rev. St. 1897, § 1167, providing that the writ of mandate shall issue from the supreme court only when necessary for the exercise of its functions and powers, a petition therefor must show that the steps sought to be enforced on the part of the trial court are with a view to an appeal.

Original action for writ of mandate by the state of Indiana against William Friedley. Defendant demurs to the petition. Sustained.

Harry R. McMullen, for the State. Warren N. Hauck, for respondent.

HACKNEY, C. J. The questions herein arise upon demurrer to a petition on behalf of Harry R. McMullen, prosecuting attorney for the Seventh judicial circuit, against William T. Friedley, special judge of the Dearborn circuit court. It is alleged that the respondent, acting as special judge in the trial of a suit for divorce, admitted the prosecuting attorney to defend therein, upon the representation that the suit was collusive, and the defense made by the defendant therein was not in good faith. The suit proceeded to trial, and decree in favor of the plaintiff therein, and an order that the prosecuting attorney be discharged from further service in said suit, to which order there was an objection, but no exception. It is shown that thereafter said prosecuting attorney, during the term, tendered a motion for a new trial of said suit, which motion the court, said judge presiding, declined to entertain, or allow to be filed. Neither said motion nor the grounds thereof appear from the petition herein. It is also

shown that after the term, time not having been sought or given beyond the term, said prosecuting attorney tendered to the respondent a general bill of exceptions relating to questions of evidence only, and asked that the same be signed, and ordered made a part of the record, which the respondent declined to do. The prayer of the petition is that the alternative writ of mandate issue directing the respondent to show cause, if any, why said motion for a new trial should not be filed, and said bill of exceptions signed, and made a part of the record.

From these facts there is possible inference, but no allegation to the effect, that the prosecuting attorney desires or intends to appeal from the decree in said suit. In support of the demurrer it is insisted that no appeal by a prosecuting attorney appearing in a divorce suit will lie. There is no provision of the statute expressly allowing an appeal by the prosecutor. The only statute permitting him to defend is section 1038, Horner's Rev. St. 1897, as follows: "Whenever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to appear and resist such petition." Whether the prosecutor, appearing in pursuance of this provision, appears simply as an attorney, or whether he, in his representative capacity, becomes so far a party as to give him or to give the state an appealable interest in any case, are questions not necessary, at this time, to decide. In this case his appearance, if authorized by the statute quoted, there having already been a defense, was upon the theory that such defense was not in good faith,—was no defense. The court, having heard the case, upon the evidence rejected the prosecutor's defense, and, whatever his legal attitude towards the case, he was expressly discontinued as a representative of the state in that behalf. To this action of the court there was no exception, and there can be no question for appeal arising therefrom. Horner's Rev. St. 1897, § 626; *Railway Co. v. McBeth*, 149 Ind. 78, 47 N. E. 678; *Association v. Black*, 136 Ind. 544, 35 N. E. 829; *Butler v. Thornburgh*, 141 Ind. 152, 40 N. E. 514; *Hedrick v. Whitehorn*, 145 Ind. 642, 43 N. E. 942; *Johnson v. Eberhart*, 140 Ind. 210, 39 N. E. 459; *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896. Having had his relations to the case cut off before the offer of the motion for a new trial or the tendering of the bill of exceptions, he had no authority to take further steps, and those proposed were entitled to no recognition. The bill of exceptions not having been tendered to the judge until after the close of the term, and no time beyond the term having been obtained, it came too late. Horner's Rev. St. 1897, § 626; *Marshall v. Beeber*, 53 Ind. 83; *Whitworth v. Sour*, 57 Ind. 107; *Elliott, App. Proc.* §§ 800, 801, and authorities there cited.

It may be said, however, that the filing of the motion for a new trial would carry the exceptions over until it was ruled upon. The motion and its grounds not being before us,

we cannot say that it was not properly rejected as presenting no legal ground for a new trial. The exceptions reserved by the proposed bill of exceptions relating alone to the evidence, and the petition failing to show that the motion for a new trial presented as grounds for a new trial any of the rulings so excepted to, we cannot say that the petitioner was harmed by the refusal to entertain the motion, or that such exceptions would become available. The motion may have related to none of such rulings, and such rulings could only be made available upon a motion for a new trial. *Starnor v. State*, 61 Ind. 360; *Rousseau v. Corey*, 62 Ind. 250; *Conner v. Town of Marlon*, 112 Ind. 517, 14 N. E. 488; *Brown v. State*, 140 Ind. 374, 39 N. E. 701.

An objection to the petition as fatal as any we have stated is that it is not shown that the steps sought to be enforced in the divorce case are with a view to an appeal. The statute expressly provides that the writ of mandate "shall issue from the supreme court only when necessary for the exercise of its functions and powers." Horner's Rev. St. 1897, § 1167. The "functions and powers" of this court would be necessarily involved only when, by the failure of the trial judge, the parties would be prevented from perfecting a desired appeal. The petition is insufficient, and the demurrer is sustained.

(153 Ind. 107)

COPELAND v. TOWN OF SHERIDAN.¹

(Supreme Court of Indiana. Oct. 25, 1898.)

INTOXICATING LIQUORS—CONSTRUCTION OF STATUTES—LICENSES—AMOUNT.

1. Act April 10, 1885 (Acts 1885, p. 171), authorizing the trustees of towns to license the sale of intoxicating liquors, is void, since it is an amendment to the act of March 1, 1877, held invalid by the supreme court.

2. Acts 1852, § 22, cl. 7, as amended by Acts 1879, p. 201, gave the trustees of towns power to license the sale of intoxicating liquors, in consideration of a sum not to exceed the amount required by the statutes of the state for a license to sell such liquors. Rev. St. 1894, § 7281, provides that the state fee for a license to sell spirituous, vinous, and malt liquors shall be \$100; and to sell vinous and malt liquors, \$50. *Held*, that a town had the power to issue a single license to sell all kinds of liquors, and exact \$100 therefor.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Albert Copeland was convicted of violating an ordinance of the town of Sheridan by selling intoxicating liquors without a license, and he appeals. Affirmed.

Edenharter & Mull, for appellant. Gavin, Coffin & Davis, for appellee.

HOWARD, J. Appellant was convicted of having, within the corporate limits of the town of Sheridan, sold intoxicating liquors in a quantity not less than a quart, to wit, two quarts of beer, to be then and there drunk as a beverage, without having a license so to do, contrary to the provisions of an ordinance of

¹ Rehearing denied.

said town passed June 15, 1896. The ordinance in question provided for a license fee of \$100. It is contended that the town had no authority to pass such an ordinance, and that, even if it had such authority, it could not pass an ordinance which should exact more than \$50 as a license fee for selling vinous and malt liquors. It is conceded that whatever power, if any, the town had to pass the ordinance in question, must be derived from the seventh clause of section 22 of the act of 1852 for the incorporation of towns, as the same has since been amended. The power of the town, as originally given in that clause, was "to license, regulate or restrain auction establishments, traveling peddlers and public exhibitions within the corporation." 1 Gavin & H. St. p. 619 (1 Rev. St. 1852, p. 482). This, of course, gave no power to license the sale of intoxicating liquors. By an act approved March 2, 1855, an attempt was made to amend section 22 of the act of 1852, supra, by adding to the original 16 clauses 3 additional ones, but setting out only the new clauses,—the seventeenth, eighteenth, and nineteenth (Acts 1855, p. 128; 1 Davis' Rev. St. p. 878, at page 880; 1 Gavin & H. St., at page 625); but the amendatory act was held void for failure to set out the full section as amended. Cowley v. Town of Rushville, 60 Ind. 327. A like feature resulted from the attempt made by an act of March 11, 1867, to amend the seventh clause of said section,—the clause here under consideration; the legislature having again failed to set out the whole section as amended. Acts 1867, p. 220; 3 Davis' Rev. St. p. 121; Town of Martinsville v. Frieze, 33 Ind. 507. By an act approved March 1, 1877, a third attempt was made to amend said section,—this time also with the intent to reach clause 7, and authorize towns to license the sale of intoxicating liquors. Acts 1877 (Reg. Sess.) 144; Rev. St. 1881, § 3333; Rev. St. 1894, § 4357. But the effort again failed, for the reason that the legislature attempted to secure the object in view by amending the void act of March 2, 1855, supra. Carr v. Town of Fowler, 74 Ind. 590. A fourth effort to amend the section was made by an act approved April 10, 1885. Acts 1885, p. 171; Rev. St. 1894, § 4357; Horner's Rev. St. 1897, § 3333; Thornton's Rev. St. § 4462. This last act seems to have been regarded by the court below, as it evidently was, also, by all the late compilers of our statutes, as a valid law. It appears, however, on examination, that the act was but an amendment of the void act of March 1, 1877, supra. It must consequently be also void, since "a valid law cannot be enacted by amending an invalid and void law." Cowley v. Town of Rushville, supra. By an act approved March 6, 1897, however (Acts 1897, p. 176; Horner's Rev. St. 1897, § 3333a), it is admitted that the legislature has finally, by an independent statute, given to towns the power to license by ordinance the sale of intoxicating liquors. Still, although the act of

1897 may apply to all future cases, yet, as the ordinance before us was passed June 15, 1896, it is plain that this last act can have no effect in the case at bar. But counsel for appellee cite us to an act approved March 31, 1879 (Acts 1879, p. 201), which, though overlooked by the compilers of the revision of 1881, and by all subsequent compilers of the statutes, and even by this court,—in Clevenger v. Town of Rushville, 90 Ind. 258, where by oversight the void act of 1877, supra, was relied on,—seems nevertheless to be a valid amendment of section 22 of the original act of 1852, and to have fully authorized the passage of the ordinance in question. The act was recognized as valid in McKinney v. Town of Salem, 77 Ind. 213. The seventh clause of section 22 of the act of 1852, as so amended by the act of 1879, gives power to the trustees of towns "to license, regulate or restrain auction establishments, street auctions, and all tables, alleys, machines, devices and places for sports or games, kept for hire or pay, traveling peddlers, public exhibitions, and the sale of spirituous, vinous, malt and other intoxicating liquors. A sum not exceeding the amount required by the statutes of the state for license to sell or retail intoxicating liquors, may be required to be paid into the treasury of the corporation by the person so licensed before receiving such license."

While counsel for appellant in their reply brief candidly admit the validity of this act, and that it gave to the trustees of the appellee town power to pass an ordinance for licensing the sale of intoxicating liquors, yet they say that the ordinance is invalid for the reason that it required the appellant to pay a license fee of \$100, whereas the statute last cited, and under which the ordinance, if valid, must have been passed, limited the license fee to be charged to "a sum not exceeding the amount required by the statutes of the state for a license to sell or retail intoxicating liquors," which sum then required by the state was, for a license to sell spirituous, vinous, and malt liquors, \$100; and for a license to sell vinous and malt liquors only, \$50. Acts 1875, p. 55; Rev. St. 1894, § 7281; Rev. St. 1881, § 5316. In other words, the contention is that, under the statutes then in force, appellant could not, in order to be permitted to sell beer, known by the court to be a malt liquor, be required to pay a license fee of more than \$50, and could not, consequently, be fined for violating an ordinance which exacted a license fee of \$100. We do not think the limitation here sought to be placed upon the power of the town to exact a fee up to the sum of \$100 "for license to sell or retail intoxicating liquors" can be established or maintained. The town might perhaps have issued a license "to sell only vinous or malt liquors, or both, in quantities less than a quart at a time," as provided in the act of 1875, supra, and if it did so, possibly, under the act, could demand a fee of but \$50. The town, however, was not required to issue

such a license, but might, as it did, issue only a license "to sell spirituous, vinous, malt or other intoxicating liquors in any quantity not less than a quart at a time." For such a license, to sell "intoxicating liquors" generally, even though not in quantities less than a quart at a time, it is evident, construing the acts of 1875 and 1879, *supra*, together, that the only limitation upon the fee to be charged is \$100; that being the amount then "required by the statutes of the state for license to sell or retail intoxicating liquors." The town was under no obligation, by the statutes then in force, to issue one license for selling spirituous, vinous, and malt liquors, and another to sell vinous and malt liquors alone. The only requirement was that the corporation should not exact a license fee "to sell or retail intoxicating liquors" greater than the fee exacted by the state. This the town, by its ordinance, did not attempt to do, and consequently no invalidity is shown in the ordinance. Judgment affirmed.

(152 Ind. 321)

KLINE et al. v. BOARD OF COM'RS OF HUNTINGTON COUNTY.¹

(Supreme Court of Indiana. Oct. 27, 1898.)

**HIGHWAYS—SPECIAL ASSESSMENTS—CONCLUSIVE-
NESS—REASSESSMENTS—LIMITATION—FIND-
INGS—EXCEPTIONS—REVIEW.**

1. Under Burns' Rev. St. 1894, §§ 6855, 6856 (Rev. St. 1881, §§ 5091, 5092), empowering the board of commissioners to lay out and improve roads, etc., the board has power to lay an additional assessment to meet the cost of such improvement when the first was inadequate.

2. Under Burns' Rev. St. 1894, § 6858 (Rev. St. 1881, § 5094), providing that viewers shall make "an assessment of the expenses of such improvement" as a basis for the action of the commissioners, their order directing the making of the contemplated highway improvement and levying an assessment of the cost thereof is not a judicial determination that such assessment will be adequate, so as to bar an additional assessment in case of a deficit.

3. The six-years statutory limitation has no application to a proceeding under the highway statute to reassess lands for the improvement of highways, because such proceeding is not one for the recovery of money by the county.

4. A reassessment of the cost of highway improvement cannot be defeated by the fact that the county had already fully paid for the improvement by money advanced, and the new assessment was only designed to reimburse it for the deficiency in the original assessment.

5. Findings will not be reviewed when the evidence is not in the record.

6. An exception to conclusions of law jointly will not be sustained if any of them are correct.

Appeal from circuit court, Huntington county; Robert Lowry, Special Judge.

Action by Henry Kline and others against the board of commissioners of Huntington county. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

B. M. Cobb, for appellants. Whitelock & Cook, for appellee.

JORDAN, J. This was a proceeding by the board of commissioners of the county of Hunt-

¹ Rehearing denied.

ington to reassess lands benefited by the construction of a free gravel road known as the "Huntington and Zanesville Highway." Proceedings to improve this road were instituted in 1881, under the act of 1877. Rev. St. 1894, §§ 6855, 6856 (Rev. St. 1881, §§ 5091, 5092; Horner's Rev. St. 1897, §§ 5091, 5092). It appears that the original assessment upon the lands benefited amounted to \$9,000; and the board of commissioners, under the authority of the above statute, in order to raise money to meet the expenses of the improvement, issued and sold bonds to that amount. After collecting the original assessment, and applying the money arising therefrom to the payment of these bonds and the interest thereon, it appears that said assessment proved to be inadequate to pay all of the expense incurred in the improvement of the highway. Appellants, upon notice, appeared before the board of commissioners, and remonstrated against the levying of an additional tax, and such proceedings were had before the board that viewers were appointed, and an additional assessment was made, and approved and confirmed by the board, from which order an appeal was taken to the circuit court. In the latter court appellants filed an amended remonstrance. By the first paragraph of their amended remonstrance they challenged the right of the board to make a reassessment upon their lands to pay the deficit arising out of the construction of the road, and under the third paragraph they set up that the deficit, for the payment of which the reassessment was proposed to be made, had been paid and satisfied by the county upon the order of the board of commissioners without the request or consent of appellants, and that this payment had been made by the county more than six years before the institution of this proceeding; wherefore it was prayed that the amount be adjudged barred under the six-years statute of limitations. Each of these paragraphs of the remonstrance, on motion of appellee, was struck out, and rejected, and the first contention of counsel in this appeal is that in this ruling the trial court erred. Appellants, in discussing the question sought to be raised by the first paragraph of their remonstrance, contend that the original assessment under the order of the board of commissioners was a final settlement or determination upon the question of benefits accruing to their lands, and that, therefore, the board was precluded from making a second assessment to meet the deficit in the cost of improvement; or, in other words, it is insisted that under the original order of the board the question of an additional assessment is *res judicata*.

The power or right of the board of commissioners, under the authority of the statute mentioned, to levy an additional assessment upon lands benefited by the improvement of a public road, when the original assessment proves to be insufficient, is no longer an open question, but is one which has been firmly

settled by the decisions of this court, subject, however, to the right of any landowner to demand that in no case shall the assessments made upon his land, when considered in the aggregate, exceed the amount of the benefits to the land by reason of the improvement. *Board v. Fullen*, 111 Ind. 410, 12 N. E. 298; *Rogers v. Voorhees*, 124 Ind. 469, 24 N. E. 374; *Goodwin v. Board*, 146 Ind. 164, 44 N. E. 1110, and cases there cited. The contention that the original order of the board is a final adjudication upon the question of reassessment is not tenable, as such question was in no wise at issue in the original proceedings. Among the matters, under section 6858, Rev. St. 1894 (section 5094, Rev. St. 1881; section 5094, *Horner's Rev. St. 1897*), which the viewers appointed are required to report to the board of commissioners is "an estimate of the expenses of said improvement." It is true that the estimated expense of the work is a matter which the law intends should be taken into consideration by the board in making its order for the improvement, for, if it were disclosed to that body in any particular case by reliable facts that the cost of the work would exceed the estimate of the viewers, it certainly, under the law, would not be right for the board to undertake the improvement of the road. However, if the board is satisfied that the legitimate expenses arising out of or necessarily connected with the work will not exceed the estimate, and proceed to order that the desired improvement of the highway be undertaken, and it subsequently should be ascertained that the board was mistaken by reason of some unforeseen causes which have resulted in increasing the cost of the work beyond the original estimate, under such circumstances it could not in reason be said that the question of additional assessment to meet a deficit had been previously determined by the original order, and that, therefore, the right or power of the board to order a reassessment to be levied no longer existed. *Board v. Fullen*, supra.

In answer to the insistence of appellants that the court erred in rejecting the third paragraph of the remonstrance, it may be said that this is purely a proceeding, as it professes to be, to secure an additional assessment upon the lands in controversy for the purpose mentioned, and in no sense is it one for the recovery of money by the county, and the six-years statute of limitations interposed by appellants has no application. Neither can they, in order to defeat this proceeding, avail themselves of the alleged fact that the county, upon the order of the board of commissioners, had advanced the money to pay the deficit in dispute, and that the purpose of the assessment sought to be made was to reimburse the county for the money which it had paid. The county, under the circumstances, is entitled to be reimbursed for the amount, principal and interest, which it has paid upon the expenses of the improve-

ment. The statute is careful to protect the county against all loss or liability that it may incur upon the legitimate expenses arising out of the improvement, and the lands within the taxing district benefited thereby are, under the law, held liable to protect the county against loss. *Manor v. Board*, 137 Ind. 367, 34 N. E. 959, and 36 N. E. 1101; *Goodwin v. Board*, supra; *Gavin v. Board*, 104 Ind. 201, 3 N. E. 846; *Little v. Board*, 7 Ind. App. 118, 34 N. E. 499. The court did not err in rejecting the first and third paragraphs of the remonstrance.

The next alleged error discussed by appellants is based upon the overruling of the motion for a new trial. Counsel, in their brief, say, "This brings in review the facts found by the court." But the evidence, however, is not before us, and, in its absence, we must accept the finding of the court as correct. Many reasons which are assigned in the motion for a new trial have no legitimate place in such a motion, and therefore present no question for consideration. The other remaining reasons assigned in the motion depend upon the evidence, and, in its absence from the record, we are precluded from reviewing them.

The court made a special finding of facts, and stated its several conclusions of law thereon. Appellants did not except to these conclusions severally, but excepted jointly. The rule is, under such circumstances, that all of the conclusions must be wrong in order to render such an exception available. *Royse v. Bourne*, 149 Ind. 187, 47 N. E. 827, and cases there cited; *Evansville & T. H. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2. It cannot be successfully insisted in this case that all of the conclusions are wrong, and it must, therefore, follow that the exception to the conclusions does not serve to raise any question for our consideration.

Other errors assigned are not discussed by counsel for appellants in their brief, and therefore they must be deemed as waived. There is no available error, and the judgment is affirmed.

(151 Ind. 396)

CITIZENS' ST. R. CO. v. REED.

(Supreme Court of Indiana. Nov. 1, 1898.)

SPECIAL VERDICT—EVIDENCE.

The jury may not return the primary facts on evenly balanced evidence, where the burden of establishing the ultimate fact rests on the party in whose favor the primary facts are returned.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by Nancy E. Reed, administratrix, etc., against the Citizens' Street-Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. H. H. Miller, John B. Elam, and Will H. Latta, for appellant. Ayers & Jones, for appellee.

HACKNEY, C. J. This was an action for personal injuries resulting in the death of John W. Reed, alleged to have been sustained by reason of the appellant's negligence, and without any negligence on the part of the decedent. The trial resulted in a special verdict in the form of interrogatories and answers returned by a jury. The first alleged error of the trial court was in charging the jury that, "if the evidence is evenly balanced as to any fact inquired about in an interrogatory, then you should find that such fact does not exist." The burden rested upon the appellee to prove by a preponderance of the evidence the alleged negligence of the appellant, and that the decedent was free from contributory negligence. To sustain this burden it was indispensable that the special verdict should find facts enforcing the legal inference of negligence on the one side, and freedom from negligence on the other. No fact tending to establish either the conclusion of negligence on the part of the appellant, or of due care on the part of the decedent, could be found upon "evenly balanced" evidence. These propositions are so thoroughly settled in the law of this state as to admit of no doubt. The theory of the case was that the appellant was negligent in running a street car without a gate or barrier on the front platform next to the poles suspending the trolley wire; that the decedent was employed by the appellant as a road officer, with the duty to inspect cars while in use, and direct their repair and improvement, including the addition of gates, when necessary, and as to this was superior to those running the cars; that he boarded the car numbered 342 by the rear platform, and passed to the front platform, with a headlight in his hand, and when he had gone upon said platform he lost his balance, and fell from the platform, at the end thereof next to the poles, which was not guarded or protected by a gate; and that in falling he struck one of such poles. Relating to the question of contributory negligence, the jury were asked and answered the following: "Did said decedent at the time and place mentioned enter the wrong car with the headlight by mistake? Answer. No." "When decedent passed through the door of said car, or onto the front platform thereof, could he see, by looking, that the end of said platform towards the south was open? Answer. No." "Did decedent, immediately after he was recognized by said motorman, endeavor to get off of said car with the headlight? Answer. No." "At the time said Reed stepped upon the platform, could he see that the safety gate was not on the side next to the poles? Answer. No." "Was the fact that the safety gate was not upon the front end of said car, upon the side next to said poles, known to said Reed at that time? Answer. No." These inquiries were as to primary or subsidiary facts having more or less influence upon the ultimate fact, namely, did Reed exercise that degree of care which a man of

ordinary care and prudence would have exercised under like circumstances? As to this ultimate fact there were few other interrogatories and answers, and these were as to Reed's duty to inspect running cars, and order them in for repairs; the rainy and dark condition of the evening; that he knew the condition of the track, the position of the poles, and the swaying motion of the cars; that the headlight was for car numbered 542, while he carried it upon car numbered 342; that the motorman was near the middle of the platform; that Reed went upon the left side of the platform; and that while going upon the platform he did not take hold of anything for support. There were interrogatories and answers which found the ultimate fact that he exercised such care as a person of ordinary care and prudence would have exercised under like circumstances. The conclusion was also found that he was without fault or negligence. This conclusion could result only from the law and the facts, and the jury had no right to pass upon questions of law. *Board v. Bonebrake*, 148 Ind. 311, 45 N. E. 470; *Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14; and authorities cited in each. The finding of the ultimate fact involved an inference or conclusion from the primary or subsidiary facts. Ordinarily it is not the privilege of the jury to return such conclusion, and they are required to return only the primary facts. There are cases, however, where the jury may draw the inference. They are those where the primary facts found and returned admit of two or more reasonable inferences. Upon these propositions, see *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Smith v. Railway Co.*, 141 Ind. 92, 40 N. E. 270; *Board v. Bonebrake*, supra; *Smith v. Manufacturing Co.*, 148 Ind. 333, 46 N. E. 1000; *Sutherland v. Railway Co.*, 148 Ind. 308, 47 N. E. 624.

Whether the present is a case in which the jury were authorized to draw the inference we need not decide, but it is without any doubt that the inference is never permitted without the primary facts, or those which give the inference its support. If it were otherwise, the duty of the court to pass upon the facts might be foreclosed in every case by the return of the jury of only the ultimate or inferential facts of the want of care on one side, and the exercise of care on the other. Here the appellee's learned counsel argue that all of the interrogatories quoted upon the subject of contributory negligence—those so answered in the negative—might be stricken out, and there would remain sufficient findings to support the judgment. But to strike them out would not only require a reliance upon the inference drawn by the jury, but would dispense with primary facts supporting that inference. We are confronted, therefore, with the question, may the jury return the primary facts, upon evenly balanced evidence, where the burden of establishing the ultimate fact rests upon the party

in whose favor the primary facts are returned? We must answer this question in the negative. It is not claimed that the questions of the deceased's opportunities to know, and of his actual knowledge, of the dangerous condition of the car, were unimportant in considering his care. Nor could it be said that the inquiries as to whether he had taken the headlight upon the wrong car, and, when he recognized the motorman, endeavored to get off the car, had no bearing upon his care. These important questions were decided by the jury against the appellant. Under the direction of the court, the decision may have been upon evenly balanced evidence. It cannot be said that every negative answer of the jury was not upon the conclusion that the evidence was evenly balanced. Nor can it be said that the ultimate fact was not drawn from these very negatives. Taking these negatives, without reference to the instruction, the court would accept them as in a great measure, if not entirely, requiring the inference of care on the part of Reed. Without these negatives the findings of fact upon which to predicate the inference of care would be exceedingly vague and shadowy, if, indeed, they did not show contributory negligence. If the case required the jury to draw the inference of care, we cannot escape the conclusion that they did so upon these negatives. If not required to draw the inference, the facts supporting the inference drawn by the court, being thus authorized upon evenly balanced evidence, could not be accepted. The inference is not supported by a preponderance of the evidence when the facts from which it is drawn are found upon evidence evenly balanced. For the error mentioned the judgment is reversed, with instructions to grant the appellant's motion for a new trial.

(151 Ind. 339)

SRADER v. SRADER et al.

(Supreme Court of Indiana. Oct. 25, 1898.)

SETTING ASIDE DEED—COMPLAINT.

Complaint to set aside a deed alleged to have been obtained by fraud must show that the consideration was not sufficient, and an offer to restore the same.

Appeal from circuit court, Montgomery county; J. M. Rabb, Special Judge.

Action by James H. Srader against Morton E. Srader and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Claude Thompson and Paul & Van Cleave, for appellant. Thomas & Whittington, for appellees.

JORDAN, J. Action by the appellant to set aside, upon the ground of fraud, a deed executed by Andrew W. Srader to appellees, Jacob G. and Morton E. Srader, whereby he conveyed to them certain described real estate. The gist of the material facts, as alleged in the first paragraph, may be said

to be as follows: Andrew W. Srader died on the 8th day of November, 1896, leaving the appellant surviving as his only full brother, and certain others of the appellees in this action as his half brothers and sisters, and only heirs at law. William H. Long, one of the appellees, is the administrator of the estate of said decedent. Andrew W. Srader, prior to his death, was the owner of 40 acres of land situated in Montgomery county, Ind., which he inherited from his mother. In November, 1895, he sold and conveyed this real estate to the appellees Jacob G. and Morton E., who were his two half-brothers, for the agreed consideration of \$2,000; \$200 of this purchase price being paid in cash by the said grantees to the said Andrew W. Srader, the grantees assuming, as a part of the purchase money, the payment of a \$500 mortgage lien existing against the land at the time of the sale, and executed promissory notes payable to the said Andrew W. Srader for the remainder of the said purchase price. These unpaid notes were held by the administrator of the said Andrew W. at the commencement of this action, and it is alleged that he, as said administrator, is about to collect the notes from the said Jacob G. and Morton E. Srader, and convert them into money. It is averred that the said decedent was a person feeble in mind, and incapable of looking after his own affairs, and that his said two half-brothers were shrewd business men, in whom he had implicit confidence. It is also averred that, under the circumstances, these two half-brothers, appellees herein, in order to induce the decedent, Andrew W., to convey the real estate in question to them, falsely represented to him that the mortgage lien of \$500, which existed against said land, was about to be foreclosed, and that he would thereby lose his said property; that they would cause anonymous letters to be written to the said Andrew W., which stated that the land would be taken from him in a few days by the holder of the mortgage lien, and that the only way for him to save the property was to convey it away, and take notes therefor. Said decedent, it is averred, confided in said Jacob G. and Morton E., and would show these letters to them, and they would represent to him that the matters stated in said letters were true. It is averred that Jacob G. and Morton E. wrote the letters themselves, or caused them to be written, for the purpose and with the intention of taking advantage of the said decedent, and thereby inducing him, by said fraudulent means, to transfer the land to them. It is charged that the decedent, Andrew W., relied upon these representations, and believed them to be true, and, having full confidence in his said half-brothers, conveyed the real estate to them. The falsity of the said representations is alleged, while it is also averred that they were made for the fraudulent purpose of taking advantage of

the said decedent. The complaint contains other averments in regard to the false representations made by the appellees to the decedent in respect to the manner in which the real estate would descend, and the manner in which his property would be distributed, in the event of his death; but these facts are not material, and lend no support to the complaint. The prayer of the first paragraph is that the deed of conveyance be set aside, and the title quieted in the appellant, and that the notes for the purchase money remaining unpaid be canceled and declared void. The facts alleged in the second paragraph are substantially similar to those set up in the first, and the prayer is that the title to the real estate be quieted in appellant. For insufficiency of facts, a demurrer was sustained to each paragraph of the complaint, and a final judgment in favor of the appellees was rendered upon demurrer.

The only question presented for review is: Do the facts, as averred in the complaint, sufficiently constitute a cause of action in favor of appellant to set aside the deed or conveyance in question upon the alleged ground of fraud? We are of the opinion that the facts, as alleged in the paragraphs in question, are not sufficient, and that the demurrer to each was therefore properly sustained. Appellant, as the heir of the deceased grantor, occupies no better position than would the latter had he instituted and prosecuted this action prior to his death. Without deciding the question as to the sufficiency of the fraud imputed to appellees, by means of which they procured a sale of the land to them, it is, however, manifest that the complaint is fatally bad, for the reason that there is an absence, under the facts, of at least two essential elements. First, there is no showing that the grantor sustained any damage or injury in the sale and conveyance of his land to the appellees. It is not disclosed that the purchase price of \$2,000, for which the 40 acres were sold and conveyed, was not equal to the full value of the land. Five hundred dollars of the consideration were satisfied by the grantees assuming the payment of the mortgage existing against the premises to that amount. Two hundred dollars were paid to the grantor in cash, and for the remaining \$1,300 the grantees executed to the grantor their promissory notes, which, it appears, the administrator of the latter held and was proceeding to collect. There is no showing that these notes are not amply good, and worth their full face value. For aught appearing in the complaint, the sale and conveyance of the land, under all of the circumstances, may have been conducive to the best interests of the grantor. Fraud without damage or injury to the defrauded party creates no cause of action. This rule is elementary and one of universal application. *Wiley v. Howard*, 15 Ind. 169; *Bodkin v. Merit*, 102 Ind.

293, 1 N. E. 625; *Cooley, Torts*, pp. 474, 475. Second, it does not appear that there was any effort made to place the appellees in statu quo by a return or an offer to return to them the amount of the money which they paid in cash upon the purchase price for the land, and by restoring or offering to restore to them the notes which they had executed. It is a well-settled rule that a party desiring to rescind a contract upon the ground of fraud must either restore or offer to restore what has been received therefor, in order that the other party may be placed, as near as possible, in statu quo. This doctrine is well affirmed by many authorities. *Wiley v. Howard*, supra; *Vance v. Schroyer*, 79 Ind. 380; *Ashmead v. Hurt*, 125 Ind. 566, 25 N. E. 709. Judgment affirmed.

(151 Ind. 356)

MARSH et al. v. BOWER.

(Supreme Court of Indiana. Oct. 26, 1898.)

APPEAL—RECORD.

There can be no review where it appears that there were filed at least two amended complaints, with reference to which various rulings were made, but the one on which trial was had is unidentified, though accompanying the transcript are two documents purporting to be amended complaints, which do not show the time or order of their filing.

Appeal from circuit court, Floyd county; William T. Zenor, Special Judge.

Action between James K. Marsh, trustee, and others, and George B. Bower. From a judgment for Bower, the others appeal. Affirmed.

J. G. Howard, A. Dowling, W. H. Watson, and M. Z. Stannard, for appellants. George H. Voight, for appellee.

HACKNEY, C. J. This case originated in the Clark circuit court, and went on change of venue to the lower court. The transcript on change of venue, being the first paper copied into the transcript before us, recited the filing, upon at least two occasions, of amended complaints, without setting forth such complaints. It appeared also that various rulings were made with reference to such amended complaints upon demurrers and motions to make more specific. Accompanying the transcript were, among other pleadings, two documents purporting to be amended complaints, neither of which bears file mark or other means of ascertaining the order or time of its filing, nor is there other identification of the complaint upon which the trial was had, in the transcript brought to this court. The point is urged by the appellee, and is not answered for the appellants, that no question is presented for decision because of the imperfection in the record in failing to disclose the complaint upon which the proceedings and judgment were had. Not only have we inextricable confusion from the presence of the two amended complaints, which differ in essential respects, but, if

either of such complaints were absent, the record would, in our opinion, present no question for decision. There is abundant authority for the proposition that upon the appellant rests the duty of presenting a record disclosing manifest error. Elliott, App. Proc. § 186. It is well settled, also, that, in the absence of the complaint, no question is presented for decision. Collins v. Express Co., 27 Ind. 11; McCardle v. McGinley, 86 Ind. 538; Fellenzer v. Van Valzah, 95 Ind. 128; Reid v. Reid, 149 Ind. 274, 49 N. E. 2; Gelsen v. Reder (Ind. Sup.) 51 N. E. 353; Railway Co. v. Lavender, 7 Ind. App. 655, 34 N. E. 847. In the last of these cases cited, upon a record much like the present, the court held that such an imperfection could not be cured by any presumption arising from the presence, in the transcript, of the pleading unidentified as that upon which the trial was had. The sufficiency of pleadings, the correctness of conclusions of law, and questions upon the motion for a new trial all relate back to the complaint, and, in its absence from the record, are not properly presented. The judgment is affirmed.

(151 Ind. 364)

STATE ex rel. BIBLE et al. v. WHITE,
Auditor, et al.

(Supreme Court of Indiana. Oct. 27, 1898.)

HIGHWAYS—ESTABLISHMENT—DAMAGES.

Under Burns' Rev. St. 1894, §§ 6735, 6737, 6752 (Horner's Rev. St. 1897, §§ 5010, 5012, 5025),—providing that, before the county commissioners can grant petition to establish a highway in two counties, they must determine whether the damages assessed are greater than the public utility of the highway, and leaving it to them to determine by whom the damages shall be paid, except that any amount in excess of such utility cannot be paid out of the county treasuries,—where, after the commissioners have, on a petition for a highway, allowed one \$50 damages, and determined that the damages assessed are not greater than the public utility, and found in favor of the highway, and declared that each county shall pay half the damages, such person appeals, and gets verdict for \$450 damages, the case should be returned to the county commissioners to determine whether the damages exceed the utility, and who shall pay them; and therefore a judgment, without this, that the damages shall be paid half by each county cannot be enforced.

Appeal from circuit court, Montgomery county; Joseph M. Rabb, Special Judge.

Mandamus proceedings, on the relation of William W. Bible and others, against William M. White and another, auditors of Montgomery and Tippecanoe counties. Judgment for defendants. Relators appeal. Affirmed.

Paul & Van Cleave, for appellants. C. E. Lake and F. M. Dice, for appellees.

MONKS, J. It appears from the record that a proceeding was brought to establish a highway in the counties of Tippecanoe and Montgomery, and that the relator Shep-

ard filed with the board of commissioners of Montgomery county a remonstrance for damages to his real estate in Montgomery county, and was allowed \$50. Said board of commissioners determined that the damages assessed were not greater than the utility of the proposed highway, and ordered that notice thereof be given to the auditor of Tippecanoe county, as required by section 6735, Burns Rev. St. 1894 (section 5010, Horner's Rev. St. 1897). Afterwards the board of commissioners of each of said counties found in favor of the petition for said highway, and declared it located, and that each county pay one-half of the damages. The relator Shepard appealed, under the provisions of section 6754, Burns' Rev. St. 1894 (section 5027, Horner's Rev. St. 1897), from the decision of the boards in regard to damages. On the trial of said cause in the Montgomery circuit court, said relator, Shepard, obtained a verdict and judgment upon his remonstrance for \$450 damages, and an order that each of said counties pay one-half thereof. A certified copy of said judgment was delivered to the auditor of each of said counties. This action was brought by the relators, to compel, by writ of mandamus, appellees, the auditors of Montgomery and Tippecanoe counties, respectively, to issue a warrant to the relator Shepard for one-half of said damages; and the trial court rendered judgment on demurrer against the relators.

It is settled law in this state that, in proceedings to establish highways in one county only, under the statute (section 6748, Burns' Rev. St. 1894; section 5021, Horner's Rev. St. 1897) the question of whether or not the damages shall be paid out of the county treasury is one solely for the consideration and determination of the board of county commissioners. Jamleson v. Board, 56 Ind. 466, 476; Hayes v. Board, 59 Ind. 552; Wilkinson v. Bixler, 88 Ind. 574, and cases cited. As was said by this court in Wilkinson v. Bixler, 88 Ind. 574, on page 577: "It is a matter exclusively within the discretion of the board, and its judgment and determination in that regard cannot be controlled, coerced, or reviewed by any other court. Whether the whole or one-half of the damages should be thus paid out of the public treasury, the other half having been paid by the petitioners, was a question which the board had the exclusive right to determine; and, having determined it, that determination cannot be reviewed upon appeal to the circuit court." It is also settled law "that the petitioners may pay the damages assessed, and that such payment is neither improper morally nor legally wrong." Wilkinson v. Bixler, 88 Ind. p. 577. Section 6748 (5021), supra, provides that, if "the board shall consider the proposed highway, vacation, or change to be of sufficient importance to the public, they shall order the costs and damages to be paid out of the county treas-

ury." And the cases above cited hold that said section vests the discretion in the board of commissioners whether the damages and costs shall be paid out of the county treasury. In *Hays v. Board*, 59 Ind. 552, on page 553, this court said: "A proposed highway may be of public utility, and yet not be of sufficient importance to the public to justify the payment of the damages out of the county treasury. It may be of sufficient public utility to call into exercise the right of eminent domain, and to authorize it to be laid out upon the lands of private persons, upon the payment of the damages occasioned thereby, and yet not of sufficient public importance to require those damages paid out of the public treasury. The statute leaves it to the board of commissioners to determine when damages shall be paid out of the county treasury." The statute also clearly contemplates that damages may be paid by those who desire the establishment of the proposed highway, for it provides that "no such highway shall be opened, worked or used until the damages assessed therefor shall be paid to the persons entitled thereto, or deposited in the county treasury for their use, or they shall give their consent thereto in writing filed with the auditor of such county." Burns' Rev. St. 1894, § 6752 (Horner's Rev. St. 1897, § 5025). Section 6752 (5025), supra, applies to proceedings to establish highways in one county, or in more than one county. The boards of commissioners, in proceedings to establish highways in more than one county, have the same discretion in regard to whether the damages shall be paid out of the county treasury that is possessed by a board of commissioners in a proceeding to establish a highway in one county only. Before the boards of commissioners can grant the prayer of the petition in a proceeding to establish a highway in more than one county, each board must determine whether the damages assessed are greater than the utility of the proposed highway. Burns' Rev. St. 1894, §§ 6735, 6737 (Horner's Rev. St. 1897, §§ 5010, 5012). If a majority of such boards of commissioners decide that the damages are greater than the public utility of the proposed highway, the damages cannot be paid out of the treasuries of said counties. But if the highway is of public utility, and the petitioners pay the damages under the provisions of section 6752 (5025), supra, or so much thereof that the remainder not paid is not greater than the utility of the proposed highway, a majority of said boards may establish such highway.

After the return of the verdict in the Montgomery circuit court assessing the relator Shepard's damages at \$450, as the question involved was as to the amount of such damages, the only power the court had was to render the proper judgment for costs, and order the case remanded to the boards of commissioners of said counties, for them to de-

termine whether said damages were greater than the utility of the proposed highway. If such boards so determined, the highway could not be established unless the petitioners would pay all the damages, or such part thereof as said boards determined necessary so that the amount remaining unpaid would not be greater than the utility of the proposed highway. The record does not show that the boards of commissioners ever ordered said \$450, or any part thereof, paid out of the treasuries of said counties, or that they ever determined that said damages were only equal to or less than the utility of said proposed highway. Any judgment or order of the Montgomery circuit court on such appeal that the damages, or any part thereof, be paid out of the treasuries of said counties, was wholly unauthorized. It follows that the relator Shepard is not entitled to have such damages, or any part thereof, paid out of the treasuries of said counties, unless the boards of commissioners of said counties shall establish said highway, and so order. The judgment is therefore affirmed.

(151 Ind. 401)

FLETCHER v. WHITE, Auditor, et al.

(Supreme Court of Indiana. Nov. 1, 1898.)

DRAINS—ALLOTMENT OF REPAIRS—JURISDICTION—INJUNCTIONS—ESTOPPEL.

1. Under Acts 1889, p. 53 (Burns' Rev. St. 1894, § 5633), providing for the repair of public ditches, and requiring that the surveyor, whenever practicable, should locate each allotment on the tract of land assessed for its repair, the trustee of the township in which the allotment is located has jurisdiction of such repairs, though the land assessed therefor is situated in another township.

2. Where the trustee of the township in which plaintiff's land was situated, mistaking his duty under Acts 1889, p. 53 (Burns' Rev. St. 1894, § 5633), relating to the repair of public ditches, notified plaintiff to repair his allotment of a ditch running through his land and extending into another township, which allotment was located in such other township, and, on failure of plaintiff to do so, repaired such allotment, and certified the expense thereof to the county auditor for collection on the tax duplicate, an action to enjoin the collection of such expense could not be maintained, for want of equity, as plaintiff was estopped by his conduct in standing by and permitting such work to be done for his benefit, by such officer, without objection.

Appeal from circuit court, Montgomery county; J. M. Rabb, Special Judge.

Action by Foster A. Fletcher against William M. White, auditor of Montgomery county, and others, for an injunction. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Paul, Van Cleave & Paul, for appellant. Crane & Anderson, for appellees.

HOWARD, J. The appellant is the owner of certain lands in Madison township, Montgomery county, through which a public ditch runs. The ditch is six or seven miles in

length, and extends also into Union township, said county. In making the allotments, under the statute, for the repair of said ditch (Acts 1889, p. 53, Burns' Rev. St. 1894, § 5633), the county surveyor allotted to appellant a certain part of the ditch in Union township. Whether the trustee of the township in which the land is situated or the trustee of the township in which the allotment is located is the proper official to give notice to repair, and, in case of failure of the owner to do the work, to make the repairs himself, and certify the cost to the county auditor, to be placed upon the tax duplicate for collection, is somewhat uncertain on a first reading of the various sections of the act for repairing public drains, cited above. The statute is, in this respect, not very definite. We are, however, satisfied, on examination of the various provisions of the law, that the proper officer to cause repairs to be made is the trustee of the township in which the allotment is located. The statute cited requires that the surveyor, "whenever practicable," should locate each allotment upon the tract of land assessed for its repair. This matter is thus left to the sound judgment and discretion of the surveyor, and in the present case the surveyor, for reasons not apparent from the record, did not locate appellant's allotment upon his land, nor even in his township. Undoubtedly, however, the trustee of the township where the allotment is located has jurisdiction of the repairs. In the case at bar, therefore, the trustee of Union township, in which appellant's allotment was located, and not the trustee of Madison township, where appellant's land is situated, should have given appellant notice to repair, and, on appellant's failure to do the work, should have proceeded to make the repairs, and to cause the expense to be placed on the tax duplicate for collection. The trustee of Madison township, however, conceiving it to be his duty, gave the notice to repair, and, on appellant's failure to do the work, went ahead himself, and repaired appellant's allotment, and certified the expense to the county auditor for collection on the tax duplicate. Appellant then brought this action against the appellees, who are the auditor and treasurer of the county and the trustee of Madison township, to enjoin the collection of the said expense of repairing his allotment as placed upon the tax duplicate.

While there is no doubt, as we have already intimated, that the trustee was mistaken as to his duty, and that the work done by him should have been done by the trustee of Union township, yet we do not think that appellant has shown any equities in his favor that should entitle him to an injunction against the collection of the cost of repairing that part of the ditch allotted to him by the county surveyor. He has stood by and received the benefit of the work done by the trustee, though done by that official under a misapprehension of duty; and we do not think

he can now come in, and, because of the officer's mistake, cause the people of Madison township to pay for the repair of his ditch. He received notice to do the work, and then permitted the trustee to do it without taking any action. His suit for injunction came too late. He should have brought the suit when the trustee first gave notice, and threatened to do the work, and not have waited until his ditch had been repaired, and then sought to be relieved of the cost after receiving the benefit of the work. It has frequently been held by this court that a person cannot stand by and receive the benefit of a work, and afterwards appeal to a court of equity to be relieved from paying for it. He is estopped by his own conduct. See *Board v. Plotner*, 149 Ind. 116, 48 N. E. 635, and numerous authorities there cited. Judgment affirmed.

(151 Ind. 407)

STATE ex rel. CUTTER v. KAMMAN et al.
(Supreme Court of Indiana. Nov. 2, 1898.)

HIGHWAYS — REPAIRS — DUTY OF SUPERVISORS —
PENALTY FOR NEGLECT — MANDAMUS —
SUFFICIENCY OF PETITION.

1. Burns' Rev. St. 1894, § 6818 (Horner's Rev. St. 1897, § 5068), provides that the road supervisor shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep them in good order. Section 6828 (5077) provides that such supervisor shall, within 10 days after the receipt of any money, proceed to employ laborers to repair the highways in his district, and attend to and not neglect such repairs, and, if the tax assessed shall be insufficient therefor, he shall call out the hands in his district to complete such repairing. Section 6838 (5088) provides that, where a supervisor shall fail to use due diligence in keeping the highways in good repair, he shall forfeit the sum of \$10 for every offense, to be recovered by the township trustees. *Held*, that it is the imperative duty of the supervisors to keep the highways in good repair.

2. Mandamus will lie to compel highway supervisors to repair the highways notwithstanding they are liable to a fine for failure to do so, since such fine does not compel the performance of their duty, and is not an adequate legal remedy.

3. An allegation in a petition for mandamus to compel a supervisor to repair a highway, and in the alternative writ, that the road is in an impassable condition, by reason of its being washed into gulleys, and the deposit of driftwood, stones, and other debris thereon, and has so remained for more than 12 months last past, sufficiently shows that the road was in such condition when the action was commenced, and had been for more than 12 months before.

4. Mandamus will lie to compel the township trustee to bring suit against a highway supervisor to recover the fine prescribed by Burns' Rev. St. 1894, § 6838 (Horner's Rev. St. 1897, § 5088), as a penalty for failure to keep the highways in repair.

5. Where the facts alleged in the petition for mandamus and the alternative writ make a prima facie case, facts existing on account of which a peremptory writ should not be issued must be set up by way of return to the alternative writ.

Appeal from circuit court, Ohio county; N. S. Givan, Judge.

Petition for mandamus by the state, on the relation of John F. Cutter, against Frank W. Kamman, township trustee, and others. From a judgment sustaining a demurrer to the petition, and granting a motion to quash the alternative writ, relator appeals. Reversed.

Coles & Hall, for appellant. R. L. Davis and John L. Davis, for appellees.

MONKS, J. This action was brought by appellant to compel, by writ of mandamus, appellee Obertate, a road supervisor, to repair a part of a certain highway in his road district, and appellee Kamman, trustee of said township, to sue said Obertate for the statutory penalty for his failure to keep said highway in repair. An alternative writ was issued, and appellees each moved to quash the same, and also filed a demurrer, for want of facts, to the petition for the alternative writ. The motions to quash the alternative writ and the demurrers to the petition were sustained by the court. The errors assigned call in question said rulings of the court below. If, under the statutes, it rests in the discretion of road supervisors whether they keep the highways in their road districts in repair, it is concluded that the demurrers and motions of appellees were properly sustained.

Section 6818, Burns' Rev. St. 1894 (section 5068, Horner's Rev. St. 1897), provides, among other things, that the road supervisors "shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep the same in good repair." Section 6828, Burns' Rev. St. 1894 (section 5077, Horner's Rev. St. 1897), provides that "such supervisor within ten days after the receipt of any money which he is not required to pay over to the township trustee, shall proceed to employ laborers to repair the highways in his district, but shall not pay more to such laborers than is customary in his district for similar purposes, and such supervisor shall attend such repairs, but in no case shall he neglect to repair such highways, and if such labor and tax, or such labor, if no tax has been assessed, shall be insufficient therefor, he shall call out the hands in his district to complete such repairing; and if any person so called out shall refuse to work, he shall be liable to pay the commutation money therefor, and it shall be the duty of the supervisor to bring suit for the same as provided in this act." Section 6838, Burns' Rev. St. 1894 (section 5088, Horner's Rev. St. 1897), provides that "in case such supervisor shall fail to use due diligence in keeping the highways of his district in good repair, under the regulations herein prescribed, for every such offense shall forfeit the sum of ten dollars, to be recovered before any justice of the county in the name of the township by the trustee of such township, and all sums so recovered shall be for the benefit of the district for which such super-

visor was elected or appointed, and such trustee shall bring suit within three days after receiving information of any such forfeiture."

These sections of the statute plainly impose upon a road supervisor the duty to keep the highways in his district in good repair, and he is authorized to call out the hands of the district to complete the repairing if the labor and tax are insufficient therefor. If a highway is out of repair, the statutes require that he place the same in good repair. The plan and manner of making the repairs, and the material used in making the same, may rest in his discretion; but his duty to put the same in good repair is a public duty, and is imperative, and not discretionary. Under such circumstances, if the law furnishes no other adequate remedy, mandamus will lie; and any person having an interest in the matter can, as relator, maintain the action. *Henderson v. State*, 53 Ind. 60, 63, and cases cited; *Holliday v. Henderson*, 67 Ind. 103, 107; *Hamilton v. State*, 3 Ind. 452; *Wampler v. State*, 148 Ind. 557, 563, 564, 47 N. E. 1068; *Manor v. State*, 149 Ind. 310, 313, 49 N. E. 160, and cases cited; *Larkin v. Harris*, 36 Iowa, 93; *Patterson v. Vall*, 43 Iowa, 142; *People v. City of Bloomington*, 63 Ill. 207; *Hammar v. City of Covington*, 3 Metc. (Ky.) 494; *People v. Thompson*, 32 Hun, 93; *Borough of Uniontown v. Com.*, 34 Pa. St. 293; 14 Am. & Eng. Enc. Law, 166, 167; 7 Lawson, Rights, Rem. & Prac. § 4031; *Dane v. Derby*, 89 Am. Dec. 733. In *Borough of Uniontown v. Com.*, supra, it was held that, as the borough was of common right bound to keep its streets in repair, it could be compelled to do so by mandamus. In *Larkin v. Harris*, supra, and in *Patterson v. Vall*, supra, it was held that, as it was the duty of a road supervisor to remove all obstructions from a highway, and keep the same in repair, mandamus was the proper remedy to compel him to perform this duty.

Appellees insist that if they failed to keep the highway in repair, as alleged, they were liable to a fine of not less than \$5 nor more than \$100 each, under the provisions of section 2148, Burns' Rev. St. 1894 (section 2061, Horner's Rev. St. 1897), and that this constituted an adequate legal remedy, and therefore mandamus would not lie. The fact that a party is liable to indictment and punishment, or to a penalty or forfeiture, which may be recovered in a civil action for his failure or refusal to perform a duty imposed by law, does not constitute any objection to the granting of the writ, for the reason that such proceedings cannot compel the performance of official duty, and therefore such remedies are not adequate. *People v. Mayor, etc.*, of New York, 10 Wend. 395, 398, and cases cited; *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 528, 531; *Babcock v. Goodrich*, 47 Cal. 488, 506; *Fremont v. Crippen*, 10 Cal. 215; *State v. Holliday*, 8 N. J. Law, 205; *In re Trenton Water Power Co.*, 20 N. J. Law, 659, 660; *State v. Wright*, 10

Nev. 175; *State v. Northeastern R. Co.*, 9 Rich. Law, 247; *People v. State Treasurer*, 24 Mich. 469; *People v. State Treasurer*, 23 Mich. 499; *Railroad Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65; 14 Am. & Eng. Enc. Law, 102, 103, and cases cited in note 4, p. 103. So far as *State v. Yant*, 134 Ind. 121, 33 N. E. 896, holds to the contrary, it is overruled.

It is next insisted by appellees that it is not averred that the adjacent landowner had not removed the alleged obstruction to the highway, as it was his duty to do under the statute. It is alleged in the petition and alternative writ: "Which part of said road * * * is in an almost impassable condition, by reason of its being washed into gulleys, and the deposit of driftwood, stones, and other débris thereon, by heavy rains, and has so remained for more than twelve months last past." It is clear from this allegation that the highway was in the condition alleged when the action was commenced, and had been in that condition for more than 12 months before. Even if the alleged gulleys were an obstruction of the highway, within the meaning of section 6831, Burns' Rev. St. 1894 (section 5080, Horner's Rev. St. 1897), which we need not and do not decide, yet it was the duty of the supervisor to keep said highway in repair; and if the adjacent landowners failed to remove obstructions, as required by said section, it was the duty of the appellee Obertate, as supervisor, to have it done. Borough of Uniontown v. Com., supra. If he had no funds, and if he could not give receipts for labor on the highway, under section 6834, Burns' Rev. St. 1894 (section 5084, Horner's Rev. St. 1897), then it was his duty to call out the hands in the district, as provided in section 6828 (5077), supra. Appellees cite *Mayor, etc., v. Roberts*, 34 Ind. 471, as holding the contrary; but that case is not in point here, as it only holds that whether an improvement shall or shall not be made, and paid for out of the general fund in the treasury of a city, is a matter in which the judgment of the city council cannot be reviewed by the courts in a proceeding by mandamus, for the reason that courts cannot review the discretion of such bodies by mandate. Section 6838 (5088), supra, provides that the township trustee shall bring suit within three days after receiving notice of the failure of the supervisor to use due diligence to keep the highways of his district in repair. The allegation that the said highway had been in the condition alleged, and on that account almost impassable, for more than one year, was sufficient to show that the supervisor had failed to use "due diligence in keeping the highways of his district in good repair." This statute is peremptory, and no discretion is left to the trustee. Mandamus will therefore lie to compel the performance of such duty. It is suggested that such a remedy might be proper, in *State v. Yant*, 134 Ind., on page 127, 33 N. E. 896.

The assignments of error present no question as to the right to compel the supervisor and trustee, respectively, to perform said duties in the same action, and we decide nothing as to that question. The facts alleged in the petition and alternative writ make a prima facie case for a writ of mandamus, and, if any fact exists on account of which a peremptory writ should not be issued, the same must be set up by way of return to the alternative writ. Judgment reversed, with instructions to overrule the demurrer to the petition, and to overrule the motion to quash the alternative writ, and for further proceedings not inconsistent with this opinion.

(151 Ind. 422)

SELZ SCHWAB & CO. et al. v. MAYER et al.

(Supreme Court of Indiana. Nov. 3, 1898.)

PARTNERSHIP—ASSIGNMENT OF PROPERTY—RIGHTS OF CREDITORS—FRAUDULENT CONVEYANCES—FINDINGS.

1. On the dissolution of a partnership, one member surrendered his interest to the others, who composed another firm, in consideration of the latter releasing a debt due from the former to the partnership, and also assuming the debts of the firm. *Held*, that the agreement was supported by a valid consideration.

2. Two partners composing one firm were also members of another firm which had a third member. The latter firm, on the retirement of the third member, mortgaged its property to secure debts of both firms. *Held*, that the creditors of the latter firm had no lien on its assets, and therefore, in the absence of fraud, the mortgage was valid as against them.

3. As the burden of proving that a mortgage given to secure creditors is fraudulent is on the party attacking it, a failure to find a fraudulent intent is equivalent to a finding that there was none.

4. A failure to find whether a mortgage was made with fraudulent intent, in an action to set aside such mortgage, does not make the findings defective, so as to require a venire de novo.

Appeal from circuit court, Fulton county; Geo. W. Holman, Judge.

Action by the John V. Farwell Company and others against Sigmund Mayer and others. Judgment for defendants, and plaintiff Selz Schwab & Co. appeals. Affirmed.

Harley A. Logan, for appellant. Leopold M. Lauer, Charles P. Drummond, and Samuel Parker, for appellees.

MCCABE, J. The John V. Farwell Company, the Durand & Kasper Company, the Havens & Geddes Company, and Selz Schwab & Co., being four several corporations, as judgment creditors of a part of the defendants, sued the appellees to compel the application of certain assets in the hands of the defendants, to be applied to the payment of the plaintiffs' several judgments, to set aside a certain mortgage of certain goods as fraudulent, the sale of the property mortgaged, and the application of the proceeds to the payment of the several judgments of the several plaintiffs, and asking the appointment of a

receiver. The issues formed upon the complaint were tried by the court, resulting in a special finding of the facts, upon which the court stated conclusions of law leading to judgment for the defendants. The conclusions of law and the trial court's refusal to award a venire de novo are called in question by the assignments of error. All of the plaintiffs have been joined as appellants in this court, but all of them, except Selz Schwab & Co., having been notified, have declined to join in the appeal. The action was commenced in the Marshall circuit court, and afterwards the venue was changed to the Fulton circuit court. The substance of the facts found is: That Sigmund Mayer and Lambert Nussbaum, both of Plymouth, Marshall county, Ind., for many years prior to February 28, 1896, were engaged in business at said Plymouth, as merchants, under the firm name of Nussbaum & Mayer. That during said time they established a general store in the village of Marmont, in said county, and in the year 1896 took as a partner in the business at Marmont one Henry M. Speyer, said business in said town being carried on under the firm name of Nussbaum, Mayer & Co. Said firm of Nussbaum & Mayer, of Plymouth, furnished all the capital for the business at Marmont, and that firm was to have one-half of the profits of the business at Marmont, and Speyer the other half. Said Speyer was to superintend and manage the business at Marmont in consideration of his said share of the profits. During the existence of said partnership at Marmont, and some time prior to February 28, 1896, said firm of Nussbaum, Mayer & Co. became indebted to the plaintiff the John V. Farwell Company, and was so indebted on said date in the sum of \$1,390.20, and to the Durand & Kasper Company in the sum of \$247.89, to Selz Schwab & Co. in the sum of \$1,049.68, and to the Havens & Geddes Company in the sum of \$299.41. That the claims of said plaintiffs were afterwards, but before the bringing of this action, reduced to judgment in the Marshall circuit court, which claims are unpaid. That on said date said Nussbaum, Mayer & Co.'s assets consisted of a stock of goods of the value of between \$4,000 and \$5,000, notes and accounts due the firm of about \$1,000, and of real estate, consisting of a store building and some lots of the value of about \$2,000, and had no other property. That said firm was then indebted for borrowed money and for goods in the sum of \$10,500, and was insolvent. That the firm of Nussbaum & Mayer, of Plymouth, a member of the firm of Nussbaum, Mayer & Co., of Marmont, on said date had assets, consisting of real estate, goods, notes, and accounts, of the value of about \$9,000, and was indebted for borrowed money and for goods about \$13,000, and was insolvent. That on said date said Nussbaum & Mayer, as one member, and said Henry M. Speyer, as the other member, of the Marmont firm, entered into a written agreement of dissolution of the same, provid-

ing therein, as a consideration for the withdrawal of Speyer therefrom, the assumption by Nussbaum & Mayer of all indebtedness of said firm of Nussbaum, Mayer & Co., and the surrender and satisfaction of the indebtedness of about \$300 due from Speyer to the firm of Nussbaum, Mayer & Co., providing in said instrument that the dissolution was not to take effect until the next day, February 29th; that there was no other consideration for such dissolution. That on the next day, February 29, 1896, said Henry M. Speyer, in pursuance of said contract, transferred to said Nussbaum & Mayer all of his interest in the assets of the firm of Nussbaum, Mayer & Co., and retired from the firm. That, on said last-mentioned date, said Nussbaum & Mayer, as a firm and as individuals, executed a mortgage on all the real estate and goods, which constituted assets of the dissolved firm prior to said dissolution, and on the assets of the firm of Nussbaum & Mayer, of Plymouth, to secure notes executed by them and others, aggregating \$6,474.61, which included a part of the indebtedness of the firm of Nussbaum, Mayer & Co.; and said mortgage secured notes described therein for the indebtedness of Nussbaum & Mayer, said notes all bearing the said date of February 29, 1896, and falling due 30 days thereafter, and signed Nussbaum & Mayer, aggregating \$10,756.33. That said mortgage was duly executed and acknowledged on said February 29, 1896, and recorded in the office of the recorder of Marshall county, on March 2d, following. That on January 21, 1896, Sigmund Mayer was the owner of a dwelling property constituting his home in Plymouth, which on that day he conveyed to his two sons. That Henry M. Speyer was the owner of a dwelling property and a livery barn in Marmont, worth \$1,200, but on which was a mortgage of \$300. That, on said 29th day of February, he executed a mortgage to his mother on said property in the sum of \$880.37, being a pre-existing debt. That he was then insolvent. That on January 29, 1896, said Lambert Nussbaum was the owner of a dwelling constituting his home, and which he conveyed to his wife. That all of the items of indebtedness described in said mortgage were for money borrowed from time to time, by the respective firms, covering a period of 10 years previous to February 29, 1896, which was evidenced by promissory notes, some of which were renewed from time to time, and the money derived therefrom was used in the business of the respective firms. That on said February 29th some of said notes were due, and some were not due, but all were surrendered on that day, and the notes described in the mortgage executed took the place of the others. That there was no other consideration for the execution of the mortgage. That on said February 29, 1896, said Nussbaum & Mayer assigned to the defendant Leopold M. Lauer all of the notes and accounts due to the firms of Nussbaum, Mayer & Co. and Nussbaum & Mayer, for

the benefit of the creditors named in said mortgage. That Nussbaum & Mayer continued in the possession of all of said mortgaged property, and to sell at retail goods of both of said stores, until April 6, 1896, when Leopold Lauer took possession thereof, and sold the same, under said mortgage and the order of the Marshall circuit court. That, during the period from said February 29th to April 6th, the sales and collections at the Marmont store amounted to \$1,073.50, and the sales and collections at the Plymouth store amounted to \$1,556.29. That on May 2, 1896, all of the goods of said Plymouth store were sold at public auction by said Lauer, and brought \$950; and on May 1, 1896, all of the goods then remaining at the Marmont store were sold at public auction, and brought \$3,100. That all the notes and accounts due to the Marmont store, uncollected, are of the value of \$200. That said notes are now, and have been since said February 29th, in the possession of said Leopold M. Lauer. That on April 3, 1896, said Leopold M. Lauer, acting on behalf of the creditors named in said mortgage, paid to each of said creditors 15 per cent. of the face of their claims. That the remainder of the money, realized from all sources, from the goods, notes, and accounts, is now on deposit in the First National Bank of Marshall county, at Plymouth, Ind., placed there by said Leopold M. Lauer, amounting to \$4,947.33. That said contract of dissolution, and the transfer of said notes and accounts of the firm of Nussbaum, Mayer & Co., by said Henry M. Speyer, to said firm of Nussbaum & Mayer, and by said firm of Nussbaum & Mayer to Leopold M. Lauer, and the execution of the notes described in said mortgage, and the execution of the mortgage itself, were all made, done, and performed in pursuance of an understanding between all of the members of the two firms that the creditors named in said mortgage were to be preferred over other creditors of said firms, and the entire assets of the two firms were to pass by these transactions to the mortgagees, for the benefit of themselves as preferred creditors, and security for the payment of their said claims. The conclusion of law upon these facts is to the effect that the plaintiffs cannot recover, and should take nothing by their suit. It is contended that the conclusion of law is wrong, first, at least, as to the assets of the firm of Nussbaum, Mayer & Co., because there was no consideration for the transfer of its assets to Nussbaum & Mayer by the retiring partner, Speyer, and hence it is contended that said firm could not mortgage them.

Assuming, without deciding, that the want of a consideration for the transfer, by Henry M. Speyer to Nussbaum & Mayer, rendered the transfer void, and the mortgage of said assets void also, it is sufficient to say that the agreement of Nussbaum & Mayer to pay the debts of the firm of Nussbaum, Mayer & Co., and release and cancel the indebtedness

of \$300 due to the firm of Nussbaum, Mayer & Co., from Henry M. Speyer, the retiring partner, was an ample consideration to support the contract. But the principal ground on which it is contended that the conclusion of law is wrong is that the mortgage of the partnership property, and the assignment of the notes and accounts of the firm of Nussbaum, Mayer & Co., having been made to secure certain preferred creditors of both firms for pre-existing debts, was not valid against the creditors of Nussbaum, Mayer & Co. Appellant contends that the creditors of the latter firm had an equitable lien on all the assets of that firm for the payment of their debts. It is conceded that this lien or preference must be worked out through the liens of the partners, to compel the application of the partnership property and assets to the payment of the partnership debts. *Fisher v. Syfers*, 109 Ind. 514, 516, 10 N. E. 306; *Elliott v. Pontius*, 136 Ind. 641, 35 N. E. 562, and 36 N. E. 421. As soon as the property of the firm of Nussbaum, Mayer & Co. was sold to the firm of Nussbaum & Mayer, and the other firm was dissolved, its property became the property of the firm of Nussbaum & Mayer, and that firm could apply such property to the payment of its debts, the same as if it had never been the property of the dissolved partnership, unless the creditors of the dissolved firm had a lien on the same for the satisfaction of their debts. *Trentmen v. Swartzell*, 85 Ind. 443-447. Whether they did have such a lien is the controlling question in this case.

It is well established in this court, and is the uniform judicial opinion everywhere, that such lien may be waived or parted with by the partners; and, when it is so waived or surrendered, the creditors have no lien. This proposition is not controverted by the appellant. The question here is what will operate as a waiver of the lien by the partners, so as to cut off the partnership creditors from availing themselves of it. It is held by this court that a sale of his interest in the partnership effects by a partner of the firm, in the absence of fraud, is a waiver of his lien on the partnership assets, and thereafter the creditors of the firm cannot avail themselves of the lien for the satisfaction of their debts against the partnership assets. *Trentman v. Swartzell*, supra; *Goudy v. Werbe*, 117 Ind. 154-159, 19 N. E. 764; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543. This is the unquestioned rule recognized everywhere, and it is conceded by the appellant's counsel, in the absence of anything in the contract of dissolution and transfer of the property of the dissolved firm indicating an intention on the part of the partners in the dissolved firm to retain the lien of the partners, to compel the application of the property thereof to payment of its debts; and it is contended that the contract by which the remaining partner promised to pay the debts of that firm raised the implication that there was no

intention to waive or part with the lien of the partners, and implies an intention by the partners to retain the lien. Many adjudged cases by the courts of last resort of other states are cited, holding that a contract, such as the one found in this case, implies an intention on the part of the partners to retain the lien. These cases recognize the rule that, in the absence of a contract of the kind mentioned, the sale and transfer of the firm property is a waiver or abandonment of the lien of the partners, so as to preclude the partnership creditors from availing themselves of it. But the adjudicated cases outside of this state are in conflict on this point, many of them holding that the partners' liens are waived and abandoned by such a sale and transfer, whether accompanied by a contract to pay the partnership debts or not. Appellant, however, contends that this court has never decided the question. But it has frequently held in just such cases that the lien of the partners is waived and gone, even though the transaction was accompanied by a contract to pay the indebtedness of the firm. *Trentmen v. Swartzell*, supra; *Goudy v. Werbe*, supra; *Purple v. Farrington*, supra. The finding of facts is silent as to any fraudulent intent in the transaction. The plaintiffs had charged that the sale, transfer, and mortgage were made with the intent to defraud the creditors of the dissolved firm. They had the burden of that issue and the failure to find such fraudulent intent is equivalent to a finding that there was no fraudulent intent. As was said in *Purple v. Farrington*, supra: "Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit. Each has the right to waive his equitable lien, and together they may sell, assign, or mortgage the property of the firm, to pay or secure either an individual debt of one of the partners, or the debts of the firm. The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners, so long as the right of any of the partners has not been waived. * * * The true doctrine is that the property of the partners is their joint property, and they may sell and dispose of the same in good faith, as they deem proper; * * * and they have the right to prefer creditors, and even may, if all the partners consent to do so, dispose of the property to satisfy the individual debt of one of the partners, which would operate to decrease the assets of the firm, and to the detriment of the firm creditors; yet, nevertheless, they have such right to secure or pay the bona fide debt of one of the partners." To the same effect are *Goudy v. Werbe*, supra; *Elliott v. Pontius*, supra; *Henderson v. Trust Co.*, 143 Ind. 561, 40 N. E. 516; *Hardware Co. v. Thomas*, 147 Ind. 313-320, 46 N. E. 645, and authorities there cited; *Fisher v.*

Syfers, supra; *McFadden v. Ross*, 126 Ind. 341, 26 N. E. 78. The failure to find whether the transfer and mortgage were made with a fraudulent intent, to cheat, hinder, and delay the creditors of the dissolved firm, did not make the finding defective, so as to require appellant's motion for a venire de novo to be awarded; and hence there was no error in overruling the motion therefor. There being no error in the record, the judgment is affirmed.

(21 Ind. App. 63)

McCOLLUM et al. v. SHAW.

(Appellate Court of Indiana. Oct. 25, 1898.)

COUNTY COMMISSIONERS—SERVICES—FEES—ALLOWANCE—APPEAL.

1. Under Burns' Rev. St. 1894, §§ 7856, 7859 (*Horner's Rev. St. 1897, §§ 5769, 5772*), providing that any one aggrieved by a decision of the board of county commissioners may appeal to the circuit or superior court, except from decisions allowing for services voluntarily rendered or things voluntarily furnished for the public use, an appeal lies from a decision of the board allowing a claim of one of its members for services.

2. A board of county commissioners has such powers only as are authorized by statute.

3. Under Burns' Rev. St. 1894, § 7820 (*Horner's Rev. St. 1897, § 5735*), providing that the board of county commissioners "shall have all the duties, rights and powers incident to corporations, not inconsistent with the provision of this act," and section 7926 (5823), providing that the county commissioners shall receive \$3.50 "for each day engaged in the discharge of their duties," a member of the board is not entitled to fees for services in superintending work on county property under agreement with the board, rendered at times when the board was not in session.

Appeal from circuit court, Shelby county; W. J. Buckingham, Judge.

Appeal by Robert McCollum and others from a decision of the board of county commissioners allowing the claim of Jesse Shaw. Reversed.

Adams & Carter and Wilson & Thompson, for appellants. John C. Cheeney and Hord & Adams, for appellee.

BLACK, J. The appellee, Jesse Shaw, a member of the board of commissioners of Shelby county, filed his claim before that board on the 10th day of June, 1896. The claim was allowed on the same day by the other two members of the board in the sum of \$112.52. Robert McCollum, one of the two appellants here (said board being the other appellant), as a citizen and taxpayer of said county, appealed to the court below, where, a motion to dismiss the appeal having been overruled, the cause was tried by the court. In its special finding the court stated the facts substantially as follows: The appellee, at the times in question, was a duly elected and acting member of the board of commissioners of said county. He served as a member of the board for nine days at its regular March term, 1896, and for the same period at its regular June term, 1896; also

for one day at a special called session on the 14th day of December, 1895, and for two days at a special called session on the 6th and 7th of April, 1896. He paid out for the county, for freight and postage due from it, as was necessary, 52 cents. We may here remark that it is agreed by counsel that as to these services at regular terms and special sessions of the board the appellee was entitled to an allowance at the rate of \$3.50 per day, and that he was entitled to be reimbursed for the amount of 52 cents so paid out by him. It is not denied that for the foregoing items the appellee might properly have been allowed the sum of \$74.02. The dispute here relates to the other items of claim, amounting to \$38.50, which were shown in the special finding in substance as follows: The county owned 240 acres of land, upon which were situated certain buildings, described, and an orchard of 160 bearing apple trees. This farm was cultivated and managed by a superintendent elected by said board of commissioners, and residing on said premises, and said farm and buildings were maintained by said board as a "poor asylum," to provide for the paupers of said county, of whom there were 25, who were supported and cared for there. In the spring of 1896 said buildings had become out of repair, so that the stone steps leading into a building had fallen into decay; the cellar walls leaked, and water passed into the cellar; and it became necessary to repair the cellar walls, and to put a cement floor in the cellar. It was also necessary to repair the wash house, and to paint and repaper and otherwise repair the main building, at a necessary outlay of a large sum of money; also to build a granary to store wheat raised on the premises. All the apple trees were of one variety, except three trees, and it was proper and necessary that some of the trees should be grafted. Said board decided to make said repairs and improvements, and directed the appellee, as one of their body, to proceed to said poor asylum on the 30th of April and 4th of May, 1896, and to employ labor and procure material, and to point out the kind of repairs needed and desired, and to direct the same, which he did; and the employes were employed to do the work by the day, because the character of the work was such as to impress the board that this was the better way to do the work. The board employed one Hugh Hoskins to graft the fruit trees under the direction of the board; and the board delegated the appellee, as a member of the board, to meet said Hoskins on the farm on the 12th of May, 1896, and to point out to him the apple trees they desired grafted; also the number to be grafted with different varieties of fruit; and to see that the work was properly done, and to see that said repairs and improvements were progressing as directed; which service the appellee did as a member of said board. The county owned a court house, county jail, and jailer's residence at Shelby-

ville, and it became necessary to put in water-closets in the jail, jailer's residence, and court house, and to build sewers connecting with a sewer in a public street; also to have a large amount of plumbing done in said buildings, to remove an iron railing in the court room, to change the interior thereof, and to purchase a carpet for the court room, and to make other improvements; all of which was ordered by said board. On the 9th and 15th of May, 1896, the appellee, as a member of said board, and at its request, served two days in supervising said work, overseeing the same, and conducting it according to the wish of the board. Said board had in contemplation the adoption for said asylum of a water system and a heating system, the necessity for which was stated at length in the finding, and, having heard that Marion county, Ind., had successful systems in operation, said board, on the 20th day of December, 1895, visited the Marion county asylum, to examine said systems, with a view of gaining information in reference thereto, or of adopting the same or some other system in Shelby county; and also examined into the management of said institution, with a view of adopting all useful suggestions. On the 11th of January, 1896, the appellee and another member of said board served as such one day in employing labor, buying material, having a door cut in a heavy brick wall, to convert an old vault in the court house into a room for an office by direction of said board, which was afterwards occupied as an office by the county superintendent of schools. February 27, 1896, the appellee, with the other members of said board, served one day as such in making a proper and necessary visit to the poor asylum, for the purpose of taking an inventory of the personal property of the county in possession of an outgoing superintendent, and to see that he was properly accounting for the same. On the 12th of March, 1896, a new superintendent having been installed in the poor asylum, it became necessary and proper, it was found, for the appellee and the other members of the board to visit said asylum, and to advise and direct him as to the management and control of the paupers of said asylum, which they did. A public bridge over Blue river had become out of repair, and said board decided to repair it, and on the 14th of April, by direction of the board, one of their number went to a mill to purchase lumber for the repairs, and the appellee, with the other member, was directed by the board to employ the hands, tear up the old floor, and direct the employes when and how to put down the new floor, and direct the work on the same, which was done by the appellee. It became proper and necessary for said board to erect a bridge over Big Sugar creek, which the board decided to do, and said board, with the appellee as a member, served one day in locating said bridge, and in staking off the location for the abutments and piers, on a day when the

board was not in regular or special session, but had come together on their own motion to locate the bridge. At the time the appellee rendered the services in looking after the repairs at the poor farm, the court house, and the county bridges, and when he visited the Marion county poor farm, the board of commissioners was not in a regular, special, or called session. Upon these facts the court stated as its conclusions of law that the appellee served as a member of the board of commissioners of Shelby county, in the discharge of his duties as such commissioner, for 32 days, and expended 52 cents for the county, which he should have refunded to him, and that he should recover against said board \$112.52, and that the appellant McCollom should pay the costs; to which conclusions the appellant McCollom excepted.

It is contended on behalf of the appellee that the court erred in overruling the motion to dismiss the appeal, it being suggested in argument that no appeal lies from the action of a board of county commissioners in allowing a claim against the county. The right of appeal in such cases is provided by statute, and recognized by many decisions. See sections 5769, 5772, Horner's Rev. St. 1897 (sections 7856, 7859, Burns' Rev. St. 1894); Myers v. Gibson, 147 Ind. 452, 46 N. E. 914; Gemmill v. Arthur, 125 Ind. 258, 25 N. E. 283; Waymire v. Powell, 105 Ind. 328, 4 N. E. 886; Holman v. Robbins, 5 Ind. App. 436, 31 N. E. 863; Van Auker v. Hook, 6 Ind. App. 610, 34 N. E. 104. The allowance to the appellee, aside from his reimbursement for the small sum paid by him for freight and postage, was stated by the court to be for service for 32 days as a member of the board of commissioners of the county in the discharge of his duties as such commissioner, at the rate of \$3.50 per day. It appears that the services thus compensated were rendered on 21 days when the board was in session and on 11 days when the board was not in session, and the dispute before us relates solely to the rightfulness of the allowance for these 11 days. The powers of the board of county commissioners are statutory, and all its acts must be expressly or impliedly authorized by statute. Gavin v. Board, 104 Ind. 201, 3 N. E. 846; Board v. Barnes, 123 Ind. 403, 24 N. E. 137; Board v. Bradford, 72 Ind. 455; Hight v. Board, 68 Ind. 575; Badger v. Merry, 139 Ind. 631, 39 N. E. 309; State v. Hart, 144 Ind. 107, 43 N. E. 7; Myers v. Gibson, supra. That the law will not uphold or tolerate contracts made by the board of county commissioners with one or more of its members for services for the performance of which it might have employed other persons, and that no allowance may be made by the board by way of compensation for such services voluntarily rendered for the county, is well established. Waymire v. Powell, 105 Ind. 328, 4 N. E. 886; Pratt v. Luther, 45 Ind. 250; Stropes v. Board, 72 Ind. 42; Hornung v. State, 116 Ind. 458, 19 N. E. 151; Brown v.

Bank, 137 Ind. 655, 667, 37 N. E. 158. Therefore it is not pretended on behalf of the appellee that the services rendered by him when the board was not in session were rendered by way of performance of contracts, or that compensation could properly be allowed for them as for services voluntarily rendered. His account allowed by the board purported to be for services rendered as a county commissioner; and as to those services rendered when the board was not in session it is claimed in argument on his behalf that he was acting under authority delegated to him from the board in session, and also that he performed the services in the capacity of a county commissioner. The compensation allowed by the board does not appear to have been regulated, either in the statement of the account or in the allowance thereof, by any contract price, or by the value of the services; but he claimed and was allowed the statutory compensation per diem for the discharge of his duties as a county commissioner. If such services were within his duties as county commissioner, the authority to render them at the expense of the county must appear in the statutes.

It is provided by the state constitution (article 6, § 10) that the general assembly may confer upon the boards doing county business in the several counties powers of a local administrative character. The statutes relating to the organization of boards of county commissioners, their powers and duties, indicate that the duties of a county commissioner are to be performed, and his official authority is to be exercised (at least where there is no special provision to the contrary), as a member of the board of which he is a constituent part at lawfully convened sessions of the board. By the terms of the statute (section 5735, Horner's Rev. St. 1897; section 7820, Burns' Rev. St. 1894), the commissioners are to be considered a body corporate and politic by the name and style of "The Board of Commissioners of —," and as such and in such name may prosecute and defend suits, and have all other duties, rights, and powers incident to corporations, not inconsistent with the provisions of the act of which this provision forms a part. Much stress is placed by counsel upon this statutory declaration of corporate power. But the powers incident to corporations thus announced are limited to such as are not inconsistent with express statutory provisions. Such powers are conferred upon the commissioners not individually, but collectively as a board, acting as such within the limited authority, and according to the expressed methods of the statutes. There is not only a broad difference between a private corporation organized for a private purpose, though subserving a public interest, and a public corporation, like a county or city organized for public purposes only, and whose obligations must be paid from public funds raised for public purposes only, a corporation of which latter class may always de-

fend on the ground that a supposed contract was outside the authority conferred on it by law (*Driftwood Valley Turnpike Co. v. Board of Com'rs Bartholomew Co.*, 72 Ind. 226; *Rising v. City of Ft. Wayne*, 187 Ind. 427, 37 N. E. 328); but there is a distinction also between the corporate character of a county and that of such municipal corporations as cities and towns (*Rob. Co. & Tp. Off.* § 4; *Board of Com'rs v. Allman*, 142 Ind. 573, 42 N. E. 206). "Considered with respect to their corporate powers, counties rank low down in the scale of corporate existence, and are frequently termed quasi corporations." *State v. Hart*, 144 Ind. 107, 43 N. E. 7. "The powers of the board of commissioners are limited, and for any act done by them not within the scope of their powers the county is not liable." *Id.* In *Potts v. Henderson*, 2 Ind. 327, it was held that a statute authorizing boards of county commissioners to contract for building bridges, and to appoint one or more persons to superintend the same, did not empower the commissioners to appoint agents to make such contracts. Where a contract between a board of commissioners and an architect provided that the board had the right to order changes in the plans and specifications, it was held that this meant that the request to make changes should come from the board acting officially, and not from a member of the board acting individually, and in his private capacity. *Board v. Bunting*, 111 Ind. 143, 12 N. E. 151. In *Archer v. Board*, 3 Blackf. 501,—an action against a board of county commissioners to recover for work and labor and for goods sold and delivered,—it was said: "The defendants are only chargeable in their corporate capacity. No act of theirs, relative to the subject-matter of this action, could render them liable in their character of commissioners unless such act was done by them at a regular meeting of the board at the time fixed by law." See, also, *Campbell v. Breckenridge*, 8 Blackf. 471; *Potts v. Henderson*, 2 Ind. 327. In *Board v. Chitwood*, 8 Ind. 504, it was held that a board of county commissioners could not meet at any time other than in the terms prescribed by statute, and that it could only transact business as a board when legally in session. In *Board v. Ross*, 46 Ind. 404, it was said that it would be making a dangerous precedent to hold that county commissioners could do acts binding on the county when not in session, or when acting successively and separately. In *Torr v. State*, 115 Ind. 188, 17 N. E. 286, it was said: "As a matter of course, a board of commissioners must be lawfully in session in order to do any valid official business, and it cannot lawfully convene itself in special session by an order adjourning over the term to a day in vacation." The commissioners cannot lawfully convene as a board except at the times prescribed by statute, unless called in special session by the auditor or other county officer designated by statute. See *Jussen v. Board*, 95 Ind. 567;

Wilson v. Board, 68 Ind. 507; *Board v. Brown*, 28 Ind. 161; *Oliver v. Kightley*, 24 Ind. 514. The board of commissioners has incidental implied powers, but they are such that without them it could not adequately perform its express powers in full accordance with the purpose of the legislature. For any supposed power there must be a legislative enactment, to which it may be referred legitimately. See *Board v. Barnes*, 123 Ind. 403, 24 N. E. 137. In *Waymire v. Powell*, 105 Ind. 323, 4 N. E. 886, it was held that a board of county commissioners had no authority to order an allowance of \$3.50 for per diem as a commissioner of said board for one day's service in inspecting, examining, and measuring the stone abutments of a certain new bridge. It was said: "The order recites that the allowance was for 'per diem as a commissioner of the board,' etc., but it also shows that it was not for 'attendance as a member of the county board or board of equalization,' and it was, therefore, made without any authority of law." The statute in relation to the compensation of county commissioners in force when the order in that case was made, and quoted in the opinion of the supreme court, provided (section 5823, Rev. St. 1881): "The county commissioners' fees shall be as follows: For each day's attendance as a member of the county board or board of equalization each commissioner shall receive three dollars and fifty cents." This was superseded by section 1 of an act of 1889 (Acts 1889, p. 186; section 5823, *Horner's Rev. St.* 1897; section 7926, *Burns' Rev. St.* 1894), entitled "An act fixing the salaries of county commissioners," etc., said section 1 being as follows: "That the county commissioners of this state shall each receive for their services as such commissioners for each day engaged in the discharge of their duties, the sum of three dollars and fifty cents: provided, that in counties where the population shall exceed one hundred thousand as shown by the last census, such commissioners shall each receive in lieu of such per diem, the sum of eighteen hundred dollars per annum, to be paid out of the county treasury." It is claimed for the appellee that the difference in the terms of the existing statutory provision in relation to the compensation of county commissioners and that which it superseded should distinguish the case at bar from a case involving an application of the superseded statute. While the statute in its present form entitles county commissioners to receive the designated sum for their services as such commissioners for each day engaged in the discharge of their duties as such commissioners, they were formerly entitled to receive the same sum for each day's attendance as a member of the county board or board of equalization. The later statute of 1889 does not change the character of the official duties of the commissioners, and, so far as their official powers and duties remain unchanged by statute, the services for which they may receive

compensation as officials remain the same as under the earlier statute. So far as any of the services rendered by the appellee on the 11 days in question are concerned, no statute has been pointed out to us, and none is found by us, except such as forbid an implication that the rendering of such services by a county commissioner alone or jointly with other commissioners, when not participating as a member of the county board in a lawful session of the corporate body, entitles him to any compensation therefor from the county. If differences exist between the county commissioners and the county officer who alone has authority to call the board to meet in special session, the determination by that officer of the question whether or not the public interests demand that such a meeting be convened, having been committed by statute to him, instead of the commissioners, or any of them, cannot be reversed, or set aside, or ignored by them, or any of them. They cannot, while in lawful session, prepare for circumventing such determination; and cannot, whether in lawful session or not, in effect contract with themselves to render unofficial service under a pretense of a delegation of their official authority as a board to the individual members thereof. The services in dispute not having been rendered by the commissioner in discharge of his duties as such, he is not entitled to compensation for them. The judgment is reversed, and the cause is remanded, with instruction to state conclusions of law in accordance with this opinion.

(22 Ind. App. 475)

MICKS et al. v. STEVENSON.¹

(Appellate Court of Indiana. Nov. 1, 1898.)

APPEAL—OBJECTIONS NOT MADE BELOW—SALE—WHAT CONSTITUTES.

1. The objection that general averments that plaintiff complied with all the terms of an agreement, and that the sale therein stipulated was consummated at a sum approved by defendants, are not a sufficient showing of performance, will not be considered, where made for the first time on appeal; no material averment being entirely omitted from the complaint.

2. A contract of sale was duly executed, containing conditions for deferred payments, and for assuming debts. *Held*, that the sale was "consummated," so as to entitle the agent to commissions for effecting it, although the conditions were never complied with.

Appeal from circuit court, Elkhart county; L. W. Vail, Special Judge.

Action by Milton L. Stevenson against J. E. Micks and E. G. Gilman. There was a judgment for plaintiff, and from the judgment, and an order denying a new trial, defendants appeal. Affirmed.

Dodge & Hubbell, for appellants. Chamberlain & Turner, for appellee.

HENLEY, C. J. Appellants were on the 23d day of April, 1896, the owners of one-half of the capital stock of the Home Electric

¹ Rehearing denied.

Light & Power Company, a corporation doing business in the city of Elkhart, Ind., and upon that day entered into the following contract with appellee: "This agreement, made this 22nd day of April, 1896, between Milton L. Stevenson, of the city of Elkhart, county of Elkhart, state of Indiana, party of the first part, and J. E. Micks and E. G. Gilman, also of said city of Elkhart, parties of the second part, witnesseth: That, for and in consideration of the covenants herein by the parties of the second part, said party of the first part agrees to negotiate a sale to one Carroll Collins, of Champaign, in the state of Illinois, of a one-half interest in the Home Electric Light & Power Co., a corporation doing business in the said city of Elkhart; said one-half interest being owned by said parties of the second part hereto. It is agreed that, upon the consummation of said sale at a sum first to be approved and accepted by the parties of the second part, that the said parties of the second part shall pay to said party of the first part the sum of one thousand dollars (\$1,000). In witness whereof, we have hereunto set our hands this day and date first above mentioned. Milton L. Stevenson, Party of the First Part. J. E. Micks, E. G. Gilman, Parties of the Second Part." Appellee's complaint is founded upon this contract. Said contract is set out in the body of the complaint, and it is alleged that appellee duly performed all the covenants and agreements upon his part as stipulated in the contract; that he negotiated a sale of said one-half interest in said stock to said Carroll Collins, the person named in said agreement; that appellants were the owners of said one-half interest so sold, and that said sale so made was made at a price approved and accepted by appellants; and that the sum of \$1,000 is due and unpaid. Judgment is asked for \$1,000. Appellants answered by general denial. There was a trial by jury, and a verdict for \$1,000 in favor of appellee. Appellants' motion for a new trial was overruled, and judgment rendered in accordance with the verdict of the jury. The assignment of errors on appeal to this court questions the sufficiency of the complaint, and the action of the lower court in overruling the motion for a new trial.

The complaint is attacked for the first time upon appeal, and counsel for appellants in their able brief nowhere attempt to show to this court, or contend, that a material averment has been omitted from the complaint. It is claimed by appellants' counsel that the general averments that appellee complied with all the terms of the agreement upon his part, and that the sale was consummated at a sum approved and accepted by appellants, is not a sufficient showing of performance of the terms of the agreement upon the part of appellee, but that appellee should have stated what he did, and from such statement of facts the court could conclude whether or not he had complied upon his part with the terms of the contract. Without discussing the mer-

its of appellants' contention, it is enough to say that the averments of appellee's complaint were sufficient, under which the court could without error admit proof of what appellee actually did towards the performance of the conditions imposed upon him by the contract. It is only where a material averment is entirely omitted from a complaint that this court will hold the complaint bad when attacked for the first time upon appeal. This we think is the correct rule. *Assurance Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95, and cases there cited.

All but two of the various reasons urged by appellants in their motion for a new trial are waived on account of failing to discuss them in the briefs filed in this court. The two reasons discussed relate to the giving of certain instructions to the jury, and the admission of certain evidence. Appellee offered in evidence a written contract between the Home Electric Light & Power Company, O. N. Lambert, and the appellants, Micks and Gilman, as parties of the first part, and the said Carroll Collins, as party of the second part. This contract provided for the sale and transfer to said Carroll Collins of all the stock in the said Home Electric Light & Power Company. It further provided that said Collins should pay the sum of \$2,000 cash at the time of the execution of the contract, the payment of \$8,000 on or before the 15th day of December, 1896, and the further payment of stated amounts at stated times therein mentioned; that said Collins should assume certain existing indebtedness; and that the stock should not be transferred to said Collins until the \$8,000 payment which was due on or before December 15, 1896, had been paid by him. It is not contended that the contract was not duly executed by all the parties thereto, but it is claimed by appellants' counsel that no sale was consummated under the contract, because it was conditional, and the conditions were never complied with by the purchaser, and that by the terms of the contract no sale could be consummated prior to the payment of the \$8,000 due December 15, 1896. If this agreement evidenced a sale of the stock of appellants to said Carroll Collins, it was certainly competent evidence upon the trial of this cause. Chancellor Kent says, "A sale is a contract for the transfer of property from one person to another for a valuable consideration, and these things are requisite for its validity, viz. the thing sold, which is the object of the contract, the price, and consent of the contracting parties." 2 Kent, Comm. 468. The contract offered in evidence was a contract for the transfer of property, and all of the things requisite for its validity are therein recited. The conditions named in the contract make it none the less a sale. They were such conditions as were imposed by the seller, and agreed to by the purchaser. The ownership and equitable title to the property described in the contract passed to the said Carroll Collins.

The sale was complete, and appellee could have nothing to do with, or control in any manner, the terms thereof, or the conditions imposed upon the buyer. In the case of *Beardsley v. Beardsley*, 138 U. S. 262, 11 Sup. Ct. 318, the appellant had signed and delivered to appellee a paper in the following words: "I hold of the stock of the Washington & Hope Railway Company \$33,250, or 1,350 shares, which is sold to Paul F. Beardsley [the appellee], and which, though standing in my name, belongs to him, subject to a payment of \$8,000, with interest." It was held in the above-cited case that the equitable title and ownership of the stock passed to the party to whom the paper was delivered, with a reservation of the legal title by the former as security for the purchase money. See 21 Am. & Eng. Enc. Law, p. 483.

The question of whether or not appellee was instrumental in effecting the sale as evidenced by the contract under consideration, and whether such sale grew out of the contract upon which appellee's action was founded, was a question for the jury, and was decided adversely to appellants. The instructions complained of by appellants, we think, stated the law correctly. We find no error in the record. Judgment affirmed.

(21 Ind. App. 88)

CARPENTER et al. v. CHICAGO & E. I. R. CO.

(Appellate Court of Indiana. Oct. 27, 1898.)

ACCIDENT INSURANCE—EMPLOYER AS INSURED—
BENEFIT OF EMPLOYEE—ACTIONS.

A contract signed by an insurance company and defendant railroad company certified that decedent was insured against accidents so long as he remained in the employ of defendant, and that the contract was made in accordance with the policy issued by the insurance company to defendant for the benefit of its employees. The complaint alleged the taking out of a policy by defendant, the deduction of monthly premiums from decedent's wages, and the injury. It was not alleged that the wages deducted were not applied by defendant to the payment of premiums to the insurance company, or that defendant received or retained moneys from the insurance company due the estate of decedent under the policy. *Held*, that defendant was not liable, since decedent was the third party for whose benefit the insurance was taken out, and hence his estate could enforce the contract against the insurance company.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Action by Mary E. Carpenter and others against the Chicago & Eastern Illinois Railroad Company and another on a contract of insurance. From a judgment rendered on sustaining a demurrer by defendant railroad company, plaintiffs appeal. Affirmed.

E. S. Holliday and Frank A. Horner, for appellants. George A. Knight and W. H. Lyford, for appellee.

HENLEY, C. J. The only error assigned by appellants in this cause is that the lower

court erred in sustaining appellee's demurrer to appellants' complaint. Appellants are the only heirs of one Emanuel Carpenter, deceased, and are the children and widow of said Emanuel Carpenter, deceased, whose estate was settled without administration. This action was brought against the appellee and the American Casualty & Insurance Company. Appellee appeared and separately demurred to the complaint, stating as cause that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the lower court, and, appellants refusing to plead further, judgment upon demurrer was rendered in favor of appellee.

The complaint is upon a written contract, and is in one paragraph. It alleges the death of Emanuel Carpenter, the settlement of his estate without administration, and that appellants are his heirs, and only heirs at law. It alleges that a certain contract was executed by all of the parties to this action, and makes the said contract a part of the complaint. This contract is in the following words: "This is to certify that Emanuel Carpenter, Sec. 25, Coal Bluff, is insured by the American Casualty Insurance and Security Company of Baltimore, Md., against accident resulting in bodily injury or death. By the terms of the policy the above-named person, so long as he remains an employé of the Chicago & Eastern Illinois Railroad Company, will receive through the paymaster of that railroad company in case of accident, however and whenever happening between the date hereof and the first day of May, 1893, the following benefits: (1st) For accidental injury not resulting in death, one-half of his usual wages, during disablement, if not more than fifty (50) weeks; also, doctor bills. (2nd) For accidental injury resulting in his death, his legal representatives will receive one-half of his usual wages for one year, and doctor bills and funeral expenses. The above benefits will not accrue to said person except for accidents sustained while he is in the employ of the Chicago & Eastern Illinois Railroad Company, and only between this date and the first day of May, 1893. No benefits will accrue hereunder for any accident occurring as the result of a riot or other violation of the law. This certificate is issued in accordance with the policy of insurance issued by the American Casualty Insurance and Security Company to the Chicago & Eastern Illinois Railroad Company for the benefit of its employees. Dated at Chicago, Ills., this 1st day of July, 1892. [Signed] American Casualty Insurance & Security Co., W. E. Midgley, President. Chicago & Eastern Illinois R. R. Co., by Charles H. Rockwell, Gen'l Supt." It is further alleged that a certain policy of insurance written by appellee's co-defendant was taken out by appellee for the benefit of its employes, and that the premium paid for said policy was collected from said employes by appellee retaining a stated amount out of

the monthly wages of each insured employé; that appellants' decedent was one of appellee's employes, and that appellee retained out of his monthly wages the sum of \$2 per month, which went into the treasury of appellee, to pay for said insurance; that appellants' decedent was accidentally injured while in the employ of appellee, and in the line of his said employment, and that said accidental injury occurred during the term of said insurance, and that from such injury he was wholly disabled, and lingered a long time, and finally died as a result thereof; that the wages, doctor bills, and other moneys which said contract and policy of insurance provided should be paid on the happening of the events related in the complaint have never been paid. Judgment for \$400 is demanded.

Does the complaint state facts sufficient to create a liability upon the part of the appellee? We are unable to find in the complaint any averment charging appellee with a breach of any contract declared upon, or the breach of any duty owing to appellants or their decedent. It is not charged that the moneys, or any part thereof, which appellee deducted from decedent's wages, was not applied to the payment of premiums due from him to appellee's co-defendant; neither is it charged that appellee received and retained any moneys from the said insurance company which were due appellants under the policy taken out for the benefit of Emanuel Carpenter, deceased. It seems clear to us that this action cannot be maintained against appellee. There was no contract of insurance between appellee and Emanuel Carpenter. The contract of insurance was entered into between appellee and its co-defendant, and was for the benefit of said Emanuel Carpenter; he accepted its terms, and paid to appellee the amounts necessary to insure him the benefits; he was the third party for whose benefit the contract was made; and, under the well-settled rules of law as announced by the decisions of our supreme court, he, or his heirs in case of his death, could enforce the contract against the insurance company, if his injury was such a one as would bring him within the provisions of the policy. *Dunlap v. McNeil*, 35 Ind. 816; *Devol v. McIntosh*, 23 Ind. 529; *Miller v. Billingsley*, 41 Ind. 489.

We find no error in the record. Judgment affirmed.

(21 Ind. App. 106)

GRIM v. ADKINS et al.

(Appellate Court of Indiana. Oct. 28, 1898.)

PUBLIC OFFICERS—AUTHORITY—EXECUTION—COLLATERAL ATTACK—COSTS.

1. Authority of one acting as justice of the peace under an appointment cannot be questioned in replevin for goods levied on under judgment rendered by him.
2. That an execution is for five cents more than the judgment does not render it void, or subject to collateral attack.

3. Costs in replevin against a marshal and execution creditor for goods taken on the execution cannot be recovered against the execution creditor, it appearing that the property was detained by the marshal, and that the execution creditor never had possession thereof, and it not appearing that he advised the levy thereon, or had demand made on him therefor.

Appeal from circuit court, Greene county; William W. Moffett, Judge.

Replevin by William W. Grim against Charles C. Adkins and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. O. Sample, for appellant. H. C. Shaw, for appellees.

COMSTOCK, J. Appellant (plaintiff below) brought this action against appellees to recover possession of certain personal property which he alleged they wrongfully withheld from him. An issue having been formed by general denial, at the request of appellant the court made a special finding of facts, and stated its conclusions of law thereon. Appellant excepted to such special finding of facts. A motion for a new trial was overruled, and judgment rendered against appellant. The errors assigned are: (1) That the court erred in its conclusions of law upon the special finding of facts; (2) the court erred in rendering judgment on the special finding of facts and conclusions of law against appellant.

The court found that at the December term, 1893, of the board of commissioners of Greene county, Daniel A. Foster was duly appointed a justice of the peace for Jefferson township of said county, to fill a vacancy of such office in said township; that in January, 1894, he qualified as such justice of the peace pursuant to such appointment; that at the general election held in November, 1894, said Foster was duly elected a justice of the peace for said township, but that he did not qualify after said election as such justice of the peace, but continued to discharge the functions of said office under said appointment; that after said election, and while said Foster was so acting, Seyfort (appellee) brought suit before said justice of the peace against William Grim (appellant) for the possession of real estate, and damages for its detention, which cause was tried, and resulted in a judgment in favor of Seyfort for the possession of said real estate, and five dollars damages for the detention of the possession thereof, and for costs; that thereafter said Foster, acting as such justice of the peace, issued a writ of possession and execution on said judgment to Adkins, the duly-qualified and acting marshal of the incorporated town of Worthington, in said county, commanding him to make the said sum of five dollars damages, with interest and costs accrued in said cause. Adkins levied on the goods set out in the complaint to satisfy said writ, whereupon appellant instituted this action to replevin the same. Appellant's theory is,

that Foster was not a justice of the peace when he rendered the judgment; that he "could not, under his appointment, hold over after the election; and that, as he did not qualify after his election, he could not hold by virtue of the election, and that thereupon his acts were void, and that the acts of Adkins were also void so far as they related to said execution. Counsel for appellees contend that the question thus raised cannot be considered on this appeal, for the reason that the right to a public office cannot be tried in an action in replevin. Upon the subject of replevin it is stated in 20 Am. & Eng. Enc. Law, at page 1047, that neither the right to an office, the constitutionality of a statute, nor the regularity and sufficiency of an execution can be tried. In *Baker v. Wambaugh*, 99 Ind. 312, it is held that the right of a justice of the peace, acting under color of appointment to fill a vacancy, cannot be questioned by a suit to enforce the collection of a judgment by him rendered. In *Gumberts v. Express Co.*, 28 Ind. 181, it is held that, where one is in the exercise of an office in which the public is concerned, his authority as an officer in the performance of official acts can only be questioned in a direct proceeding to contest his right to hold the office. See, also, *Desmond v. McCarthy*, 17 Iowa, 525; *Creighton v. Piper*, 14 Ind. 182; *McInstry v. Tanner*, 9 Johns. 135; *Potter v. Luther*, 3 Johns. 431; *Reed v. Gillet*, 12 Johns. 296; *Parker v. State*, 133 Ind. 173, 32 N. E. 836, and 83 N. E. 119; *Mowbray v. State*, 88 Ind. 524. In *Wilcox v. Smith*, 5 Wend. 234, the court says: "An individual coming into office by color of an election or appointment is an officer de facto, and his acts in relation to the public or third persons are valid until he is removed, although it will be conceded that his election or appointment was illegal." Foster was acting as justice of the peace under an appointment, and it is clear that his authority cannot be questioned in this proceeding.

Appellant's counsel further contend that, because an execution for a greater amount than the judgment was issued, it was, therefore, void, and can be attacked collaterally. The special finding shows that the judgment was for \$5, and costs taxed at \$18.20, while the execution commanded the officer to make the sum of \$5 the amount of the judgment, and costs taxed at \$18.25. In 8 Enc. Pl. & Prac. p. 429, upon this question the law is thus, as we think, correctly, stated: "A variance in amount between the execution and a judgment which is not sufficient to destroy the identity of the judgment on which the writ issued does not render the writ void, but voidable only, especially when the variance is due to clerical error, or to miscalculation of the amount remaining due on the judgment;" citing many decisions. The error in said writ is not sufficient to destroy the identity of the judgment.

Appellant's counsel further contend that the

court erred in its fifth and seventh conclusions of law. The fifth conclusion of law is as follows: "Plaintiff should recover costs up to the return to plaintiff by defendant Adkins of the items of property mentioned in finding No. 10½." Said finding 10½ was, in substance, that on the 23d day of August, 1896, defendant Adkins delivered over to the possession of said Grim certain articles of property therein mentioned since the date of levy. The court found that defendant (appellee) was entitled to hold the remainder of the goods under the writ. The court properly, in its discretion, made a division of the costs. The seventh conclusion reads as follows: "That defendant Seyfort should recover his costs against the plaintiff, and that the plaintiff should take nothing against defendant Seyfort." The findings show that the property was detained by Adkins; that demand was made on him for possession of the property before the commencement of this suit; that Seyfort at no time had possession in person of any part thereof. Nor do the findings show that Seyfort advised the levy to be made on the goods, nor was any demand made on him for them. We find no error for which the judgment of the lower court should be reversed. Judgment affirmed.

(21 Ind. App. 665)

BLUMENTHAL et al. v. STATE.¹
(Appellate Court of Indiana. Oct. 28, 1898.)
HIGHWAY—ON RAILROAD RIGHT OF WAY—ADVERSE USER.

1. A highway may be acquired by adverse user on a railroad right of way parallel with the railroad.

2. Uninterrupted use by the public of a road continuously for 20 years constitutes it a highway.

Appeal from circuit court, Lake county; John H. Gillett, Judge.

August Blumenthal and others were convicted of obstructing a highway, and appeal. Affirmed.

N. O. Ross and Geo. O. Ross, for appellants. T. S. Fancher, Thos. J. Heard, and O. J. Bruce, for the State.

ROBINSON, J. This cause was transferred to this court by the supreme court. Appellants were tried and convicted for obstructing a public highway. The only error assigned is the overruling of the motion for a new trial. A new trial was asked because the finding of the court was contrary to the law and the evidence. The highway in question lies within the right of way of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and parallel to the track; and, if a highway exists at the place in question, it was established by user. It is argued by counsel that the land in controversy, having been appropriated for and used by the railway company for its right of way, cannot be appropriated, either directly or indirectly, for

another and different use. But this question has been decided adversely to appellants in the case of *Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crown Point* (Ind. Sup.) 50 N. E. 741. In that case the court said: "One proposition relied upon by the appellant is that, having appropriated land to its right of way and station grounds, no power existed to take, by direct proceeding, any part thereof, laterally, for a street or public highway, and that, therefore, no right existed to take the same indirectly, as by user or estoppel. It is not doubted that lands appropriated to one public use are not, in the absence of special authority, subject to condemnation for another and inconsistent public use. This case, however, presents no question at variance with this doctrine. The question here is, can a railroad company, holding property for the uses of a railway, part with the same for another public use? That it may do so by express grant is not doubted. That the doctrine urged is for the protection of the holder of the first public use is certain. That the railroad company may waive this protection seems equally certain; and, if it may, just why the company is not bound by the principles of waiver and estoppel, under which the individual may surrender his lands to the easement of a street or highway arising from adverse user, it is difficult to see. That one public use may be lost by user or dedication to another has been directly decided. *Board v. Huff*, 91 Ind. 333; *Easley v. Railway Co.*, 113 Mo. 236, 20 S. W. 1073; *Turner v. Railroad Co.*, 145 Mass. 433, 14 N. E. 627."

The only remaining question argued is the sufficiency of the evidence. There was evidence that the public had continuously, without interruption, used the road in question as a highway for more than 20 years prior to the obstruction complained of. In the case of *Hart v. Trustees*, 15 Ind. 226, it was held that the uninterrupted use of a road by the public continuously for 20 years constituted it a public highway of an undefined width, and it was limited to the width it occupied at the end of the 20 years. See *Board v. Huff*, 91 Ind. 333. There is no error in the record. Judgment affirmed.

(21 Ind. App. 74)

KANE et al. v. SEFRIT et al.
(Appellate Court of Indiana. Oct. 25, 1898.)
VALUE—EVIDENCE.

The fact that a purchaser of an article, the balance of the purchase price of which he refuses to pay, on the ground that it was not up to warranty, or worth more than had already been paid, mortgaged it, with other articles, does not tend to show that he valued it at the price paid, there being no representation in the mortgage as to the value of any of the articles.

Appeal from circuit court, Daviess county; D. J. Hefron, Judge.

Action by Thomas Kane & Co. against Charles G. Sefrit and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

¹ Rehearing denied.

G. G. Barton, for appellants. Gardiner & Gardiner, for appellees.

HENLEY, C. J. The appellants in this cause filed their complaint in one paragraph upon two promissory notes executed by appellees for a part of the purchase price of a certain gas engine. Appellees answered in two paragraphs. The first paragraph of answer averred that the notes were given without any consideration; the second, that the gas engine purchased by appellees, and for which the notes in suit were executed in part payment, was not such an engine as appellants had warranted it to be; that the balance of the purchase price other than the two notes in controversy had been paid by appellees in cash; and that, on account of the defective working of the engine, which is particularly described in the answer, the said payment of \$100 in cash was in fact a full consideration therefor; that appellants' warranty had failed, and appellees demanded judgment in their favor. A reply was filed, denying the material allegations of the answer. It was upon the issues thus formed that a jury in the lower court returned a general verdict in favor of appellees. Appellants moved for a new trial. The motion for a new trial was overruled, and judgment rendered in favor of appellees. The overruling of appellants' motion for a new trial is the only error properly assigned to this court. Under this specification of the assignment of errors, appellants' counsel argue two questions: First, it is contended that the verdict is not sustained by the evidence. We find from a careful reading of the evidence that it is very conflicting, and that much evidence was introduced supporting appellees' second paragraph of answer. The rule that this court will not weigh the evidence is too firmly established to require a citation of authorities to sustain it. It is next contended that the lower court erred in refusing to permit appellants to introduce in evidence certain chattel mortgages executed by these appellees to third parties to secure the payment of debts, in which mortgages the gas engine, together with a large amount of other chattels, were named as the mortgaged property. Appellants' counsel contend that these mortgages tended to prove that appellees had mortgaged the gas engine mentioned in the second paragraph of answer at its full purchase price. In neither of the mortgages offered in evidence is any value placed upon any specific article therein described, and nowhere therein is any representation made as to the value of the gas engine included in the chattels mortgaged. We are unable to see how these mortgages, executed by appellees, in any manner placed a value upon the gas engine, or, for that matter, upon any one of the articles described therein. We think the lower court properly refused to admit them in evidence. We find no error. Judgment affirmed.

61 N.E.—32

(23 Ind. App. 306)

HENRY v. MOBERLY.¹

(Appellate Court of Indiana. Nov. 1, 1898.)

LIBEL—STATEMENTS CONDITIONALLY PRIVILEGED—MALICE—FALSITY—EVIDENCE—DAMAGES.

1. Where an alleged libel was made under qualified privilege, plaintiff must prove that the publication was malicious and without probable cause.

2. A school trustee, at the request of his associates, put in writing certain charges, that a teacher applying for reappointment had claimed wages not due her, and knowingly made false statements in order to obtain them. He had previously said or written nothing derogatory of her. They were on friendly terms, had never had any trouble, and had always met each other courteously. Held not to justify a finding that the charges were maliciously made.

3. A statement in writing by a school trustee to his associates, of charges against a teacher's integrity, as a reason for not re-employing her, is a privileged communication.

4. In order to hold a person liable as for falsely and maliciously making privileged statements concerning a third person, it is essential that he knew they were false.

5. An alleged libel in the guise of a privileged communication by a school trustee to his associates, protesting against the employment of a certain person as teacher, which did not prevent her employment, and was not communicated to any other persons, and did not occasion any financial loss, will not warrant more than nominal damages.

Black, J., dissenting.

Appeal from circuit court, Clay county; S. M. McGregor, Judge.

Action by Mary R. Moberly against James R. Henry. There was a judgment for plaintiff, and defendant appeals. Reversed.

Willis Hickam, Wm. R. Harrison, J. C. Robinson, George A. Knight, and James A. McNutt, for appellant. I. H. Fowler, D. H. Downey, John R. East, and Hollday & Byrd, for appellee.

WILEY, J. In June, 1889, appellant was a member of the board of school trustees of the town of Gosport, and was its treasurer, and had been for many years prior thereto. Appellee had been employed by said school trustees as a teacher in the public school of said town, and did teach therein during the school year of 1888 and 1889. At a meeting of the board held on the 21st day of June, 1889, called specially to consider the application of appellee to be re-employed for the next ensuing school year as a teacher, appellant, as a member of said board, filed a written protest against so employing appellee. The majority of said board refused to consider the objections therein urged to her employment, and did favorably consider appellee's application, and did contract with her to teach in said school for the next ensuing year. After such protest was filed, and appellee was re-employed as indicated, appellant withdrew the protest filed by him, and locked it up in his safe, until he was required by the court to produce it for inspection. Appellant did not publish or circulate said protest in any way other than to submit it to said school trustees, and, when it was submitted, no one was pres-

¹ Rehearing denied.

ent but the three members of said board. It appears from the record that, at a previous meeting of said board, appellant stated his objections to the re-employment of appellee, which objections were stated orally, and were essentially the same as those embraced in the written protest filed June 21, 1889; and, at the request of the other two members of the said board, appellant reduced his objections to writing. The "protest," as it is designated in the record, is quite lengthy; but, as only a certain part of it is relied upon as libelous, we need not set it out in full in this opinion. It is headed as follows: "Gosport, Ind., June 21st, 1889. George P. Lee, President, A. H. Wampler, Secretary, Gosport School Board—Gentlemen: I, James R. Henry, treasurer of said school board, submit the following as my protest against the employment of Mary Moberly as teacher in Gosport school for the ensuing year." In this protest the appellant stated seven different reasons why he objected to the employment of appellee, the second of which is as follows: "(2) For claiming wages not due her, and in making statements, which, in my opinion, she knew to be false, in order to obtain them." Upon this language in the protest, appellee sued appellant for libel, and charged in her complaint that said language was uttered and published by filing it with said board, etc. As to the publication of these words the complaint avers that they were false and libelous and without probable cause, and, in the language of the complaint, "thereby charging and intending to charge that said plaintiff [appellee] * * * had willfully and corruptly lied concerning the amount of money due her, and that she was a liar." The cause was put at issue by an answer admitting the publication of the words charged, but averring that they were true, and reply in general denial. In other words, the answer was a justification. Appellant's motions for judgment in his favor on the special verdict, that the court render judgment in favor of appellee for nominal damages only, and for a new trial, were respectively overruled, and proper exceptions reserved. The assignments of error challenge these several rulings; also, the overruling of appellant's demurrer to the complaint and the sufficiency of the complaint.

This is the second appeal in this case. See *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981. In the former appeal this court held that the communication, or the "protest," sued upon, was privileged. In the former appeal the judgment was reversed, because of the insufficiency of the complaint. The complaint was then amended, and appellant again urges that it is still insufficient; but, upon a careful examination of the opinion upon the former appeal, we think that the objections urged against the complaint are obviated by the amendments, and substantially conform to the rule announced therein. Hence the rule applies that the law as declared in the former appeal is the law of the case in a subsequent

appeal. There was no error in overruling the demurrer to the amended complaint.

The other alleged errors may be considered together. Before further discussing the questions involved, we deem it proper to state in narrative form the material facts, as shown by the special verdict. The jury found that appellee was a school teacher; that she had taught in the public schools of the town of Gosport for the two school years immediately preceding June 20, 1889; that she was duly licensed to teach the ensuing year; that the school board of said town was composed of George P. Lee, A. H. Wampler, and appellant; that Lee was president, Wampler secretary, and appellant treasurer, of said board; that on the evening of June 20, 1889, a majority of said board voted to employ appellee as such teacher for the ensuing year; that appellant voted for another person for the same position; that, at said meeting, appellant stated orally to said board his objections to the employment of appellee; that thereupon Wampler and Lee requested appellant to put his objections in writing, and present the same at a subsequent meeting; that appellant agreed to do so, and a meeting of said board was called to meet at the residence of Wampler the following day, at 1 o'clock p. m., to receive and consider the same; that said board did meet at the time and place designated, in the parlor of the residence of said Wampler; that at said meeting there were no persons present but the members of said board; that, when said meeting was called to order, appellant presented his objections in writing; that one of the members read the same to the other members of said board; that the second specification of said protest was as follows: "For claiming wages not due her, and making statements she knew to be false in order to obtain them;" that, by the use of such words, appellant intended to charge that appellee willfully and corruptly lied; that he thus intended to charge that appellant was a liar; that said language so written and published was to gratify a feeling of personal ill will and revenge entertained by appellant towards appellee; that he wrote and published said language with a corrupt motive, to injure the good name of the appellee; that he did so in bad faith; that he knew it was untrue; that the words were written and published maliciously, to injure the appellee; that the said language was without probable cause; that appellee did not ask or claim of said board more money than was due to her; that, at the end of the school year 1888-89, there was due her \$85, which appellant paid to her on or about May 20, 1889; that, for teaching in said school, she was to receive \$35 per month; that the language sued on, and contained in the statement filed with said board, was written by appellant for the purpose of reading to Lee and Wampler, as members of said board; that June 21, 1889, had been fixed for finally hearing and determining appellee's application to teach

in the Gosport schools; that said meeting was called for the express purpose of enabling the appellant to file a written statement of his reasons and objections against the further employment of appellee, and for the purpose of considering the objections by appellant; that the only publication of said objections by appellant was made to said Lee and Wampler, while said school board was in session, considering said application; that the sole purpose of appellant in preparing and publishing the language sued on was to make known to the other members of said board his objections to the fitness of appellee to so teach, and to prevent her further employment; that said "protest" was prepared by appellant as a member of said school board, and by him delivered to Lee and Wampler, the other two members of the board, while said board was convened, as his protest against the further employment of appellee as a teacher in said school; that the three members of said board were the only persons who saw or heard said instrument when it was so read and published; that, before said meeting at which said protest was read, Lee and Wampler had been fully informed as to the contents of the charge sued on; that, as soon as said "protest" was so read and published, the said Lee and Wampler at once decided that said charge did not contain anything that affected the character or fitness of appellee to teach in said schools, and did then and there employ her to teach for the ensuing year; that they placed her in said school at the beginning of the following school year; that the language complained of was written and published in reference to the matter of appellee's knowledge, and the claims made by her in reference to the amount of wages claimed by her to be due her at the time of her settlement with appellant as treasurer, at the end of the school year of 1888-89; that immediately after said protest had been published, as aforesaid, appellant took the same into his possession, locked it up in a safe in his bank, where it remained until after this action was commenced, when it was produced by order of court, and no other person or persons ever saw it; that when appellee made her final settlement with appellant for her salary, on or about May 20, 1889, she did not claim or assert that she was to receive more than \$35 per month; and that the instrument containing the language sued on was prepared and published at the request of Lee and Wampler, as members of said board.

It is proper to say here that the complaint does not state any facts that would entitle appellee to special damages, and hence her right to recover must rest upon the general averments of her complaint, and the facts found by the jury, if such facts are within the issues and shown by the evidence. The language which appellee has made the basis of her action is not libelous per se, and only becomes so by reason of the innuendo charged. It having been held in the former appeal,

and we think correctly so, that the occasion upon which the language was published was one of qualified privilege, it follows, under the great weight of authorities, that it was necessary for appellee to allege and prove that the publication was malicious and without probable cause, to entitle her to recover. Upon this proposition, we cite, without quoting, the case of *Henry v. Moberly*, supra, where, in an exhaustive opinion, many authorities are collected, and the subject ably discussed. To better understand the merits of the controversy here presented, we deem it necessary to state some facts disclosed by the evidence which do not clearly appear from the special verdict. The language used in the protest, which appellee has singled out as her cause of action, as claimed by appellant, had its origin in an alleged conversation between appellant and appellee at the former's bank, when she called on him for a final settlement of her salary at the close of the school year 1888-89. Appellant testified that appellee came to his bank to have a settlement; that he looked over her account, and told her there was \$85 due her; that she emphatically said, "That is not right;" that he said to her that he thought he had kept the books right; that he got her former receipts, and figured the amount she had already received, and showed her that it was \$195; that he put down \$35, and multiplied it by eight; that she then said, "\$35 is not right; I am entitled to have more than \$35; I am to have as much as the other teachers;" that he then said to her that she had been employed for \$35 per month, and that that was all he was authorized to pay her, and that, if she was to get any more, she would have to see the other trustees, and, if they would allow her more, he would pay it; that she said she would go to see the other trustees, and he told her that was all right. He further testified that he asked her if she would take the \$85 then, or wait till she saw the other trustees, and that she said, "No; I will take it now." He also testified that at the time she was angry and excited, and, as she went out, she said it was not right. As to this part of appellant's evidence, he was corroborated in every material fact by another witness, who heard the conversation between appellant and appellee, and saw her conduct and actions. Appellee was a witness in her own behalf, and was asked this question: "Now, Miss Moberly, will you tell this jury what you said, and what Mr. Henry said to you, at that time?"—to which she answered: "I went in to draw my money. I said I came down to draw my money. He got the books, and came out, and I said, 'How much is coming to me?' He figured there a little while, and he said there was \$85 due me. After he figured there a short time, I said to him, 'How much are you giving me, any way?' and he said, '\$35.' Then I said, 'Why is it that you can't give me as much as the other teachers?' I didn't tell him I

wanted more, or anything of the kind; I just said, 'Why is it that you haven't given me as much as the other teachers?' " We do not set out this evidence for the purpose of criticising the jury in its findings in regard to what did actually take place, or what was said between appellant and appellee, but to show the ground of the charge of which she complains,—that appellant accused her of claiming more than was due her, and making statements which she knew to be false to obtain it. We might properly say here that all the other teachers were receiving larger salaries than appellee, which she knew, and that she was to receive \$35 per month, and no more, which fact she knew when she made her final settlement with appellant.

Recurring again to the question of the language sued on as being privileged, we desire to submit some additional observations, and cite some authorities bearing upon it. The general rule prevails that, where a publication is libelous per se, malice is presumed, and proof of it is not necessary to entitle plaintiff to recover. *Sharpe v. Larson* (Minn.) 70 N. W. 554; *Nolte v. Herter*, 65 Ill. App. 430; *Owen v. Dewey* (Mich.) 65 N. W. 8; *Youmans v. Paine*, 86 Hun, 479, 35 N. Y. Supp. 50; *Dixon v. Allen*, 69 Cal. 527, 11 Pac. 179; *Thompson v. Powning*, 15 Nev. 195; *Gaul v. Fleming*, 10 Ind. 253; *Hudson v. Garner*, 22 Mo. 423; *Mousler v. Harding*, 33 Ind. 176; *Byrket v. Monohon*, 7 Blackf. 83; *Mitchell v. Milholland*, 106 Ill. 175; *Simmons v. Holster*, 13 Minn. 249 (Gil. 232). But, when the publication is not libelous per se, the burden shifts, and the plaintiff must prove malice. In such case there is no presumption of malice, and a recovery cannot be had unless malice is proven; and especially is this rule applicable where the publication is privileged. This is the rule, and so held both in England and in this country by an unbroken line of authorities. In a recent case in England it was held that in an action for libel, if the libel was published on a privileged occasion, there must be proof of actual malice; and, in the absence of such proof, the defendant was entitled to judgment. *Nevill v. Insurance Co.* [1895] 2 Q. B. 156, 14 Reports, 587. In Maine it was held that, where the matter complained of is privileged, the burden of proving malice was upon the plaintiff, and that the defendant cannot be called upon to show that he was not actuated by malice, until some evidence of malice towards the plaintiff, more than a mere scintilla, has been adduced by the plaintiff. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411. In New York it was held that, a publication being privileged, the plaintiff has the burden of proving malice. *Youmans v. Paine*, supra. And in an action for slander, where the rule is the same, where the words spoken were presumptively privileged, the burden is upon the plaintiff to prove that they were maliciously

spoken. See, also, *Green v. Meyer* (Sup.) 44 N. Y. Supp. 81; *Henry v. Moberly*, supra.

The jury did find that the publication by appellant of the language complained of was malicious; and if we were to be guided and controlled by such finding, regardless of evidence, it would be the end of the controversy upon this question. We have, however, examined with minuteness and care every word of the evidence, and fail to find a single fact or item of evidence which in the remotest degree shows malice on the part of appellant. The evidence of both appellant and appellee shows that, prior to the alleged libel, they were on friendly terms; that there had never been any trouble between them; that when appellant, as a member of the school board, visited the school, he visited the room and grade over which appellee had control; that, when they met each other, they exchanged the common courtesies of such occasions. There is not a word of evidence in the record showing that appellant had previously said or written anything derogatory to the good name and fame of appellee. As we have already said, the publication of the language relied upon was not libelous per se; and, as the publication was privileged, there was no inference or presumption of malice, but the appellee was bound to prove it to sustain her right of action. While it is true that the jury found that malice existed, yet there was no evidence from which such fact could possibly have been found, and we must conclude that it was found from mere inference or presumption. This being true, the verdict cannot stand.

In a well-considered case in Kansas, where the complaint alleged that the defendant published a false and malicious libel concerning the plaintiff, setting out the publication complained of, from which it appeared to be prima facie privileged, as a report to a Grand Lodge of Odd Fellows, justifying a subordinate lodge in expelling a member for perjury, it was held that the burden of proof upon the trial as to whether the defendant was actuated by malice was upon the plaintiff, and that, if the plaintiff gave no evidence of express malice, under the allegations of the complaint the defendant was entitled to a verdict. *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384. See, also, *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Lathrop v. Hyde*, 25 Wend. 448; *Fowles v. Bowen*, 30 N. Y. 20. In Ohio it was held that even a citizen not only had the right, but that it is his duty as a citizen, to communicate to the appointing power whatever he knows for good or ill concerning one who is an applicant for a teacher, and that, when such communication is made in good faith, the citizen is protected, even though the statements contained in the communication be not true. *Nolan v. Kane*, 13 Ohio Cir. Ct. R. 485. How much more forcibly the rule should apply if the communication is made by a

member of the appointing power to associate members thereof, and especially when such communication is made at the request of such associate members. Here we have a member of a school board, having, as we must presume, the good of the schools in view, protesting to his associate members of the board against the employment of a teacher, giving his reasons in writing why he objects to her further employment, and the only publication of his protest was the reading of it on a privileged occasion at a special meeting of the board called for that purpose, with no one present but the members of the board. There is not a word of evidence, or a circumstance disclosed by the entire record, that appellant acted with malice, nor is there anything to show that he did not act in good faith. In the case before us the jury found that the charge made by appellant was false. This finding was made upon the uncorroborated evidence of the appellant as against the evidence of appellee corroborated by the evidence of a disinterested witness. The jury being the exclusive judges of the evidence and credibility of the witnesses, both the trial and this court are bound by their finding. But, to prove malice, the onus being on plaintiff, she would be bound to prove, not only the falsity of the charge, but to go further, and prove that the qualified privileged communication was maliciously published. While proof of the falsity of the charge may be considered as tending to prove malice, yet the unbroken line of authorities hold that such evidence is not in itself sufficient for that purpose. What we consider a leading case upon this question is *Laing v. Nelson* (Neb.) 58 N. W. 846, where many authorities are collected and reviewed, and the subject is carefully and ably considered. With one quotation from that case, we dismiss the subject without further comment. The court said: "Upon a review of the decisions, we think the proper rule to be that, while the plaintiff might rely upon the presumption of the falsity of the charges made against him, he is not required to do so, but may introduce affirmative evidence of such falsity in cases where malice must be expressly shown, as a step in the proof of malice, but that the falsity of the charge is not in itself sufficient to establish malice, and only becomes sufficient when coupled with evidence tending to show that the plaintiff made the charges knowing them to be false, or with other evidence tending to show malice."

We next remark that there is no finding by the jury that the appellant knew at the time he made the charges that they were false, and this, under the authorities, is essential. The verdict, being silent upon this important fact, is equivalent to a finding upon the question favorable to the appellant. We need not cite authorities in support of a proposition so familiar, and one which has so

often been decided by the supreme and this court. The damages claimed by appellee for the alleged libel is for the injury she sustained to her reputation by its publication to two members of the school board, by the appellant, who was their associate in office. They were all engaged in the same public service. It is not claimed that any one else ever heard of the charge after its publication at said meeting, through appellant; and its publication thereafter, if at all, by any person other than appellant, could not make appellant liable. It is not even claimed that its publication resulted in loss of employment or any financial loss. There is no finding by the jury that she sustained any financial loss. It abundantly appears that Lee and Wampler both requested appellant to reduce his charge to writing, for the purpose of having it published to them in their official capacity, and not in their individual capacity, and that it was to be published to them the following day, at a special meeting of the school board for that express purpose. This publication was made at a time while the board was further considering appellee's application for employment. The jury found that appellant filed the protest for the sole and only purpose of preventing appellee's further employment, and that, notwithstanding the protest, the other two members of the board, after reading the same, decided in appellee's favor, on the ground that, in their judgment, the protest contained nothing which affected appellee's character or fitness to teach the school. Both the evidence and the verdict show that Lee and Wampler knew every fact stated in the protest, long before it was presented to them in writing, and therefore it did not convey to them any new or additional information. Looking to the evidence, we find that, as soon as it was read, "Lee remarked that he saw nothing in that protest to change his mind, and Mr. Wampler sanctioned him by saying that that was his view of it exactly, and they said Miss Moberly would remain in the school." It looks to us that, if her character or fitness as a teacher were not injured or affected in the minds of Lee and Wampler, the only persons to whom the protest was addressed, or in whose presence it was published, she was not injured in her reputation or character. The attempt of the appellant to prevent the further employment of appellee was futile, and the finding of the jury that his sole object was to prevent such employment, and that she was immediately employed, controvert the idea that she was thereby injured. In fact, the jury affirmatively find that she did not suffer injury, by finding that she was re-employed. By the publication of the language charged, appellee could not have been brought into public scorn, contempt, or ridicule, because the alleged libel was not given to the public; nor could her reputation have been injured thereby under the facts as found in

this case. This being a privileged communication, appellee was not entitled to recover damages for wounded feelings, distress of mind, humiliation, etc. Taking the verdict as a whole, it is not sufficient to support a judgment for appellee for more than nominal damages at least, because there is no finding that she was injured by the publication, while it affirmatively appears that she was not injured. We feel, however, that the ends of justice will be best subserved by a new trial. Judgment reversed, with instructions to the court below to grant a new trial.

COMSTOCK, J., concurs in the conclusion. BLACK, J., dissents.

(21 Ind. App. 91)

GAAR, SCOTT & CO. v. WILSON.

(Appellate Court of Indiana. Oct. 27, 1898.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCE—
NEGLIGENCE—ASSUMPTION OF RISK—PLEADING—
EVIDENCE—EXCEPTION—BILL OF EXCEPTIONS.

1. An employé does not assume the risk of a defect in an appliance, unknown to him, and which the employer knows of, or for which he is responsible.

2. Complaint of an employé injured by a defective appliance must allege want of knowledge of the defect, but need not aver want of means of ascertaining it.

3. The taking of exception to and at the time of the overruling of a motion for new trial may be shown by the bill of exceptions.—Burns' Rev. St. 1894, §§ 638, 640, 641 (Horner's Rev. St. 1897, §§ 626, 628, 629), providing time may be given to reduce the exception to writing; that when the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception "may be taken" by the party causing it to be noted at the end of the decision that he excepts; and that, when the record does not otherwise show the decision or grounds of objection thereto, the party objecting "must, within such time as may be allowed, present to the judge a proper bill of exceptions."

4. A bill of exceptions cannot be rejected as an original bill containing more than can be presented by such a bill, though it is plainly shown that the part containing the evidence is the original longhand manuscript, and the signature of the judge and certain dates are in manuscript, the remainder being typewritten, it not being stated anywhere that the bill of exceptions is the original bill, and the clerk at the end of the transcript certifying that the foregoing transcript contains full copies of all papers and entries in the cause, and that on a certain date the stenographer filed in the clerk's office his longhand manuscript of the evidence, which is the same manuscript incorporated in the bill of exceptions made a part of the transcript.

5. Failure of the bill of exceptions to affirmatively show that the stenographer was elected or agreed on by the parties, or that he was sworn to report the case, is not ground for excluding the evidence authenticated by the statement signed by the judge that it was all the evidence given in the cause.

6. Plaintiff in an action for injury from the falling of an iron which, when not in use, was held in an upright position by a clamp, having complained, not that the clamp was an improper device for the purpose, but that it was negligently permitted to become out of order, cannot give evidence that other irons had fallen

out of other clamps, it not being shown that there were defects in the other clamps occasioned by the cause of the defect in question, or that such defect was produced by the other defects, but the contrary appearing.

Appeal from circuit court, Henry county; William O. Barnard, Judge.

Action by Leigh C. Wilson against Gaar, Scott & Co. for injury received by plaintiff in defendant's employ. Judgment for plaintiff. Defendant appeals. Reversed.

Wm. A. Brown and Jackson & Starr, for appellant. M. E. Forkner and Chas. E. Hernly, for appellee.

BLACK, J. A demurrer to the appellee's complaint for want of sufficient facts was overruled. It was in substance shown by the complaint that the appellant was a corporation, etc.; that it had at Richmond, Ind., a manufacturing establishment, in which it manufactured portable steam engines and other machines for the market; that it employed in this establishment a large number of employes, who were engaged in the building of said engines, etc.; that the appellee entered into the employ of the appellant about five years before the bringing of this action, and, as such employé, he was, under the direction of the appellant, engaged in working upon said machines for the appellant; that, in building its steam engines, "there is used in one of the rooms, under the charge of a superintendent, what is known as a shaft, or arbor, made of metal, which is several inches in diameter, and about eight feet long, and is circular; that the said shaft is used for the purpose of being placed in a certain position in an engine, when it is being constructed, for the purpose of having metal poured around it, in order to form what is known as boxing; that when said metal is poured, and said boxing is formed and completed, the said shaft, or arbor, is removed by the employes of the defendant, and is placed upright beside posts in the room where they are used; that upon said posts are attachments provided by the defendant for the purpose of holding the said shafts, or arbors, upright in position until they are again needed; that the said shafts, or arbors, are heavy; that, when the said attachments for holding the same in position are in proper order and condition, the said shaft will not slip therefrom, and fall"; that on or about the 6th of April, 1896, the appellee was an employé of the appellant, and, as such, under the direction of the appellant, was engaged in working upon an engine which the appellant was having constructed in its said machine shop, and it was a part of the duty of the appellee while performing work aforesaid, under the direction of the appellant, to take what is known as a chain, that is used in an engine, from a blacksmith shop of the appellant, in its factory, "to where he was engaged in working upon said engine; that, in doing so, it was necessary for him, in the line of his

duty, to pass near where one of these shafts, or arbors, was placed upright beside one of the posts, and held by one of the attachments aforesaid upright in position; that in passing near the same, without any fault or negligence whatever upon the part of the plaintiff, the said shaft, or arbor, by reason of the attachment by which it was held upright as aforesaid being defective and out of order, as hereinafter stated, without the fault or negligence of plaintiff, slipped from said attachment, and fell against" him, and upon his right foot, with great force, by which he was greatly injured, etc., the character and effect of the injury being stated, with his expense, etc.; that said injuries were received and sustained by him as aforesaid, without any fault or negligence on his part. It was further alleged that the appellant had a foreman in charge of the room in which the arbor, or shaft, was at the time it fell upon his foot, as aforesaid, whose duty it was to see that the same was placed in a proper and safe position, and to see and know that the attachment provided for holding the same upright, as aforesaid, was in proper repair and condition; that "the said attachments were not in proper condition, and would not safely hold the said shaft, or arbor, upright, as required,—of which facts, plaintiff avers, the defendant and his said foreman at all times had full notice and knowledge, but that said foreman and the said defendant knowingly permitted the said attachment to be and remain out of condition and out of proper repair, negligently and carelessly, and to be and remain in a condition to not securely hold said arbor, or shaft, and to permit the same to be liable at any time to fall and injure any one passing by or near the same; that he, the plaintiff, had no notice or knowledge of the unsafe condition of said attachments, as aforesaid, or of the insecure position of said shaft, as aforesaid, and was without fault in the premises"; that, at the time the appellee was so injured, he was in the line of his duty, and in the employ of the appellant as aforesaid, and was in a place where his duty required him to be, and that "he is now, and was at all times and in all things hereinbefore stated, wholly without fault or negligence." Wherefore, etc.

It is objected on behalf of the appellant that the complaint contains no charge that the appellant was guilty of negligence; that it does not show a causal connection between the appellant's negligence and the appellee's injury; and that it must be taken from the allegations of the pleading that the alleged defect in the attachment was patent, and that the injury received by the appellee was the result of a risk incident to his employment. It is averred, in substance, in the complaint, that the appellee was injured by the falling of the arbor upon him, and that it so fell by reason of the attachment being defective and out of order, as stated further on in the complaint, where it is alleged that the attachment

was not in proper condition, and would not safely hold the arbor upright, and that the appellant had full notice and knowledge of these facts, and knowingly permitted the attachment to be and remain out of condition, and out of proper repair, negligently and carelessly, and to be and remain in a condition to not securely hold the arbor, and to permit it to be liable at any time to fall and injure a person in the situation, which was that in which the appellee was shown to have been when injured. When all the averments of the pleading are considered together, we may say that it shows negligence on the part of the appellant, and that a causal connection between the appellant's negligence and the appellee's injury sufficiently appears. We are also of the opinion that the further objection of the appellant that the defect was shown to be patent, and that the injury was the result of the risk assumed as an incident of the service, is not well taken. The defect is not particularly described. No objection is made to the plan of the device for holding the arbor in an upright position, or to the form, material, construction, or situation of the attachments; but it is alleged that, when the attachments were in proper order and condition, they properly performed the purpose for which they were used. There is nothing in the complaint from which it can be said that the defectiveness of the attachment in question, whereby the arbor was not properly secured, was so obvious as to be a patent defect. It might be well known to the appellant, and yet unknown to the appellee, without fault on his part. On the one hand, the employer has the right to expect that the employé will be vigilant for his own protection, and careful to avoid injury from ordinary or known and obvious risks; yet, on the other hand, the employé has a right to presume that the employer has done his duty in using reasonable care to provide safe appliances, and to inspect them at proper times, and he is not obliged to search for defects or to exercise like diligence with the employer to discover defects. When the ordinary perils of the employment are increased by the use of defective appliances, known to the employer, or for which he is responsible, and unknown to the employé, such increased perils cannot be regarded as assumed risks. If the risk by which the employé was injured be one assumed, there can be no recovery, though he may have exercised ordinary care. It may be that notwithstanding the fact that the injured employé exercised reasonable diligence, or even the utmost care, and was free from fault, yet the injury was one incurred from a risk assumed by him, and therefore one for which there could be no recovery. It is in this state incumbent, ordinarily, upon the injured employé suing his employer for the injury, to negative knowledge on the plaintiff's part of the want of safety or of the defective condition of the appliances by which he alleges his injuries were caused.

Railway Co. v. Dalley, 110 Ind. 75, 10 N. E. 631; Engine Works v. Randall, 100 Ind. 293; Railway Co. v. Corps, 124 Ind. 427, 24 N. E. 1046; Railway Co. v. Sandford, 117 Ind. 265, 19 N. E. 770. But it is not needed that the complaint show affirmatively that the complaining employé had no means of ascertaining the defect. It is enough to aver that he had no knowledge of the defect. *Railway Co. v. Percy*, 128 Ind. 197, 27 N. E. 479; *Railroad Co. v. Duel*, 134 Ind. 156, 33 N. E. 355. While the complaint is not wholly satisfactory in form, we think it sufficient.

A motion for a new trial was overruled. It is suggested for the appellee that the record does not properly show an exception to this ruling. In the journal entry of the action of the court upon this motion there is no statement of an exception, but in the same entry it is stated that the appellant prayed an appeal to this court, which was granted, and that the appellant was given 20 days to file an appeal bond, and 60 days to file its bill of exceptions. In a bill of exceptions filed within the time granted, it is stated that on, etc., the appellant "filed its motion for a new trial of the said cause, as the same appears as a part of the record of this cause, which motion the court, after duly considering the same, overruled, on the 5th day of July, 1897, during the said term of the Henry circuit court, to which ruling of the court the defendant at the time excepted," etc. It is provided by statute (section 626, *Horner's Rev. St. 1897*; section 638, *Burns' Rev. St. 1894*) that the party objecting to the decision must except at the time the decision is made, "but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court," etc.; and (section 628, *Horner's Rev. St. 1897*; section 640, *Burns' Rev. St. 1894*) that where the decision objected to is entered on the record, and the grounds of the objection appear in the entry, the exception "may be taken" by the party causing it to be noted at the end of the decision that he excepts; and (section 629, *Horner's Rev. St. 1897*; section 641, *Burns' Rev. St. 1894*) that, when the record does not otherwise show the decision or grounds of objection thereto, the party objecting "must, within such time as may be allowed, present to the judge a proper bill of exceptions," etc. To save for review on appeal the action of the court in overruling a motion for a new trial, the record must show that an exception to that action was taken at the time thereof. *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896. It is common to show the exception in a formal entry of record showing the overruling of the motion. Such method has been constantly recognized as sufficient. But we are of the opinion that the taking of the exception at the time of the ruling may be shown, as was done in this case, by the bill of exceptions. *Pace v. Oppenheim*, 12 Ind. 533; *Stagg v. Compton*, 81 Ind. 171.

It is objected on behalf of the appellee that

there are irregularities in connection with the bill of exceptions, which should prevent the consideration of matters to which it relates. It appears that the original longhand report of the evidence was filed in the clerk's office on the 13th day of July, 1897, and that the bill of exceptions incorporating said original longhand report was presented to the judge, signed by him, and filed on the 19th of August, 1897. The bill contains, besides said report, certain separately stated exceptions to the rulings on the trial, and the statement above mentioned, relating to the exception to the overruling of the motion for a new trial. There are two signatures of the judge, both made on the same day, one at the end of the bill, and one following the report of the stenographer. Immediately before each signature is a formal statement; that following the stenographer's report referring to it as the original longhand manuscript of the evidence, and being in such form as to be a sufficient ending of a bill of exceptions containing the evidence, and the other relating to the whole bill. While it is plainly shown that the portion containing the evidence is the original longhand manuscript, it is not stated anywhere that the bill of exceptions is the original bill, and the clerk at the end of the transcript certifies that "the above and foregoing transcript contains full, true, and complete copies of all papers and entries in said cause, and that on, etc., the official reporter, who took down the evidence in said cause, 'filed in my office his longhand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions made a part of the foregoing transcript.'" Though both of said signatures of the judge and certain dates are in manuscript, while the remainder of the bill is in typewriting, we think we cannot reject the bill as being an original bill, containing more than may be presented to us by an original bill. *City of Huntington v. Griffith*, 142 Ind. 280, 287, 41 N. E. 8, 589. See *Wantland v. State*, 145 Ind. 38, 43 N. E. 931. If it may properly be said that the bill cannot be regarded as showing that the stenographer was selected or agreed upon by the parties, or that he was sworn to report this case, it cannot be said that the bill shows anything to the contrary; and such failure cannot exclude from us the evidence authenticated by the statement, signed by the judge, that it was all the evidence given in the cause. *Williams v. Turnpike Co.*, 76 Ind. 87; *Stagg v. Compton*, 81 Ind. 171; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, and 31 N. E. 453.

It appeared in evidence that the appellee was injured in a room used for building or setting up engines; that this room was longer from east to west than from north to south; that there were in it two rows of iron columns, extending from east to west, and supporting the upper floor, there being five or six columns in each row. The engines were built up in stalls or spaces, called "floors," on the

south side of the apartment, the space between the eastern column and the east end of the apartment being called "floor No. 1," that between the first two columns from the east being called "floor No. 2," and so on, the space between each two columns being a floor. The arbors, or mandrels, when not in use, were set upright beside these columns. At some of the columns there was but one mandrel; at others there were two; at some there were more than two. They were secured at the bottom by an iron ring on the floor, and near the top by the attachment mentioned in the complaint, which was fastened to the pillar. The attachments were iron bands, bent around the pillar, and fastened to it by iron screws, and so extended and formed as to constitute spring clamps for receiving and holding the mandrels. The mandrels were placed within these clamps, and taken from them by forcing the round shafts through the lips of the spring clamps. The appellee was working in the stall or floor numbered 4. In the course of his employment, he went out of a door at the east end of the apartment, and returned the same way. On his return, as he passed the first pillar on his left,—the one furthest east,—a mandrel at the north side of this pillar fell upon his right foot, and caused the injury complained of. The attachment on this pillar was adapted for receiving two mandrels,—one on the north side, and the other on the south side. There were two pieces of iron bent around the pillar, and extended on the north and south sides, and there bent out, forming a clasp on each side of the pillar; the ends being left open so that the mandrels could be slipped into the clamps, and held there. They were alike in that construction on the north and south sides of this pillar. An employé named Charles Williams, whose duty it was to pick up things when out of place, and to put them in their proper places, saw the mandrel lying on the floor in the gangway, and picked it up, put one end in the socket on the floor, and tossed the mandrel back, intending to put it in the clasp, and thinking that he did so. He was in a hurry, walking rapidly from the door at the east end of the room to answer the telephone at the west end. Having so replaced the mandrel, he, without stopping to examine whether it had been caught in the clamp or not, went on; and about a minute and a half, as he estimated, from the time of so replacing the mandrel, and between the time of his leaving the pillar and getting to the telephone, or while he was answering the telephone, the accident happened. He testified that he could not say whether he put the mandrel in carefully or not, or say positively whether it went further than the lips of the attachment or not. There was no direct evidence that the clamp on the north side of the east pillar was in a defective condition; no witness had observed any defect in it; and there was no evidence that a mandrel had ever

fallen from it before, or had been knocked down. One Charles A. Wood, who had worked at the place about five years, was permitted, over appellant's objection, to testify that he had noticed the mandrel on the south side of this pillar fall out, and that it had fallen out two or three times that he knew of. This witness having also testified that each piece of iron forming the clamps on this pillar was screwed to the pillar by two bolts, one on the north side, and one on the south side; that the two bolts on the north side gave the tension and strength to the spring on that side; that these two clamps were alike in general shape, and that there was a crack on the south side of one of the pieces of iron forming these clamps; that this crack would not weaken the clamp on the north side. Thereupon the appellant moved to strike out the testimony of this witness on the subject of the mandrel on the south side of the post having fallen out on two or three different occasions from its attachment; but the motion was overruled. Another witness, one August Unde, who had worked at the establishment many years, was permitted, over the appellant's objection, to testify that, before the accident to appellee, the witness had seen mandrels fall down; that there was not room for the engines to pass, and, when the wheels struck them, they would fall; that they did not fall of their own weight; that, in running an engine around one of the posts, it would leave the clamps open, so that they would have to be driven back, which he had seen done. This testimony related to other pillars than that from which the mandrel fell upon the appellee.

Evidence should have a legitimate bearing upon the question in issue. Here there was, as before observed, no complaint relating to the adaptation of the device to the purpose for which it was used, as to its plan, or the material of which it was made, or to the manner of its construction or attachment to the pillar. The complaint was that it was negligently permitted to become out of order. The evidence so admitted over objection does not appear to have been limited by court or counsel to any restricted purpose. Under the complaint, it devolved upon the appellee to prove that the particular attachment from which the arbor fell and injured him was negligently permitted to be defective and out of order, and that the arbor fell by reason of this negligently permitted condition of this particular attachment. It is said in the brief of the learned counsel for the appellee: "It was incumbent upon the plaintiff in this case to prove that the device was out of order, and that it had become out of order through the negligence of the defendant, so that the defendant knew its condition, or could have known it by a reasonable inspection of the same. It is averred in the complaint, and not controverted in the evidence, that the device, when in proper order, is efficient for the purpose for which it was intended. * * * It

was competent to show the workings and efficiency of this device by the operation of it and like ones in the same room, and in the exact situation in which it was situated." There was no evidence that the other mandrels of whose falling the witnesses were permitted to testify fell because of the fact that the clamps which held them (being originally sufficient) had been permitted to become out of order, so that the mandrels fell from them by reason of defectiveness occasioned from a cause which had produced defectiveness in the clamp on the north side of the east pillar. On the contrary, there was evidence of particular reasons for the falling of the other mandrels which did not apply to the attachment on the north side of the east pillar. The conditions were not shown to be essentially the same. It is a common thing to prove the condition of machinery or appliances at the time of the occurrence involved in the litigation, by facts showing the like condition of the same machinery or appliances at another time, when the circumstances shown are such as to raise a fair inference that no change has taken place. *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641. Evidence that on occasions before that in litigation, the conditions being substantially the same, the appliance by which the plaintiff was injured failed in like manner to operate properly, was held competent for the purpose of proving the defective character of the appliance, and that the employer knew or ought to have known thereof. *Brewing Co. v. Bauer*, 50 Ohio St. 560, 35 N. E. 55. Proof of similar accidents at the same switch under the same conditions was held competent in *Clapp v. Railway Co.*, 36 Minn. 6, 29 N. W. 340. See, also, *Dye v. Railroad Co.*, 130 N. Y. 671, 29 N. E. 320. Evidence that the appliance by which the employé was injured had failed in like manner to work properly on former occasions of which the employer was charged with knowledge is admissible. *Myers v. Iron Co.*, 150 Mass. 125, 22 N. E. 681. In such case the defendant may prove, if it can, that the former failure occurred from some other cause than a defect in the appliance. *Id.* In *Railway Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, it was said: "When it becomes necessary to affect those charged with the duty of keeping the bridges or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other. * * * Evidence of other similar occurrences or occasions is not admissible for the purpose of raising a presumption that the particular

accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place." The general rule is that evidence of other or similar defects is incompetent. The exceptions to the rule are, it has been held, in cases where the other defects are shown to be the result of a cause presumptively operating at the place of the injury, or where such other defects might have caused the one which produced the injury. *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358; *Railroad Co. v. Huntley*, 38 Mich. 537; *Railroad Co. v. Fox*, 11 Bush. 495; *Telegraph Co. v. Levi*, 47 Ind. 552; *Ramsey v. Railroad Co.*, 81 Ind. 394. We cannot determine that this evidence was deprived of improper effect by the fact that the falling of the other mandrels appeared by the evidence to have been occasioned by causes not shown to have affected the attachment whose defectiveness was charged in the complaint. The judgment is reversed, and the cause is remanded for a new trial.

COMSTOCK, J., took no part in this decision.

(21 Ind. App. 76)

STEVENS STORE CO. et al. v. HAMMOND.
(Appellate Court of Indiana. Oct. 25, 1898.)

LIMITATION OF ACTIONS—NOTES—SUSPENSION OF
STATUTE—SURETIES—BILL OF EXCEP-
TIONS—EVIDENCE.

1. The defense of limitations cannot be raised by demurrer, even where the complaint sets out a note on which the cause of action accrued more than 10 years prior to action brought, unless it also shows on its face that the action is not within any of the exceptions to the statute.

2. Payments by a joint-stock association of interest on a note, which its president had signed as surety, does not toll the statute of limitations as to the latter, for the obligation is joint and several.

3. Act March 8, 1897, providing that, to make evidence part of the record, it is sufficient if the transcript contains the original bill of exceptions embracing such evidence, if it appears from the record that such bill was duly presented to the judge, approved and signed by him, and filed with the trial clerk or in open court, and providing that the act shall not apply "to cases now pending on appeal," extends to appeals which were perfected after the act became operative, though the bill of exceptions had been previously signed and filed; and therefore, in such case, the record need not affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was embraced in such exceptions.

Appeal from circuit court, La Porte county; Lucius Hubbard, Judge.

Action by Seth Hammond against the Stevens Store Company and Samuel Koontz, Sr. From a judgment for plaintiff, defendant Koontz appeals. Reversed.

Ohas. Kellison, for appellant. Andrew Anderson, for appellees.

WILEY, J. The appellee Hammond sued appellant and appellee the Stevens Store Company upon a promissory note for \$1,000, dated May 25, 1883, which said note was signed as follows: "Stevens Store Co., by Samuel Koontz, Sr., President. Samuel Koontz, Sr." The note provided for interest at 8 per cent., payable annually. The complaint was in the statutory form. The appellee the Stevens Store Company was defaulted, and it is not appearing to this appeal. The appellant challenged the sufficiency of the complaint for want of facts, which demurrer was overruled, and he excepted. He then answered in three paragraphs, as follows: (1) General denial, (2) payment, and (3) statute of limitation. Appellee Hammond replied (1) by a general denial, and (2) by a new promise of the appellant to pay within 10 years. Trial by jury, resulting in a verdict and judgment for appellee Hammond. Appellant's motions for a new trial and in arrest of judgment were overruled, and on appeal he has assigned errors as follows: (1) That the court erred in overruling the demurrer to the complaint; (2) that the complaint does not state facts sufficient, etc.; (3) that the court erred in overruling the motion for a new trial; and (4) the court erred in overruling the motion in arrest of judgment.

The first, second, and fourth specifications of the assignment of errors may be considered together, as they all present the same question. The appellant contends that, as the complaint on its face shows that the action was commenced more than 10 years after the maturity of the note, and the right of action accrued, the complaint does not state facts sufficient to constitute a cause of action. There is some confusion in the record as to just when the action was commenced, but, waiving any technical question, we think it sufficiently appears that the complaint was filed and summons issued February 23, 1895. As above stated, the note was dated May 25, 1883, and became due six months after date, and hence the right of action accrued November 25, 1883. Thus it appears that the right of action accrued more than 10 years next before the suit was commenced. Though this is conceded, it does not follow that appellant's contention that the complaint is insufficient can prevail, and hence the conclusion drawn by him is wrong. The statute of limitations very wisely contains certain exceptions, and it is the uniform rule in this state that a demurrer will not lie to a complaint unless it appears from the complaint itself that the case is not within any of the exceptions. *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. 432; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Hogan v. Robinson*, 94 Ind. 138; *Newson v. Bourd*, 92 Ind. 229; *State v. Younts*, 89 Ind. 312; *Devor v. Berick*, 87 Ind. 337; *Dunn v. Tousey*, 80 Ind. 288; *Harlen v. Watson*, 63 Ind. 143; *Potter v.*

Smith, 36 Ind. 231; *Board v. Adams*, 76 Ind. 504; *Milner v. Hyland*, 77 Ind. 458; *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370. As the complaint does not show that appellee Hammond was not within some of the exceptions stated in the statute, it follows, from the authorities cited, that appellant's demurrer was not well taken, and the complaint was sufficient. This leaves for our consideration the alleged error in overruling appellant's motion for a new trial. The reasons assigned for a new trial are that the court erred in admitting certain evidence; in giving and refusing to give certain instructions; that the verdict is not sustained by sufficient evidence; that the verdict is contrary to law; and that the assessment of the amount of recovery is erroneous, in that it is too large. Before considering any of the questions presented by the motion for a new trial, we desire to say that appellant, Koontz, rested his entire defense upon the statute of limitations, and is here insisting that, as to him, the action is barred. As shown by the evidence, the facts upon which he relies for his defense are, in brief, the following: The Stevens Store Company was a joint-stock company, the shares of stock of which were owned by divers persons, including appellant, Koontz. He was the president of the company, and one of its directors; attended the meetings of the stockholders and directors, but did not participate actively in the management of the business. So far as the record shows, he was the largest stockholder. The note in suit was executed for borrowed money that went into the business of the Stevens Store Company, and such company was principal and appellant the surety thereon. The note was executed May 25, 1883, and this suit was commenced in February, 1895. The interest had been paid thereon up to May, 1892, said interest having been paid by the Stevens Store Company, through the person in charge of the business; but no part of the interest had been paid by appellant, Koontz, in his individual capacity. At the meetings of the directors exhibits or statements of the business of the company were made by its manager, and such statements were open to the inspection and examination of the directors. The payments of interest of the note were made by the manager, and such payments were made out of the funds of the company. It is shown by the evidence that appellant had signed other notes as surety for the Stevens Store Company. One witness testified that at the meetings of the board of directors appellant had stated on different occasions that he wanted all the notes paid upon which he was liable as surety, and that no particular note or notes were specified; while appellant and other witnesses testified that he had stated at some of the meetings of the board that he wanted certain and specified notes paid upon which he was liable as surety. It is also shown by the evidence that appellant

did not make any payments of interest on the note in suit in his individual capacity, and it is upon this latter fact that he relies for a reversal. Under the authorities, the note is joint and several. *Lambert v. Lagow*, 1 Blackf. 388; *Groves v. Stephenson*, 5 Blackf. 584; *Malden v. Webster*, 30 Ind. 317; *Giles v. Canary*, 99 Ind. 116. The rule is well settled in this state that one of the makers of a joint and several promissory note may plead the statute of limitations where another joint and several maker has kept the statute from running against him by payments, or otherwise. *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Christian v. State*, 7 Ind. App. 417, 34 N. E. 825. The recent case of *Mozingo v. Ross*, 50 N. E. 867, is the last expression of the supreme court upon the question, and is decisive of the case before us. It was there held that a partial payment can serve only to suspend the running of the statute of limitations as against the party making the payment, and the fact that one making the payment is the principal debtor does not alter or change the rule as to other debtors, who executed the note or obligation as sureties. The opinion of the court by Jordan, J., is an exhaustive exposition of the law, and, after quoting the statutes, and reviewing many authorities, the court reached the conclusion just stated. We do not deem it necessary to quote at length from the opinion, but content ourselves by citing it as decisive of the case in hand.

Appellant urges that the court erred in instructing the jury to return a verdict for appellee for the amount due on the note. This was the only instruction given, the court refusing to give certain instructions tendered and requested by appellant. Under the evidence and law as herein stated the court was not authorized to direct a verdict for appellee, and for the error in so instructing the jury the judgment must be reversed.

Appellee insists that the evidence is not in the record, because it does not affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, and hence we cannot consider the instructions; but in this insistence we think he is in error. The transcript was filed in this court November 22, 1897, and therefore it is governed by the provisions of the act approved March 8, 1897 (see Acts 1897, p. 244), notwithstanding the fact that the bill of exceptions was signed and filed before the act was passed. To make the evidence a part of the record under that act, it is sufficient if the transcript contains the original bill of exceptions embracing such evidence, if it appears from the record that such bill was duly and timely presented to the judge, approved and signed by him, and filed with the clerk of the trial court or in open court. This the record shows was done. The act further provides that it shall not apply to

"cases now pending on appeal in the supreme or appellate courts." This must be construed to mean that, though the bill of exceptions, embracing the evidence, was signed and filed before the act went into effect, and the appeal perfected after it became operative, the appeal must be governed, so far as bringing the evidence into the record is concerned, by the act in force when the appeal is perfected. It is not necessary, therefore, that the record should show that the longhand manuscript of the evidence was filed in the clerk's office before it was embraced in the bill of exceptions. Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

(21 Ind. App. 82)

SMITH v. MILLER et al.

(Appellate Court of Indiana. Oct. 26, 1898.)

ADMINISTRATORS—OPENING SETTLEMENT—PLEADING—DEFECTS CURED.

1. Under Burns' Rev. St. 1894, § 2558 (Horner's Rev. St. 1897, § 2403), providing for setting aside final settlement of an estate after the administrator has been discharged, on a person interested in the estate filing his petition, setting forth the fraud or mistake in the settlement or prior proceedings, "affecting him adversely," it is not enough to allege that plaintiffs were creditors of the estate, and had claims allowed which were not paid, and that the administrator did not account for funds received, but it should show that their claims were for more than nominal sums; and, having alleged that the estate was settled as insolvent, it should show that, after payment of any claims entitled to a priority, there would be a balance to be applied on their claims.

2. Failure of petition, demurrer to which is overruled, to aver a material fact, is not cured by general finding, under Burns' Rev. St. 1894, § 348 (Horner's Rev. St. 1897, § 345), declaring that "no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined."

Appeal from circuit court, Carroll county; T. F. Palmer, Judge.

Action by William Miller and others against James C. Smith, administrator of Thomas B. Robertson, deceased. Judgment for plaintiffs. Defendant appeals. Reversed.

A. C. Hindman, L. D. Boyd, and John H. Gould, for appellant. Pollard & Pollard, for appellees.

COMSTOCK, J. This action was brought by appellees as creditors of Thomas B. Robertson, deceased, whose claims had been allowed, but had not been paid, asking that the final settlement made by the administrator of said estate be set aside, and the estate reopened. The petition was based upon section 2558, Burns' Rev. St. 1894 (section 2403, Horner's Rev. St. 1897), which reads as follows: "When final settlement of an estate shall have been made, and the executor or administrator discharged, any person interested in the estate, not appearing at the final settlement, nor personally summoned to at-

tend the same, may have such settlement, or so much thereof as affects him adversely, set aside, and the estate re-opened, by filing in the court in which settlement was made, within three years from the date of such settlement, his petition, particularly setting forth the illegality, fraud or mistake in such settlement or in the prior proceedings in the administration of the estate, affecting him adversely. The executor or administrator of the estate, and any of the creditors, heirs, devisees or legatees of the decedent adversely interested in the matters alleged in such petition, shall be made defendants thereto, and shall be entitled to such notice of the pendency thereof as is required to be given, under the Code of Civil Procedure, to defendants in ordinary actions," etc. A demurrer to the petition, for want of facts, was overruled, a general denial filed, and, upon final hearing, the court found that by mistake the administrator had failed to charge himself with three separate items, amounting in the aggregate to \$72. The final settlement was set aside, and the administrator directed to file another report, charging himself with said omitted items, and setting out an itemized statement of his services as administrator.

The assignment of errors contains three specifications. The first and second challenge the sufficiency of the complaint; the third, the action of the court in overruling the motion for a new trial.

The petition avers that the plaintiffs are creditors of the estate of said Robertson, deceased; that letters of administration were duly issued to the defendant, Smith, on the 22d day of August, 1891; that on the 19th day of April, 1896, he filed in the Carroll circuit court his final settlement report of his said trust, which said settlement was duly approved and duly entered in the proper order book of said court; that neither of the plaintiffs appeared to said settlement; that neither of them was summoned to attend the same, nor did they have any notice whatever that the same would be made; that each of the plaintiffs had claims allowed against said estate, but neither of them received any part thereof; that such estate was settled as insolvent; and that said report was procured by fraud and misrepresentation practiced by said administrator upon the court. The petition then sets out particularly the acts which appellees characterize as fraudulent, among them the failure of the administrator to account for divers sums of money which he received as such administrator from various sources, and for which he did not account in said report.

Without setting out the averments showing the illegality, fraud, or mistakes of the administrator on account of which the petitioners asked that the final report be set aside, it is enough to say that they were sufficient to justify the trial court in reopening the estate, had the petition not been wanting in other necessary averments. The statute

clearly contemplates that the report shall be set aside and the estate reopened only upon the petition of those whose pecuniary interests have been affected adversely by the settlement. It must therefore appear from the complaint that the illegality, mistake, or fraud worked pecuniary damages to the petitioners. This does not appear from the averments of the complaint. It is alleged that the estate was settled as insolvent. It appears from the petition that the real estate was sold by the administrator to pay debts. If the estate was insolvent, it should appear from the complaint that appellees' claims were entitled to payment in the order of priority, or that there was a balance after payment of claims entitled to priority to be applied pro rata upon the unsecured or general claims. The complaint does not show the amount of either of appellees' claims. It should show, at least, that their claims were for more than a nominal amount. In other words, the complaint should show that appellees were affected adversely by the alleged errors or fraud, and that, but for the alleged illegality, mistake, or fraud, there would have been assets to apply to their respective claims. *Spicer v. Hockman*, 72 Ind. 120. This the complaint fails to do. For this reason the trial court erred in overruling the demurrer.

In the event of another trial, other alleged errors are not likely to arise, and we do not consider them.

The learned counsel for appellees suggest that an examination of the record will disclose that the cause was fairly tried, and that, even if the ruling on the demurrer to the complaint was erroneous, the judgment should be affirmed, under section 348, Burns' Rev. St. 1894 (section 345, Horner's Rev. St. 1897), reading as follows: "No objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." This section has been held in a number of cases, by the supreme and this court, to apply to special findings, but then in a qualified sense. The finding in this case must be held to be a general finding. In *Insurance Co. v. Replogle*, 114 Ind. 7, 15 N. E. 810, the court, by Mitchell, J., says: "The special findings cannot be looked to in order to determine the propriety of a ruling on the pleadings, unless they rest upon other pleadings than the one ruled on." In *Railway Co. v. Kurtz*, 10 Ind. App., at page 74, 35 N. E. 201, and 37 N. E. 303, the court, after a lengthy review of numerous decisions upon the question, declined to hold that a complaint defective in matter of substance could be cured by a special finding. In *Assurance Co. v. McCarty*, 18 Ind. App. 453, 48 N. E. 265, it was held that the failure to aver a material fact was not cured by a special finding. See, also, *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812; *Assurance Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95; *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666;

Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861. Judgment reversed, with instructions to the lower court to sustain the demurrer to the complaint.

(22 Ind. App. 677)

**MANUFACTURERS' NATURAL GAS CO.
OF INDIANAPOLIS v. LESLIE et al.¹**

(Appellate Court of Indiana. Oct. 27, 1898.)
**EMINENT DOMAIN—DAMAGES—APPEAL AND ERROR
—OBJECTIONS WAIVED.**

1. Where an easement in land is appropriated for the laying of natural gas mains, damages cannot be allowed for possible injury to crops from leakage or for injuries to persons and property likely to result from explosions.

2. In the absence of evidence that a natural gas main will prevent the future improvement of land, damages cannot be allowed therefor in proceedings to appropriate an easement for its construction.

3. Appellant, who at the trial did not object to the submission of special interrogatories to the jury, cannot on appeal complain that such interrogatories were not authorized by statute.

Appeal from superior court, Madison county; William S. Diven, Judge.

Proceedings by the Manufacturers' Natural Gas Company of Indianapolis against Mary Leslie and others to appropriate an easement in lands for the purpose of laying natural gas mains. From an award of damages, the plaintiff appeals. Reversed.

Chipman, Keltner & Hendee, for appellant. Carver & Ballard and Gavin & Davis, for appellees.

WILEY, J. This case was transferred from the supreme court after a judgment of affirmance had been rendered in that court, and a rehearing granted. 49 N. E. 946. It was a proceeding to appropriate an easement in lands for the purpose of laying natural gas mains, under the provisions of the act of 1889. Acts 1889, p. 22; Rev. St. 1894, § 5103, and succeeding sections. In the case before us there was a disagreement between appellant and appellees as to the appropriation of certain of appellees' lands for such easement, and they were unable to agree among themselves as to what compensation appellant should pay. Thereupon appraisers were duly appointed, as provided by law, who assessed damages at \$250. So far as the record shows, all the steps required by statute appear to have been regular, and, on the filing of the report of the appraisers, appellant paid to the clerk of the court the amount assessed for the use and benefit of appellees. To this report appellees filed exceptions, and appealed to the court below, where the question of damages was submitted to a jury, and the amount assessed at \$550 by their general verdict. At the proper time, appellant requested the court to submit to the jury certain interrogatories, and require them to be answered in case the jury agreed upon a general verdict. By their answers to interrogatories, the jury

specified the different items of damages, and these several items aggregate the amount named in the general verdict, so, as between the general verdict and the answers to the interrogatories, there is no inconsistency in the amounts. It is earnestly insisted, however, by appellant, that certain items or elements of damages found and specified by the jury in answer to the interrogatories are improper, and do not constitute damages for which it is liable in this proceeding. The several items of damages as specifically found by the jury are, as follows: (1) Value of real estate condemned, \$200; (2) interfering with the cultivation of the soil, \$50; (3) leakage of gas, permeating the soil, and entering tile ditches, causing explosions and loss of crops, \$100; (4) explosion of gas, causing damages to persons and stock, \$50; (5) barring and interfering with improvement of certain parts of the land, \$75; (6) relation of the balance of the land to the part condemned, \$75,—making a total of \$550. Upon the return of the verdict and answers to interrogatories, appellant moved for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict; also moved the court to render judgment for appellees for \$250 and \$275, respectively,—each of which motions was overruled, and appellees' motion for judgment for \$550 was sustained. Appellant then moved that the judgment be modified so as to be for \$250 and \$274, respectively, and no more, which motions were each overruled. All these motions are properly reserved and brought into the record by a bill of exceptions. The rulings on these several motions are assigned as errors, and, as they substantially present the same question, they may be considered together.

It is specially urged that the items of \$100 for leakage of gas, causing explosions and loss of crops, and \$50 for explosion, causing damage to persons and stock, are not proper elements or items of damage, and are erroneously included in the judgment. The statute under which this proceeding was brought is not as clear and definite as to the question of damages as it might be; yet we think it can be fairly construed so as to carry out the intention of the legislature in passing it. It provides, where the parties cannot agree, that an appraisal of the damages, etc., shall be made; and, as to the measure of damages, it is provided that "they [the appraisers] shall consider the injury which such owner may sustain by reason of such trenches and pipe lines, and shall forthwith return their assessment of damages to the clerk of the court, setting forth the value of the property taken, or injury done to the property, which they shall assess to the owner or owners separately." This statute is evidently intended to serve the same purpose, for the condemnation of lands, or to appropriate an easement therein, for the laying of pipe lines, etc., as the general statute relat-

¹ Rehearing denied.

ing to condemnation proceedings in securing the right of way for the construction of railroads. There is this difference, however: In a condemnation proceeding to procure a right of way for a construction of a railroad, the title to such right of way vests in the company; while, in a proceeding of this character, the company only acquires an easement. The object, therefore, of the legislature in passing the act we are now considering, was to provide landowners a just and adequate compensation for damages incident to the construction of pipe lines, etc., over and across their lands. Such compensation, it seems to us, must be measured by the actual damages to the freehold, occasioned by such construction, including the land appropriated and occupied, and the relation of the remaining land thereto. It is evident that it was not the intention of the legislature to embrace within the statute damages on account of injuries, either to persons or property, that subsequently might occur on account of negligence, etc. Such negligence, resulting in injury either to persons or property, might create an independent right of action, but it could not be made a basis for estimating the damages to the freehold, growing out of the construction of such pipe line. The rule for the assessment of damages in condemnation proceedings for railway purposes is the value of the land actually taken, and any injury to the residue. *Railroad Co. v. Allen*, 100 Ind. 409; *Railroad Co. v. McClure*, 29 Ind. 536; *Gravel-Road Co. v. Stockton*, 43 Ind. 328; *Railroad Co. v. Lansing*, 52 Ind. 229. In *Roushange v. Railway Co.*, 115 Ind. 106, 17 N. E. 193, *Zollars, J.*, stated the rule as follows: "The rule as to what damages may be assessed by the commissioners in a condemnation proceeding is that the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and construction of the road in a proper and lawful manner." And in the same case it was further said: "Such assessment of damages will not be presumed to cover damages resulting from the negligent construction of the road, or any portion of it, nor damages resulting from improper encroachments upon land outside of the right of way." In the case last cited, the right of way was conveyed by deed to the railway company; and, after the road had been constructed, it was found that, at a certain point on such right of way, the ground was soft, and the roadbed sunk. In filling up the depression, appellee encroached upon land outside of the original right of way, and the owner brought his action for damages. In discussing the question, the court said: "Had the strip of land been taken by condemnation, instead of by grant, the commissioners or jury, in assessing the damages, could not have included damages for such encroachment—First. Because they could not have as-

sumed that the railroad company would voluntarily so construct its road as to make it rest partially upon land outside the right of way. To have assumed that, and to have assessed damage accordingly, would have been to assume that the railroad company would commit a trespass, and have assessed in advance damages resulting from such trespass. Second. Because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon the balance of the land, and cause injury. Such an injury could not reasonably have been expected from the proper construction of the road." The case of *Oil Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487, is in point. It was there held, and we think correctly, that it will not be presumed, in the absence of evidence, that natural gas cannot be conducted through pipes without injury to the premises through which it passes. And in the same case it was further held that damages will not be allowed for probable future losses by fire and explosions, as independent items, disconnected from the diminished value of the land, in proceedings to condemn the same for laying pipes to convey natural gas. The questions there discussed and decided arose in condemnation proceedings, and upon an instruction to the jury. In the instruction, the court told the jury that, in considering the damages to be assessed, they could take into consideration the probability of injuries from fire and explosions which might result from the ordinary, prudent, and careful operation of the pipe line. And, in another instruction, the court told the jury that they could include, not only damages for the injuries to the land resulting from putting in the pipe line, but also damages which would probably result from the careful and reasonably prudent maintenance of the same in the future. Both of these instructions were held to be erroneous, as not stating the correct rule as to the measure of damages in such proceedings. The jury found in the case before us that appellees were entitled to recover damages for leakage of gas and the bursting of pipes, resulting in injury to crops in the sum of \$100, and \$50 damages for explosions, to the injury of persons. Under the authorities, these items of damages were not recoverable in this action, and it was reversible error to render judgment for them.

Another item of damages as found by the jury is as follows: "Barring improvements on certain portion of land, \$75." As to whether this is an element of damages proper to be considered in this proceeding, we are not able to decide from the record. We hold, however, that, under the record as it comes to us, it was improper for the jury to consider it. The evidence is not brought into the record, and whether there was any evidence upon which such damages could be predicated, we are unable to say. If the jury meant to say that at some future time

the appellees might desire to build a house or some other structure on the land traversed by appellant's pipe line, and that such line would interfere therewith, then, in that event, it would be too remote and indefinite to form the basis of the damages specified in the last above mentioned item. The statute under which these proceedings were had provides that "said trenches and pipe lines in all cases to be laid at such depth as not to interfere with the tillage of the soil, or the existing drainage, and the soil taken from such trenches shall be returned with the top soil on top, as originally found." Rev. St. 1894, § 5103, subd. 4. The same statute also provides that such trenches shall be constructed in such manner as to afford security to life or property. We must presume that appellant, in constructing its pipe line, did so in conformity to the law; and hence, in filling the trench, it placed the top soil on top, so as not to interfere with the cultivation of the soil or the use of the freehold, and also constructed its pipes in such a manner as to afford security to life and property. If this is true, then, when appellant had fully completed its line and filled the trenches, such line would not interfere with appellees' cultivation, use, and occupancy of the freehold, or prevent them from constructing buildings on any part thereof. The highest duty of a court is to see that justice is meted out, and that the rights of litigants are fully protected. In this case this could not be done by an affirmance of the judgment, for we would thus be holding that appellees could recover certain elements of damages which the statute does not authorize, which justice does not tolerate, and which this court has specifically decided are not recoverable.

It is insisted by counsel for appellees that, when this action was tried in the court below, there was no statute authorizing the court to submit to a jury interrogatories, and require them to find specially upon particular questions of fact. As to whether there was such authority or not, we do not decide, for the objection comes too late. At the trial of this cause, counsel for appellees recognized the right to have interrogatories submitted to the jury upon particular questions of fact, by not objecting thereto, and therefore appellees cannot now be heard to complain. As we have shown in this opinion, the elements of damages that may be recovered in such proceedings are clearly and distinctly marked. Neither courts nor juries can speculate upon the question, for the damages accruing to the freehold are susceptible of direct and positive proof, and hence may be determined by almost mathematical precision. It is seldom that a case comes to this court where the record presents such a wanton disregard of the legal rights of a litigant as shown by the jury in this case, in their answers to interrogatories. If the principle contended for here by appellees should prevail and become fixed in our jurisprudence, there would be no

protection to the rights of those invoking the wholesome doctrine of eminent domain, where the right involved the duty of submitting the question to the arbitrament of a jury. We could, on the answers to the interrogatories, direct a judgment; but, looking at the entire record, we believe the ends of justice will be best subserved by a new trial of all the issues. The judgment is therefore reversed, and a new trial directed.

(157 N. Y. 78)

In re TAXPAYERS AND FREEHOLDERS
OF VILLAGE OF PLATTSBURGH.

(Court of Appeals of New York. Oct. 25,
1898.)

APPEAL—DECISIONS REVIEWABLE—TOWNS—POWERS OF TOWN TRUSTEES—EXPENDITURES—DEFICIENCY OF FUNDS—CHARTER—CONSTRUCTION—EXPERTS—APPOINTMENT OF—COSTS—WAIVER.

1. An order which was the result of an investigation in a summary proceeding instituted before a justice of the supreme court, under General Municipal Law, § 3 (Laws 1892, c. 685), providing for an investigation into the financial affairs of villages, being a final order, in a special proceeding, is reviewable on appeal.

2. A justice of the supreme court in a proceeding before him, under General Municipal Law, § 3 (Laws 1892, c. 685), providing for an investigation into the financial affairs of villages, found that the trustees acted illegally in paying out of the proper fund debts chargeable to that fund, but contracted during previous years. *Held* error, since there was no prohibition in the charter against paying a debt out of the proper fund, although it was not contracted during the year when payment was made.

3. The charter of the village of P. provides that, whenever there shall be an excess of money in any particular fund in any year, the trustees can apply such excess to supply any deficiency existing in any other fund. *Held*, that the deficiency intended to be supplied was not only such as might arise from the nonpayment of taxes, but also such as might arise from the expenditure of a particular fund in supplying the reasonable wants of the village.

4. The trustees of a village contracted debts in undertaking to suppress an epidemic, under the direction of the local board of health. The charter of the village contained no provision authorizing its trustees to contract debts for preserving the public health; but General Health Law, § 30 (Laws 1893, c. 661), makes the municipality liable for all expenses incurred by the local board of health in the suppression of disease. *Held*, that the debts were not illegally created, since the general law must be regarded as part of the village charter.

5. A village charter provided that no sewer exceeding 20 rods in length should be constructed without advertising. The trustees, under the direction of the local board of health, constructed sewers, without advertising, exceeding such length, as a preventative of an apprehended epidemic. It was not claimed that there was any fraud in the transaction. *Held*, that the action of the trustees was technically wrong, but did not justify a finding that the debts so contracted were illegal.

6. In a proceeding by the freeholders of a village before a justice of the supreme court for an investigation into the financial affairs of the village, under General Municipal Law, § 3 (Laws 1892, c. 685), such justice, having the discretionary right to appoint an expert to make the investigation, on his own motion appointed one of such freeholders. *Held* error,

as such freeholder was ineligible for the appointment.

7. A justice in a proceeding before him, under General Municipal Law, § 3 (Laws 1892, c. 685), providing for an investigation into the financial affairs of a village, taxed the costs thereon against the village trustees, and directed payment by them personally. The statute authorizes the justice to tax costs, but makes no provision as to how they are to be awarded. *Held*, that the justice had no power to direct payment of the costs in a lump sum, or in such amount as he should determine to be proper; since, being a special proceeding, the costs, under Code, § 3240, should have been restricted to such as would be allowable for similar services in an action.

8. The first opportunity a party had to object to costs was when the order therefor was served on him, and he made his objection by appeal. *Held*, that he did not waive his right to question their allowance.

Appeal from supreme court, appellate division, Third department.

Proceeding before a justice of the supreme court on application of freeholders of the village of Plattsburgh for a summary investigation into the financial affairs of the village. From an order of affirmance, at the appellate division (50 N. Y. Supp. 356), of an order of the justice, the trustees of the village appeal. Reversed.

S. L. Wheeler, for appellants. Royal Corbin, for respondents.

O'BRIEN, J. This was a summary proceeding instituted before one of the justices of the supreme court under section 3 of the general municipal law (Laws 1892, c. 685), which provides as follows: "If twenty-five freeholders in any town or village shall present to a justice of the supreme court of the judicial district in which such town or village is situated, an affidavit, stating that they are freeholders and have paid taxes on real property within such town or village within one year, that they have reason to believe that the moneys of such town or village are being unlawfully or corruptly expended, and the grounds of their belief, such justice, upon ten days' notice to the supervisor, and the officers of the town disbursing the funds to which such moneys belong, or the trustees and treasurer of the village, shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in his discretion, may appoint experts to make such investigation, and may cause the result thereof to be published in such manner as he may deem proper. The costs incurred in such investigation shall be taxed by the justice, and paid, upon his order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved, and otherwise by the freeholders making such affidavit. If such justice shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, he shall forthwith

grant an order restraining such unlawful or corrupt expenditure, or such other improper use of such moneys."

On the 24th of February, 1897, 25 freeholders and taxpayers of the village made and presented to the justice an affidavit charging in substance that they had reason to believe that the moneys of the village were being unlawfully expended. It was not charged that they were corruptly expended or improvidently squandered or wasted. The charges were wholly based upon the ground of illegal action, in that the trustees had incurred expenses beyond the amount which they were authorized to raise by taxation, and had incurred debts beyond the limitations of the village charter. Upon this affidavit and notice, served therewith, the justice appointed the 10th day of March, 1897, for a hearing. The hearing was had at considerable length, and at its conclusion the justice made a report in the form of an order, in which he found that certain payments of money made by the trustees were illegal, and contrary to the limitations of the charter, and that certain debts and obligations had been created and audited which were illegal. He also made an order restraining the village treasurer from paying any of the debts so illegally created, or any of the costs of the proceedings. The investigation related wholly to past transactions; that is, to expenditures that had been made during the three years previous to the institution of the proceedings. It was not claimed that the trustees were, at the time of the institution of the proceedings, actually engaged in squandering or misappropriating the moneys of the village, or that they contemplated any such action in the future. Inasmuch as the order of the learned judge convicted the trustees of illegal payments of moneys for the restoration of which they were personally liable, and of contracting debts which, if not binding upon the village, were upon themselves personally, and since the treasurer of the village was restrained from paying the claims of certain of its creditors who had no hearing as to the validity of the claims or any opportunity to be heard, the decision may, in the future, prove to be of considerable practical importance to the parties in interest.

The first question to be considered is whether the order of the learned justice, which has been affirmed at the appellate division (50 N. Y. Supp. 356), is reviewable in this court I think it is. It was a special proceeding, authorized by statute; and, although it authorized the judge to proceed summarily, it must be classed as a special proceeding, and the order, which was the result of the investigation, must therefore be classed as a final order in a special proceeding, and hence reviewable here. For the reasons already stated, if it appears that the order is the result of the application of erroneous principles or rules of law with respect to the duties and obligations of the trustees and village offi-

cers in the administration of their trust, or an erroneous construction of the charter, it should not be permitted to stand. In the body of the order itself the reasoning and legal conclusions of the learned judge are found. In fact, the order itself assumes the form of an elaborate opinion by the learned judge with respect to the law and the facts involved in the investigation; and on a careful examination of the grounds and reasoning upon which he proceeded, and which are involved in the order, I think he applied rules and principles to the questions before him altogether too strict, and in some respects erroneous in point of law. Without further reference to the facts, it will be quite sufficient to state briefly the points disclosed by the order in which there is, as we think, legal error.

1. One of the fundamental rules laid down by the learned judge, and upon which the order largely rests, is the proposition that the trustees acted illegally in paying out, from the proper village fund, debts chargeable to that fund, but contracted during previous years. For instance, the charter provides that the trustees may raise by taxation in each year a sum not to exceed \$3,000 for the purpose of constructing necessary sewers. The order under review shows that during the year 1896 the trustees paid out more than that sum, but the excess was for sewers actually constructed during that and previous years, which had not yet been paid for. I do not think this can be said to be an illegal payment. It may happen in a perfectly honest and prudent administration of village affairs that the trustees may be required by the local board of health to construct in some one year sewers costing \$6,000, whereas they have raised only \$3,000 to pay for them; but, if in the next year they should conclude not to construct any sewers at all, they would have in the treasury \$3,000 applicable to the payment of the expense of constructing sewers. I have no doubt that they may legally pay out this money for the balance due and unpaid on sewers constructed in previous years, and what is true with regard to sewers or the sewer fund is equally true of many of the other funds referred to in the order. There is no prohibition in the charter against paying an honest debt incurred during previous years, from the proper fund, when there is money in the treasury, although the debt was not contracted during the year when the payment was made.

2. It is provided by the charter that, whenever there shall be an excess of money in any particular fund in any one year raised by tax, the trustees have power to apply such excess to supply any deficiency that may exist in any other fund. The learned judge, in his report, limits the application of this provision to cases where there is a deficiency in some particular fund in consequence of nonpayment of taxes or otherwise; and he holds it has no application when the amount of the particular fund has been

raised by taxation, and paid into the treasury. His position is that then there can be no deficiency. We think that is altogether too narrow a construction of the statute. The village has other sources of revenue besides taxes. It seems there are paid into the treasury each year considerable sums of money for fines, licenses, and other privileges for which the village is entitled to charge. The deficiency referred to in the statute is not a deficiency caused by non-payment of taxes, but one arising from the reasonable wants and necessities of the village and the expenditure of a particular fund; that is to say, if the trustees should be of the opinion that, instead of spending \$3,000 for sewers, they should spend \$4,000, and there is an excess over and above the necessities of the current year in the general fund, or any other fund, of that amount, arising from these miscellaneous sources, it is, we think, perfectly competent for the trustees to use that excess to construct sewers, or for any other purpose that, in their judgment and discretion, is for the best interests of the village.

3. The debts created and audited, and which the learned judge found had been illegally created, or a large part of them, were due to the action of the trustees of the village in prior years, although the board under investigation had audited the claims, and presumptively were willing to pay them. These debts amounted in the aggregate to something over \$11,000. About one-half of this debt was due to the prevalence of an epidemic in the village, which the local board of health undertook to suppress. The health board directed the trustees to quarantine certain places and persons supposed to be infected and dangerous to the community; and they, or the board itself, undertook to do it, and thus contracted the debts, claims, or obligations already mentioned, and which they subsequently audited. I do not think the auditing of these claims constitutes illegal action on the part of the trustees. The general public health law provides as follows: "Every such local board of health shall guard against the introduction of contagious and infectious diseases by the exercise of proper and vigilant medical inspection and control of all persons and things arriving in the municipality from infected places, or which from any cause are liable to communicate contagion. It shall require the isolation of all persons and things infected with or exposed to such diseases, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. * * * Laws 1893, c. 661, § 24. "All expenses incurred by any local board of health in the performance of the duties imposed upon it or its members by law, shall be a charge upon the municipality, and shall be audited, levied, collected and paid in the same manner as the other charges of, or upon, the municipality are

audited, levied, collected and paid." Id. § 30. This provision of the general law must be regarded as in the nature of an amendment, or at least a part of all municipal charters. The charter of this village, it is true, contains no provision authorizing the trustees to raise money or to contract debts for the purpose of suppressing disease or preserving the public health; but the general laws of the state make it their duty to comply with the orders of the local board of health in this respect; and when that board incurs expense in the performance of its duty in guarding against the introduction into the village of contagious or infectious diseases, or in the isolation of persons or things infected with or exposed to such diseases, or in providing suitable places for the treatment and care of the sick who cannot otherwise be provided for, it becomes the duty of the municipal authorities to comply with the order, whether there is any provision to that effect in the charter or not. So, we think, the strict view taken by the courts below with reference to the powers of the trustees in this respect is erroneous.

4. There are some other provisions of the charter under which acts of the trustees condemned by the report can be justified only by a very liberal construction of the law with respect to the powers of village officers acting in an emergency for the public good; for instance, the charter requires that no sewer exceeding 20 rods in length shall be constructed without advertising. It seems that the trustees of this village did construct sewers of a greater length without the necessary advertisement; and, while it is not claimed that there was any fraud or corruption in these transactions, and it is not claimed that the village has not had the benefit of every dollar spent in that regard, yet in this respect the trustees probably exceeded their powers. It is true a part of them were constructed under the direction of the local board of health, as a preventative of an epidemic then existing in the village or apprehended. It was an emergency, no doubt, that called for prompt and vigorous action; but all that could be had by compliance with the charter, and, if the trustees under these circumstances did construct sewers longer than specified in the charter, it was at least a technical disregard of the law. They could have held the orders of the board of health in abeyance until the expiration of the time provided by the charter for advertising. The general health law of the state is an exercise by the legislature of the police power, but it does not abrogate methods of procedure required by municipal charters; and when the trustees of this village constructed the sewers in question under its direction, without reference to the limitations of the charter, it is no doubt true that their action in this respect was illegal; but this consideration could hardly justify the order made in this case.

In regard to the procedure adopted at the investigation, there are two things disclosed by the record of which I think the trustees have the right to complain:

First. It will be seen by the statute above quoted that the justice making the investigation had the right to appoint an expert for the purpose of making the investigation into the financial affairs of the village, and he exercised that power; but the expert appointed was one of the complaining freeholders and taxpayers, and his appointment was without the consent of the trustees, and upon the justice's own motion. The court had the right to give to his report the same force and effect that is given to the report of a referee appointed to report testimony or facts, with his opinion thereon. It was not conclusive, but was merely for the information of the conscience of the court. When it was offered in evidence, it was objected to by counsel for the trustees on these specific grounds. It appears in the record as part of the proceedings, and hence must have been accepted by the justice for the purpose contemplated by the statute. In this way the unverified statement of one of the parties to the proceeding, who was interested, was received and acted upon by the court; and hence it may be said that in some sense the action of the trustees was investigated by one of their accusers. If the general principles applicable to jurors, judges, and referees are applicable to such a case, and to the expert appointed,—and we see no reason why they should not be applied,—then he was not eligible for the appointment. It may be that this error, if it was one, had no influence upon the result; but it is proper to say that an expert, whose duty it is to investigate books and papers of a village government, and to report the result to the court, is, in a very substantial sense, a referee, and should not have been selected, at least without the consent of all the parties, from one of the complainants, whether there was power to appoint him or not.

Second. The justice awarded costs against the trustees in the sum of \$778.75, and directed payment of this sum by them personally. If these costs were awarded upon any erroneous principle or view of the law, the trustees have the right to complain. The statute gave to the justice the power to award and tax costs, but no provision is made with respect to the principle upon which costs are to be awarded or the rate by which they are to be measured. Since this was a special proceeding, costs are governed by the provisions of the statute in that regard. It was not within the power of the justice to direct the trustees to pay costs in a lump sum, or in such amount as he should determine would be a proper allowance for the counsel fees and expenses of the complainants, as he evidently did. The costs in special proceedings are limited by statute the same as the costs in actions, and the justice

had no power in this case to award costs in excess of these limitations. Under section 3240 of the Code, the costs, if any, should have been restricted to those allowed for similar services in an action.

The first opportunity the appellants had to object to the costs, or raise any questions as to the amount, was when the order was served upon them or published, and they then made objection by appeal. They have not therefore waived their right to question the allowance in this court. If, before the order was entered, they had notice of a bill which was presented to the justice for taxation, and an opportunity to be heard before him, and failed to appear, the contention of the learned counsel for the taxpayers might be held to be correct. But a party cannot be held guilty of laches or considered to have waived any right when he makes objection at the first possible opportunity.

For these reasons, the order of the justice and of the appellate division should be reversed, without costs to either party. All concur (BARTLETT and MARTIN, JJ., in result), except VANN, J., not voting. Order reversed, etc.

(157 N. Y. 105)

POWERS v. BROOKLYN EL. R. CO. et al.

(Court of Appeals of New York. Oct. 25, 1898.)

EMINENT DOMAIN—DAMAGES—FINDINGS—EVIDENCE.

In an action for damages occasioned by the erection of an elevated railroad in front of plaintiff's property, defendant requested and was refused a finding that a stable in the rear of the premises contributed to the depreciation in the value of the property. The testimony showed generally that the proximity of a stable to property was more or less damaging. *Held* not error, since the proof did not show that this particular stable contributed to the depreciation of the property.

Appeal from supreme court, general term, Second department.

Action by George A. Powers against the Brooklyn Elevated Railroad Company and another. From a judgment for plaintiff of \$5,000, defendants appealed to the general term, and from an order of reversal (35 N. Y. Supp. 43) plaintiff appeals. Reversed.

Charles J. Patterson, for appellant. Eugene Treadwell, for respondents.

BARTLETT, J. This is the usual equitable action in elevated railroad cases, brought by an abutting property owner for a permanent injunction, unless his damages are paid. The learned trial judge found that the plaintiff's property, located in Brooklyn, at the corner of Flatbush avenue and Fifth avenue, and extending back on Pacific and Dean streets, was of the value of \$70,000; that the railroad of defendants is operated in front of so much of the property as is located on Flatbush avenue and Fifth avenue, and turns

from Flatbush avenue into Fifth avenue, so that a portion of the structure is within the line of the curb at the point where the railroad is nearest to the plaintiff's property, and is of itself necessarily detrimental thereto; that the damages occasioned to the property by the railroad and structure exceed the benefits derived therefrom by the sum of \$5,000; that the property is substantially vacant. The general term, by a divided court, reversed the judgment and ordered a new trial.

The questions for us to determine are whether the findings are against the weight of evidence, and whether legal error exists, as the reversal was on both the law and the facts. The case discloses a sharp conflict between the expert witnesses, and it was peculiarly within the province of the trial judge, who had the witnesses before him, to determine the questions of fact. The defendants' manager and chief engineer testified that, to make the curve easier, they ran close to the property in turning the corner. It needs no argument to show that the railroad structure, within a few feet of the property, and with its columns in the sidewalk, is a permanent damage, and will impair the value, to some extent, of any building that may be erected thereon. It not infrequently happens that property in a neighborhood may be generally increased in value by the advent of an elevated railroad, while other property in the same locality, by reason of the close proximity of the structure, may be damaged. We have carefully examined the record, and are of opinion that the findings are not against the weight of evidence.

It remains to consider whether there is legal error that justified the reversal of the general term. It is confidently urged by the defendants that they were entitled to a finding that the presence of the stable adjoining the rear of these premises on Pacific street had contributed to the depreciation of this property. We think the case is barren of evidence that would justify such a finding. The nature of this stable, and the facts connected with its use calculated to establish its character as a nuisance, do not appear. A number of witnesses testified generally on behalf of the defendants that the proximity of a stable to property was more or less damaging, but the proof should have gone further in order to have warranted the finding that this stable contributed in any appreciable degree to the depreciation of this property. The defendants insisted that more than one cause had contributed to the depreciation of this property, and that the fact it was left unimproved tended to that result. We think the evidence warranted the conclusion of the trial judge that only one cause contributed to the depreciation of this property, and consequently the court was not called upon to find upon this subject as requested. Without discussing further in detail the defendants' exceptions, we are of opinion

that no error is disclosed, either in the refusals to find at defendants' request, or in the rulings upon questions of evidence, that called for a reversal of the judgment by the general term. The order of the general term should be reversed, and the judgment of the special term affirmed, with costs. All concur. Order reversed, and judgment accordingly.

(172 Mass. 127)

HOGG v. AMERICAN CREDIT INDEMNITY CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

CREDIT INSURANCE — INDEMNIFYING BOND — CONSTRUCTION.

An indemnifying bond against losses from insolvent debtors provided for an indemnity on total gross sales made between June 15, 1896, and June 14, 1897, inclusive, and was to expire June 14, 1897. By a rider attached, it covered losses occurring, after payment of premium, on sales and shipments made from April 1, 1896, to June 15, 1896. The bond also provided that claims should be barred unless notice thereof was given within 10 days after the indemnified was informed of a debtor's insolvency during the term of the bond, and a final statement of claims filed in accordance with this condition was made and received at the indemnifier's office within 30 days after the bond expired. An adjustment was to be made within 60 days after its receipt, and the amount found due was payable at once. In case the bond was renewed, losses on sales covered, resulting after its expiration, on shipments made during the term of the bond, could be proven in accordance with the terms of the renewal. *Held*, that it did not authorize a claim for indemnity for a loss resulting from an insolvency occurring after the date of expiration.

Appeal from superior court, Worcester county.

Action by W. J. Hogg against the American Credit Indemnity Company of New York. A judgment was ordered for defendant, and plaintiff appeals. Affirmed.

Charles A. Merrill, for appellant. E. R. Champlin and G. L. Wilson, for appellee.

HOLMES, J. This is an action upon a bond of indemnity, within certain limits, against loss resulting from insolvency of debtors, as afterwards defined, "on total gross sales * * * amounting to \$120,000 or less; said sales * * * to be made between the 15th day of June, 1896, and the 14th day of June, 1897, both days inclusive." The bond was "to expire on the 14th day of June, 1897." By a rider attached to the bond "losses occurring after payment of premium, on sales and shipments made from the 1st day of April, 1896, to the 15th day of June, 1896, may be proven under this bond," etc. The two losses in respect of which the plaintiff claims indemnity may be assumed to have been upon sales made within the time limited by the instrument, but the insolvency causing the loss in each case occurred after June 14, 1897. The defendant demurs, the

principal ground of demurrer being that the bond does not cover losses from insolvency occurring after the term of the bond.

As we are of opinion that the defendant must prevail upon this ground, we do not go into details which are unnecessary for the discussion of this point. We fully appreciate the great probability that a business man reading the contract without warning might understand that he was getting the protection which the plaintiff claims. We appreciate the small worth or worthlessness of the bond for sales made during the last part of the term covered, when we consider the definition which it gives for the term "insolvency of debtors," as used in the bond. If we could see a reasonable doubt as to the meaning of the instrument, we should give the plaintiff the benefit of it. But whatever doubt may be left by the words, "to expire on the 14th day of June, 1897," seems to us removed by the language of three conditions, all of which lead to the same result. By the fourth condition, "notification of claims must be delivered to this company * * * within ten days after the indemnified shall have had information of the insolvency of any debtor, and must be received at the central office of the company at St. Louis, Mo., during the term of this bond; otherwise such claims shall be barred." This is perfectly explicit, and cannot be reconciled with the plaintiff's construction except by arbitrarily assuming that construction to be correct. The plaintiff says that it must be limited to cases where the conventional insolvency occurs during the term of the bond. Of course it must, as it could not be complied with in any other. But the conclusion is not that there are other cases for which the bond makes no provision at all, but that this requirement, universal in form, is universal in fact, and covers all the cases to which the bond applies. So, by condition 12-C: "A final statement of all claims which have been filed in accordance with condition No. 4 shall be made. * * * Such final statement must be received at said office within 30 days after the expiration of this bond; otherwise all claims hereunder shall be forever barred. The adjustment of claims shall be had within sixty days after receipt of such final statement by the company, and the amount then ascertained to be due shall at once become payable." This plainly provides for the winding up of all claims upon the bond. Finally, by the eighth condition, "in case this bond is renewed, * * * loss on sales covered, * * * resulting after said date of expiration, upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal." Then follows a similar provision in case this bond is a renewal. This contemplates cases like the present, and contemplates and encourages renewals as the means by which bondholders could get the benefit of continuous insurance. Unless that

means is resorted to, there is no protection for losses "resulting after said date of expiration upon shipments made during the term of this bond."

Judgment affirmed.

(172 Mass. 109)

BARRY v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

**CARRIERS—RAILROADS—INJURIES TO PASSENGERS—
STOPPING AT STATION—INSTRUCTIONS.**

1. In an action for injuries received by a passenger while attempting to alight from a train, it was not error to refuse to instruct that the brakeman's calling the station and the actual stopping of the train do not warrant a finding that defendant negligently led plaintiff to suppose the train had reached the place for her to alight, where there were other circumstances bearing on the question whether plaintiff supposed the train had reached the station.

2. A complaint for injuries received in attempting to step from a train, alleging that at or near a certain station the brakeman called out in the car in which plaintiff was seated the name of the station, and thereupon the car stopped, and plaintiff attempted to alight, and was thrown to the ground by the starting of the train, does not require plaintiff to show that the train had come to a stop "at a place designed for passengers."

3. In an action for injuries received in attempting to step from a train, it was not error to refuse to instruct that the brakeman's calling the station was not an invitation to alight from the train, or, if it was, that it was not an invitation to alight until the train had come to a stop at the station, where the court instructed that plaintiff "was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman had announced the station, and the train had stopped. She must use her senses."

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Mary Barry against the Boston & Albany Railroad Company to recover for injuries received in attempting to step from defendant's train. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

The defendant asked the court to rule as follows: "(1) If the plaintiff undertook to step off the train when it was in motion, and was injured in consequence, she cannot recover. (2) If the train had not come to a stop when she attempted to step off, she cannot recover, whether she knew it was in motion or not. (3) The plaintiff cannot recover unless the train, at the time she attempted to step off, had come to a stop at the place designed for passengers to alight, unless there is evidence to satisfy the jury that the defendant negligently led the plaintiff to suppose the train had reached and stopped at such place. (4) The act of the brakeman in calling the station, and the actual stopping of the train, are not evidence to warrant a finding that the defendant negligently led the plaintiff to suppose the train had reached the

place for her to alight. (5) She was bound to use due care to ascertain whether the train had reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman announced the station, and the train had stopped. (6) The action of the brakeman in calling the station was not an invitation to alight from the train at all, or, if it was, it was not an invitation to alight from the train until it had come to a stop at the station where it was designed to discharge the passengers. (7) On the pleadings and evidence in this case there can be no recovery unless the train had come to a stop at the place designed for passengers to alight, and while the plaintiff was, in the exercise of due care, in the act of alighting, the train was negligently started. (8) The evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight." The court gave the first three rulings and the fifth, in the form requested, and also gave the fourth in a modified form. The court also gave the seventh, subject to certain modifications as appears in the charge. As to the sixth, it is for the court to determine how far, if at all, the matter was covered. The court declined to give the eighth request in any form.

J. R. Thayer and A. P. Rugg, for plaintiff.
F. P. Goulding and W. C. Mellish, for defendant.

HAMMOND, J. At the close of the evidence the defendant requested the court to give certain rulings, eight in number. The court gave the first three and the fifth. The fourth was rightly refused in the form presented. There were other circumstances bearing upon the question whether the plaintiff supposed the train had reached the place for her to alight, and the court was not bound to rule upon the effect of the two facts named in the request considered as detached from all the others. The instruction that "the act of the brakeman in calling the station, and the actual stopping of the train, are to be considered by you in connection with the care which it was necessary for her, the plaintiff, to use in the exercise of her senses, to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight," sufficiently covered the subject-matter of the request. The subject-matter of the sixth was fairly covered by the instruction that: "She was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped. I think I substantially covered that before. She must use her senses. Simply because somebody said 'South Framingham' is not enough. She must use her senses about it." The seventh was right-

ly refused. The declaration did not require the plaintiff to prove that the train actually had come to a stop at a place designed for passengers. It alleges that "at or near the station at South Framingham the defendant's employé called out in the car in which the plaintiff was seated 'South Framingham' and thereupon the said car stopped, and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement, and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car; that, as she was on the point of stepping from said car, the train suddenly started, and she was thrown with great force to the ground." It nowhere states where the train stopped, and proof of a stopping elsewhere than at the place designed for passengers to alight was no variance. And the rest of the request was given subject to the modification contained in the latter part of the third instruction which was given. This was all the plaintiff was entitled to. The refusal to give the eighth presents a question of more difficulty. The evidence produced by the defendant seems to have a very strong tendency to show that at the time the plaintiff attempted to get off the train had not come to a stop at the place designed for passengers to alight. On the other hand, the plaintiff testified that when she was stepping out she saw the platform of the depot, and tried to step upon it, and that she "was stepping on the fourth step, and just stepping on the platform." It is argued for the plaintiff that in other parts of her testimony it appears that she did not know what she was going to step on when she left the car, and that in saying she saw the platform she was mistaken; and there is much in her testimony to support this contention. But the effect of the whole evidence was for the jury, and, there being a conflict, we cannot say, as matter of law, that they were not justified in coming to a conclusion the other way. Exceptions overruled.

(172 Mass. 123)

JOHNSON v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—SETTLING OF TRENCH.

A trench constructed by a city, shortly after being filled, settled during a heavy rainstorm, at a point where a connection was made between a 20 and a 24 inch pipe, and caused the accident to plaintiff while driving on the street. The earth was sandy for a considerable distance around the settling, and two knees which had connected the old pipe at such point were left in the ground. There was not a settling at any other place on the line of the trench. Defendant city introduced evidence that the trench was properly filled, and contended that the cause of the settling was the unusual rainstorm, which was greater than was reasonably to be anticipated, and that the failure to provide against such a storm was consistent with due care in filling the

trench. *Held*, that a finding by the jury that the settling was due to negligent filling was not error.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by William H. Johnson against the city of Worcester to recover damages for injuries received by plaintiff's wife on account of a defect in a street. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

Goulding, Johnson & Mellish, for plaintiff.
A. P. Rugg, for city of Worcester.

HAMMOND, J. The defendant asked for various rulings, none of which were given in the form presented. All are waived upon the defendant's brief, "except those that go to the essence of the plaintiff's case."

The first contention of the defendant is that there is no evidence to warrant a finding by the jury that the trench was negligently filled; that the burden of proving negligence was on the plaintiff; and that the evidence, taking it most favorably to the plaintiff, left it in doubt whether the settling was not caused by the rain falling upon a trench filled in the most approved manner; that, at best, it left it in doubt as to which of two different causes, for only one of which the defendant was responsible, led to the accident; and that the jury must have resorted to mere "surmise, conjecture, and suspicion" in order to find for the plaintiff. Upon looking at the evidence, it appears that the earth was "quite sandy * * * for perhaps a distance of three or four hundred feet." The place of the accident was where, by means of a "taper," the connection was made between the 24-inch pipe and the 20-inch pipe. The two knees which at this point had connected the old cement pipe on the south side of the road were left in the ground, and it does not appear that there was any settling anywhere else on the trench. It is true that Brady, the water commissioner, and Doyle, the foreman, both describe the general plan followed in filling the trench, and testify that such a plan was proper; and Allen, the expert engineering witness, testified that the plan was proper, and the usual one followed. But the testimony of Brady was that he was at the work "perhaps an hour and a half per day"; and Doyle testified that although he saw the filling going on around the taper, and described the method, yet he "was not there during all of the time, but was back and forth." It does not appear that any of the men who actually did the filling were called by the defendant, but it did appear that Leary, the caulker, who did a part of the work, was dead. There is also other evidence bearing upon the question.

The contention of the defendant was that the trench was properly filled, and that the settling was due to the unusual storm immediately preceding the accident; that the fall of rain was greater than was reasonably to

be anticipated; and that the failure to provide against such a storm was consistent with due care in filling the trench. The contention of the plaintiff was that the storm was reasonably to be anticipated; that the failure to provide against it was negligence; and that, considering the unusual state of things at this point and the whole evidence of the filling, the jury might well find that the most reasonable explanation of the settling was that the trench was not properly filled. Upon these matters the jury were instructed in a manner not now excepted to, except so far as inconsistent with the request to rule that there was no evidence to show negligence. We cannot say, as matter of law, that the jury were not warranted in finding that the settling was due to negligent filling. The plaintiff was not bound to prove it beyond a doubt, and the jury may have found that to have been the most reasonable explanation. *Griffin v. Railroad Co.*, 148 Mass. 143, 19 N. E. 186; *Neveu v. Sears*, 155 Mass. 303, 29 N. E. 472.

The defendant further contends that the case should not have been submitted to the jury upon the question of negligence in guarding the trench. Upon this branch of the case the contention of the defendant is that, prior to the time of the accident, it had ceased to work as a water-pipe layer at the place of the accident, and that, if due care was exercised in filling the trench, it had performed its whole duty as such pipe layer; that the highway some days before had been open to public travel; that for the subsequent settling the only liability of the defendant was its statute liability for defects within its highways; and that there was no evidence to show that the place needed or was receiving any further attention from the defendant as such pipe layer at the time of the accident. The plaintiff contends to the contrary. As to this, it is settled that if, in the progress of the work, there is negligence in guarding the trench in the highway, the defendant may be held liable at common law. *Fox v. City of Chelsea*, 171 Mass. 297, 50 N. E. 622. The real question on this branch of the case is whether, assuming the trench to have been properly filled, the subsequent defective condition of the trench arose during the progress of the work. On this point it appeared that there was a superintendent of streets, having general oversight of the streets, and charged with the duty of keeping them in proper condition, and that there is an ordinance of the defendant which, so far as material, is as follows: "The water commissioner shall have the care and control of all ponds, streams, waters, reservoirs, aqueducts, and other property acquired or held by the city for the purpose of obtaining or furnishing a supply of pure water for the use of its inhabitants; shall maintain the same in good order and condition; shall use and operate the same, and furnish all supplies required therefor;

shall take all measures necessary to protect and preserve the purity of all waters; shall purchase, lay, and maintain all pipes, conduits, and other fixtures and appliances necessary for obtaining or supplying water for the inhabitants of the city." There was evidence tending to show that the water department were engaged that fall in laying a water pipe in Main street, beginning 40 feet westerly of Winchester avenue, and running westerly 8,600 feet, to and into the town of Leicester; that they began at the easterly end, near the avenue, and laid 2,000 feet westerly therefrom to Hunt's corner; that before the accident this entire trench of 2,000 feet was filled, and the street was opened for travel, and was actually used by the public for all this time; that the condition of this portion of the way was described by witnesses as level, except that the part over the trench was rounded up somewhat; and that no guard was placed upon the trench or care taken of it thereafter until the rain came; and that the water department, immediately after closing this trench, began laying pipes in the town of Leicester, beginning about 2,000 feet beyond Hunt's corner. Brady, the water commissioner, testified that "we laid about two thousand feet, and then skipped, and went further west. The two thousand feet from Winchester avenue would take up to about Hunt's corner. We began to lay this two thousand feet early in September. We began about forty feet west of the west line of Winchester avenue to lay. From that point towards the city there was a 20-inch pipe to this side of Gate's lane. At some time before we had laid a cast-iron pipe to about 40 feet west of the west line of Winchester avenue, and then we continued that 24-inch pipe along up towards Leicester. We connected it with what we call a 'taper.' It is made one end smaller, and the taper is about three feet long, and the difference between a twenty-four inch and twenty inch was in that three feet, or about three feet; I do not remember the exact length. We commenced at this point forty feet west of Winchester avenue, and excavated on the north side of the street for this twenty-four inch pipe, and we laid to a point near Hunt's corner, where this cement pipe was on the north side, and then we connected both ends. When we had completed laying this twenty-four inch pipe of this strip of two thousand feet, we disconnected this cement pipe, and then we came back, and filled this place. We made an excavation about four feet wide on top, and six feet deep, and perhaps a foot narrower at the bottom than at the top. We laid this two thousand feet, with the exception of twenty-five or thirty feet, at the east and west end, and then we connected the two ends." He further testified that after the accident the water department made the repairs. During the rain-storm, and after it, up to the time of the accident, the defective spot was cared for only

by the water department. There was some conflict as to when, with reference to the accident, the trench was dug and filled. Clark, for the plaintiff, "should think the trench was dug about two weeks before or within two weeks." Brady, for the defendant, says: "We began to lay this two thousand feet early in September;" but on cross-examination he says: "I do not state exactly whether we began there the latter part of September or three weeks before the 14th of October." Upon the whole evidence it was a question for the jury whether that part of the work was still in the charge of the water department as a part of the original work; and this question having been submitted to the jury upon instructions not now excepted to, except so far as inconsistent with the request that the plaintiff is not entitled to a verdict upon the evidence, the exceptions must be overruled.

(172 Mass. 106)

CAREY v. TOWN OF HUBBARDSTON.

CUNNINGHAM v. SAME.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1898.)

EVIDENCE—PHOTOGRAPHS—HIGHWAYS—DEFECTS—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries sustained through a defective highway, the question whether a photograph of the locality is sufficiently verified is for the court.

2. Where, in an action for personal injuries received through a highway, defective by reason of a projecting stone, a photograph of the locality, which does not show the stone, has been introduced, the admission of a second photograph, which shows the stone, but not the grass which surrounded it at the time of the accident, is discretionary with the court.

3. One who knowingly, and without being obliged to do so, drives outside of the prepared track of a highway, or carelessly allows his horse to get out of it, cannot recover for injuries received while so traveling.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Two actions by Eliza J. Carey and Maria Cunningham, respectively, against the town of Hubbardston, for personal injuries received August 27, 1895, through a defective highway in said town, the defect consisting of a projecting stone. There was a verdict for defendant in each case, and plaintiff reserved exceptions. Overruled.

A photograph of the locality of the injury, which did not show the stone, having been introduced, plaintiffs offered another photograph, which showed the location in question, including the traveled part of the way, and the stone, but not the grass and weeds around it. This photograph was excluded, and plaintiffs excepted.

C. F. Baker and W. P. Hall, for plaintiffs.
F. W. Blackmer and E. H. Vaughan, for defendant.

HAMMOND, J. 1. The question whether the photograph was properly verified, and also

whether it was practically instructive to the jury, was to be determined by the presiding judge under the circumstances. *Blair v. Pelham*, 118 Mass. 420; *Verran v. Baird*, 150 Mass. 141, 22 N. E. 630. One photograph had been already introduced, and, although it did not show the appearance of the stone, the judge may have thought that the second photograph, which it was conceded did not show the actual condition of the grass and weeds at the time of the accident, would be misleading, rather than helpful. We see no ground for holding that there was error in excluding it.

2. After stating that it was the duty of the defendant to keep the way reasonably safe and convenient for travelers, and to "work sufficient width" for that purpose, the presiding judge submitted to the jury, under instructions to which no exception was taken, the questions whether a sufficient width was worked, whether the stone was a defect, and whether there was negligence on the part of the defendant in allowing it to be there, or in allowing the grass and weeds to grow around it. He then defined the degree of care required of the plaintiff, and used this language: "Now, Mr. Foreman and gentlemen, under those circumstances, is it a proper thing to do to drive off the traveled part of the way upon that grass? Would that be due care? If so, she was exercising due care. If it is not due care, she would not be exercising due care, and it would bar her from recovery." Then follows that part of the charge to which exception is taken, as follows: "If Mrs. Cunningham knowingly drove out of that portion of the way prepared for travel without being forced to do so by some peril or danger in the traveled way, and without any reasonable cause therefor, she took the chances of contact with any object that might be outside of the way, and for the effects of that contact she could not recover. You see this is a case where I suppose she does it knowingly. When she sees there are grass and weeds growing by the side of the way, and she knowingly and willfully drives upon the grass outside the traveled part of the way, when there is no danger in the way itself which causes her to do so, and when there is no reasonable necessity for her to do so, under those circumstances she takes the chances of any collision that may take place with any obstacle that is obscured from her view by the growing grass and weeds. If she heedlessly and carelessly allowed her horse to get out of the traveled way, she then took the risk incident to passage over that portion of the road which is outside of the traveled way. I give you these specific instructions because of the nature of the evidence in the case, and in order that the rights of all parties may be preserved. If she knowingly went out of the way, and there was nothing in the way to force her out,—if there was no reasonable cause for her to go out,—and she entered upon

that part of the way which was not wrought for travel, then she did it at her own risk, and the consequences would fall upon her. If, on the other hand, unthinkingly, carelessly, and not observing where the horse was going, allowing him to take his own course, she let him wander outside the traveled part of the way onto the grass ground, and there met with an obstacle, the consequence would fall upon her, and she could not recover." We understand these instructions, taken in connection with what precedes, to say, in substance, that if the plaintiff, without any reasonable cause therefor, knowingly drove out of the way prepared for travel, or if she carelessly allowed the horse to get out of it, and in that way was injured by contact with the stone, she could not recover; and such we understand to be the law. *Tisdale v. Inhabitants of Norton*, 8 Metc. (Mass.) 388; *Shepardson v. Inhabitants of Colerain*, 13 Metc. (Mass.) 55; *Harwood v. Inhabitants of Oakham*, 152 Mass. 421, 25 N. E. 625. The remaining exceptions were waived in the defendant's brief. Exceptions overruled.

(172 Mass. 38)

PHELPS v. NEW ENGLAND R. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1898.)

RAILROADS—INJURY AT CROSSING—GROSS NEGLIGENCE—QUESTION FOR JURY.

Pub. St. c. 112, § 213, makes a railroad corporation liable for death of one killed at a crossing through the company's failure to give signals required by section 163, unless deceased was "guilty of gross or willful negligence," etc. A woman 71 years of age, in good health, and capable of sight and hearing, was struck by a train, and killed, while attempting to pass over a grade crossing of a street and a railroad track, which was not planked between the rails, on a cold, dark night, without stopping to ascertain the location of the train, which she knew was approaching, though the required signals were not given. *Held*, that the question whether her conduct was "gross negligence" was for the jury.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Action of tort by George E. Phelps, as administrator of the estate of Rosetta Phelps, deceased, against the New England Railroad Company, to recover damages in consequence of the death of his intestate through alleged negligence on the part of defendant. The accident occurred at the crossing at grade of the railroad and a highway, in Springfield, known as the "Allen Street Crossing." At the trial the evidence was conflicting as to whether or not the signals required by the statutes to be given at the approach to the crossing were given. The jury found, in answer to a question submitted to them; that the signals were not given. The accident happened on March 31, 1897, at about half past 7 o'clock in the evening. The night was cold and dark at the time of the accident. On the evening mentioned, intestate, who was

71 years of age, left her house, which was in the vicinity of the crossing, in company with a lady friend, to attend a concert at a church situated on the opposite side of the track from her house, and some distance therefrom. There was evidence that there was no planking between the rails of the track at the point where the sidewalk on which the ladies were walking crossed the track. It appeared that intestate was in good health, and could see and hear well for a person of her age. They knew that a train was approaching, but, without stopping to ascertain its whereabouts, proceeded to cross the track, and intestate was struck and killed. At the close of the testimony defendant requested the following rulings: "(1) Upon all the evidence, the plaintiff cannot recover under the first count of the declaration. (2) Upon all the evidence, the plaintiff cannot recover under the second count of the declaration." "(6) If the plaintiff knew that the train was approaching, it is immaterial whether the signals were given or not." "(8) If the plaintiff in any way learned, before reaching the crossing, that the train was approaching, and, not being then in danger, undertook to cross the track in front of the train, she was guilty of gross negligence, and cannot recover." In charging the jury, the second request was given, the others being refused, except so far as they were incorporated into that portion of the charge submitting to the jury plaintiff's cause of action as set out in the first count of the declaration, to which refusals defendant excepted. Exceptions overruled.

Carroll, McClintock & Stapleton, Jr., for plaintiff. Wm. M. McClench, for defendant.

KNOWLTON, J. The only question in this case is whether the judge should have instructed the jury that the plaintiff's intestate was guilty of gross negligence, and should have directed a verdict for the defendant. Plainly, there was no evidence that she was in the exercise of due care, and the jury were therefore rightly instructed to find for the defendant on the second count.

The first count is founded upon Pub. St. c. 112, § 213, under which a railroad corporation is liable if one is injured in person or property, or if the life of a person is lost, at a crossing where signals are required by Pub. St. c. 112, § 163, and where the corporation neglected to give the required signals, and such neglect contributed to the injury, unless it appears that the person was "guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence or unlawful act contributed to the injury." When a plaintiff's case is made out in other particulars, the burden of proof is on the defendant to establish gross or willful negligence, or an unlawful act of the person injured, or of some one representing him, which contributed to the injury, if the corporation would escape liability on this ground. Where

there are no binding admissions, and the case must be proved affirmatively by the testimony of witnesses, the court can seldom, if ever, rule, as a matter of law, that a material fact is proved. The question what is established by testimony is ordinarily a question of fact for the jury. In the present case the evidence tends strongly to show that the plaintiff's intestate was negligent; but some of the important circumstances bearing upon her conduct were in doubt on the evidence, and the jury alone could authoritatively determine them. The defendant sought to prove gross negligence within the meaning of the statute. How much greater is the degree of neglect necessarily existing in gross negligence than that which is always found in negligence that is not gross, has never judicially been determined in this commonwealth. But the use of the words "gross negligence" in the statute shows that the legislature intended a materially greater degree of negligence than the mere want of ordinary care. *Galbraith v. Railway Co.*, 165 Mass. 572, 43 N. E. 501; *Moore v. Railway Co.*, 171 Mass. 164, 50 N. E. 530. We cannot say, as a matter of law, that gross negligence on the part of the plaintiff's intestate was proved in this case. Exceptions overruled.

(172 Mass. 32)

POMEROY v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Hampden. Oct. 20, 1898.)

RAILROADS—INJURIES TO PASSENGERS—NEGLIGENCE—AIR BRAKES—EVIDENCE—DECLARATIONS.

1. A passenger proving that he was injured through the negligence of a brakeman, conductor, or engineer may recover without proving which one was negligent.

2. The fact that air was let off in a brake in the usual way does not preclude a recovery by an alighting passenger who was thrown down by a sudden movement of the cars caused by such letting off of the brake, unless there was no way to avoid letting the air off without causing such a movement.

3. In an action by a child for personal injuries, there was evidence of contradictory declarations by the mother in the presence of the child as to the accident. The court charged that such statements were not evidence of the facts, but were used simply to affect the testimony of the parties. *Held* not error, the attention of the judge not being called to the fact that such declarations in presence of the child should be taken as admissions.

Exceptions from superior court, Hampden county.

Action by one Pomeroy against the Boston & Maine Railroad. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

A. L. Green, for plaintiff. Brooks & Hamilton, for defendant.

HOLMES, J. This is an action for personal injuries alleged to have been caused by negligently permitting a car to move suddenly while the plaintiff, a passenger, was alight-

ing from it at a station. At the trial there was evidence that the car moved as alleged, but it did not appear who made it move. Of course, the jury, if they believed the story, were at liberty to find that some servant of the company was the cause, probably the brakeman, the conductor, or the engineer. The defendant tried to break the force of this inference by asking successive instructions that, upon the pleadings and evidence, there could be no recovery by reason of negligence on the part of any one of these persons. As there was no question on the pleadings, this meant, so far as it was not misleading in form, that there was no evidence that the brakeman had been negligent, or the conductor, or the engineer. The judge refused to give the instructions asked, and the defendant excepted.

The refusal was clearly right. There was evidence that the injury was caused by some one of the servants described. It was not necessary for the plaintiff to go further, and prove from whose hand the injury came. See *Mooney v. Lumber Co.*, 154 Mass. 407, 28 N. E. 352. If she showed that the responsibility rested upon one of a group, that being all that she needed to show, rulings exonerating each member of the group successively would be wrong, either on the ground that evidence against the group was some evidence against each member of it, or else upon the ground that they were irrelevant to the evidence offered. This is another attempt to break the sticks of a fagot separately, although of a different kind from that just dealt with in *Collins v. Inhabitants of Greenfield*, 171 Mass. —, 51 N. E. 454.

The plaintiff testified that the car moved a foot and a half, and there was some evidence tending to show that the motion was caused by letting off the air in the brake in the usual way. The defendant asked a ruling that, if the injury was due to this cause, the plaintiff could not recover. However improbable this account may seem, if the jury found that the defendant let off the air at such a time and in such a way as to throw down a passenger leaving its car and using due care, then, subject to the instructions which were given, they might hold the defendant liable for the result. The judge instructed the jury that if there was no way to avoid letting the air off in the way in which it was let off, if the way adopted was the usual and proper way, it would not be carelessness. The request for a broader ruling that there could be no recovery because of any motion imparted to the car by letting off the air brakes is answered by what we have said. The instructions by the judge upon the same point seem to require no special comment.

Some testimony was put in tending to show that the plaintiff's parents had told a different story out of court. The judge cautioned the jury that the parents' statements were not evidence of the facts stated, but were "used simply to affect the testimony of those

parties." This was excepted to, and now it is suggested that a part of the testimony referred to by the judge (not all) was the conversations of the mother in presence of the child, and that the failure of the child to correct her mother might be found to have been an admission. The form in which the testimony was put suggested only contradiction of the mother, as nothing was asked or stated concerning the conduct of the child at the interview, and very naturally it did not occur to the judge that any other use was to be made of it. If the counsel for the defendant had thought that he could deduce an admission from the supposed failure of a suffering child of nine or ten, in its mother's arms, to correct her statement, he was bound to call the attention of the judge to it. Such an inference is not one which the evidence was calculated to suggest.

We have dealt with all the exceptions which were argued. We notice no error elsewhere.

Exceptions overruled.

(172 Mass. 147)

LAHTI v. FITCHBURG & L. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.

Worcester. Oct. 21, 1898.)

STREET RAILROADS—CROSSINGS—COLLISION—SUFFICIENCY OF EVIDENCE.

Evidence that defendant's car was going slowly; that plaintiff was nearly across defendant's track at the time of the collision; that plaintiff's view of the track in the direction of the approaching car was obstructed until he was within 15 feet of the track; that plaintiff looked, but saw nothing, and heard no gong; that he had been going "a little faster than a walk," but "slowed up" before reaching the track, and that upon reaching the track he hurried his horse,—is sufficient to warrant submitting to the jury the question of plaintiff's due care.

Exceptions from superior court, Worcester county; John Hopkins, Judge.

Action by Peter Lahti against the Fitchburg & Leominster Street-Railway Company. Verdict for plaintiff. Defendant excepts. Exceptions overruled.

J. E. McConnell, for plaintiff. C. F. Baker and W. P. Hall, for defendant.

FIELD, C. J. The single question in this case is whether there was evidence for the jury that the plaintiff was in the exercise of due care. We think that there was. There was evidence that the car was going at a slow rate; that the plaintiff was nearly across the track at the time of the collision; that there was a high board fence on the southerly side of Main street at its junction with Putnam street, which was an obstruction to the plaintiff's westerly view of Main street until he reached a point 15 feet southerly of the south rail of the railway track in that street; that the plaintiff looked up Main street, and saw nothing; that he heard no gong or bell; that he was going "a little faster than a walk," and "slowed up a little be-

fore he got onto the track," and that "when he got onto the track he hurried up his horse." We think this was evidence of the plaintiff's due care, to be submitted to the jury. *Driscoll v. Railway Co.*, 159 Mass. 142, 84 N. E. 171; *Robbins v. Railway Co.*, 165 Mass. 30, 42 N. E. 334; *White v. Railway Co.*, 167 Mass. 43, 44 N. E. 1052. Exceptions overruled.

(172 Mass. 89)

McISAAC v. NORTHAMPTON ELECTRIC LIGHTING CO.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 20, 1898.)

LINEMEN—RISK OF FALLING POLES—NEGLIGENCE.

1. A lineman will be presumed to have assumed the risk of the breaking and falling of poles of uncertain age, while he is working on them, by reason of decay below the surface of the ground.

2. The question asked, in an action by a lineman against his employer, an electric light company, for injury from the falling of a pole, while he was working on it, whether it was part of the duty of a lineman to make an inspection to see if it was rotten beneath the surface, is improper, as asking for an opinion of the witness in regard to the legal effect of a contract.

3. Whatever be the custom in regard to inspection of poles on which electric light wires are strung, due care on the part of a lineman requires that, before going on one, he make an inspection for rot just below the surface of the ground, where its apparent age is such as to make it probable that it is not strong enough to sustain him.

Exceptions from superior court, Hampden county.

Action by McIsaac against the Northampton Electric Lighting Company. Judgment for defendant. Plaintiff excepts. Exceptions overruled.

Carroll, McClintock & Stapleton, Jr., for plaintiff. Wm. G. Bassett, for defendant.

KNOWLTON, J. The plaintiff was employed by the defendant as a lineman, and was injured by the breaking and falling of a pole on which the defendant's wires were suspended. The pole was about 40 feet in length, was set in the ground about 5 feet, and was about 35 feet high. The undisputed evidence tended to show that it was badly decayed a few inches below the surface of the ground, so that it broke off square with the strain upon it resulting from the plaintiff's weight and the force from wires drawing upon it after other wires had been removed, which probably had previously tended to counteract the strain from those that remained. The plaintiff contends that the defendant was guilty of negligence in failing to ascertain whether the pole was sound and strong, or to take other precautions for his safety.

The plaintiff was directed to go and take down from the pole the two wires upon it which belonged to the defendant, and to put them on a new pole near by, which had been erected on account of a change of grade in a

railroad at a crossing. He went alone to do the work, using a horse and wagon belonging to the defendant to carry such tools and materials as he thought he needed. He was a man of experience in this kind of business, and the method of doing the work he seems to have determined for himself. The pole was of chestnut wood, about 8 inches in diameter at the top, and about 14 inches at the surface of the ground. It had been set between eight and nine years, and the evidence tended to prove that it showed no weakness or sign of decay above the ground.

A fundamental question is whether the defendant owed to a lineman whose business it was to work upon poles all along the line, as occasion might require, the duty to inspect its poles below the ground, and inform the lineman whenever any of them were so decayed as to be unsafe to work upon. The plaintiff admitted in his testimony that he knew that the life of a pole was limited, and that any pole after a time would become unsafe. He had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it. All the evidence tends to show that, in the ordinary course of the business, the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves, so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the poles as to soundness, without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon. The

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plaintiff testified that there were pike poles belonging to the defendant at the shed from which he started with the horse and wagon, and that he was familiar with the use of pike poles in setting new poles and bracing up old ones, and there is nothing to show that he might not have taken some of them to use in the work if he had chosen to.

The burden was upon him to show that the defendant's neglect of some duty caused the accident. We are of opinion that there is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business, which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was, therefore, no evidence of negligence on the part of the defendant.

There was no error in the rulings in regard to the admission of testimony. Evidence that the defendant had made no inspection of its pole prior to the accident was immaterial, inasmuch as the defendant owed the plaintiff no duty to inspect it.

The words, "It is not the lineman's business to do it," in Dorsey's answer, were rightly stricken out. To say nothing of other objections, they were not responsive to the question. The question whether it was a "part of the work of a lineman to make that inspection" was properly ruled out. It called for an opinion of the witness in regard to the legal effect of a contract. The question whether linemen customarily performed that work of inspection was also immaterial. So far as appeared, it was not the custom of anybody to make such an inspection; but, in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it.

Our view of the main question makes it unnecessary to consider whether the general duty of the defendant to the plaintiff in regard to the strength of poles on which he was working is affected by the fact that it was not the owner of the pole that broke, but was merely using it in its business, under the authority of the owner. Exceptions overruled.

(172 Mass. 142)

CARLSON v. METROPOLITAN LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 21, 1898.)

ACTION ON INSURANCE POLICY—BURDEN OF PROOF—
—FORFEITURE OF CLAIM—WAIVER—ESTOPPEL.

1. The burden is on the plaintiff beginning an action on an insurance policy six months after the death of the insured to prove a waiver of a provision that no suit could then be brought, and that a failure to sue before should be conclusive evidence against any

claim, notwithstanding the provisions of all statutes of limitations, since the failure is a complete defense unless waived.

2. Where an officer of an insurance company, authorized to waive a forfeiture of a beneficiary's rights under a policy by neglect to sue his claim, wrote, in reference to the same, that the company had not been able to see the matter as he did, and saw no reason for changing its view, and, closing, said a further investigation would be allowed without prejudice to the interests of the company, and an investigation was accordingly made, the company did not waive the forfeiture.

3. Where a claimant under an insurance policy has forfeited his rights by a failure to sue his claim within a time fixed by the policy, the forfeiture cannot be waived by an agent whom the policy expressly declares has no such power, where the company did not otherwise hold him out to possess such power, nor ratify similar acts, nor conduct itself in regard to other transactions so as to justify the claimant in believing he had such authority.

4. Where a claimant under a policy of insurance forfeited his rights by a failure to sue his claim within a certain time after the insured died, the company is not estopped to claim the forfeiture because he failed to sue in reliance on an agent's statement that the claim was paid, where it does not appear that he was authorized to make it, or that it was ever ratified by or known to the company, and it was not made within the scope of his real or apparent authority.

Exceptions from superior court, Hampden county.

Action by Adolph F. Carlson, as administrator, etc., against the Metropolitan Life Insurance Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

T. B. O'Donnell and R. A. Allyn, for plaintiff. E. H. Lathrop, for defendant.

HAMMOND, J. The seventh condition of this contract, so far as material, is as follows: "No suit shall be brought against this company under this policy * * * after six months from the date of death of the insured. If any such suit be commenced after said six months, the lapse of time shall be taken to be conclusive evidence against any claim, the provisions of any and all statutes of limitation to the contrary notwithstanding." Since the suit was not brought within the time therein named, this condition furnishes a complete defense unless by waiver or in some other way the defendant has lost the right to stand upon it; and the burden is on the plaintiff to show that the right has been thus lost.

The first contention of the plaintiff is that this provision has been waived. In support of this he relies upon the letter of May 27, 1895, from the defendant's secretary to Dr. Maryott, the subsequent action of the defendant in investigating the case, and the conduct and statements of McLaughlin. Neither the letter nor the investigation therein foreshadowed can be regarded as evidence of waiver. The letter states that the defendant has not been "able to see the matter as you do"; that it "sees no reason for changing its view"; and closes by saying, "This

is given to you without prejudice to our interests in any way." The intention to stand upon all its rights is plainly stated, and the most favorable view for the plaintiff is that the defendant was willing to consider whether, upon further investigation, it would waive any right; but such a willingness falls far short of an actual waiver. The same reasons apply to the subsequent investigation. It must be considered on the evidence as undertaken and conducted under the terms stated in the letter,—“without prejudice to [defendant's] interest in any way.” Nor is there any sufficient evidence of waiver to be found in the conduct and statements of McLaughlin.

The fifth condition of the contract is as follows: "The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together; and none of its terms can be varied or modified, nor any forfeiture waived, except by an agreement in writing, signed by one of the following officers, namely, the president, vice president, secretary, assistant secretary and actuary, whose authority for this purpose will not be delegated. No other person has or will be given authority. Therefore agents (which term includes superintendents and assistant superintendents) are not authorized and have no power to make, alter, or discharge contracts, or waive forfeitures," etc. McLaughlin was not one of the officers to whom, by this provision, the power was given to vary or modify the contract or to waive forfeitures. There was evidence tending to show that he "was supervising agent of the office of the defendant corporation in Hampden county, and had special charge of the Springfield office of the company, and that he was superintendent of the Springfield office." The contract provides that such a superintendent shall not have the power to waive. By the express terms of the contract, McLaughlin, being a superintendent, had not the power to vary the terms of the contract or to waive forfeitures. There is no evidence that he had been held out by the defendant as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions, that the insured was justified in believing that he had such authority. *Kyte v. Assurance Co.*, 144 Mass. 48, 10 N. E. 518. "The failure to perform a condition of a contract, the performance of which is essential to the continuance of the contract, cannot be waived by an agent when the contract itself declares that he shall not have power to waive it, or that only certain officers, which do not include him, shall have such power, unless, after the contract was made, authority had been given to the agent to waive the condition, or the company has knowingly permitted him to waive such condition." *Porter v. Insurance Co.*, 160 Mass. 183, 35 N. E. 678, and cases therein cited. The plaintiff contends, however, that even if

there has not been any waiver, still he and Maryott were told by McLaughlin that the claim had been paid; that at that time McLaughlin was an agent of the company; and that, relying upon the statements so made, he was induced to postpone his suit until after the six months; and he says that the defendant is thereby estopped from setting up this defense. In support of this contention he relies upon *Jennings v. Insurance Co.*, 148 Mass. 61, 18 N. E. 601. That case, however, is distinguishable from the one at the bar in many material respects, both as to the form of the contract and the power of the agent, and it is unnecessary to set them out in detail. It does not appear that McLaughlin was authorized by the defendant to make any such statements, that the defendant ever ratified any such statements, or even knew that any of them had been made, nor were they made within the scope of his authority, real or apparent. Exceptions overruled.

(172 Mass. 65)

BLOOD v. MILLARD.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 20, 1898.)

EASEMENTS—CREATION—TRANSFER—EXTINGUISHMENT—DIVISION OF DOMINANT ESTATE.

1. Where the owner of opposite tracts of land abutting a street conveyed one, with the privilege of using a spring on the other, it creates an easement in fee for the benefit of the tract conveyed.
2. Where the owner of opposite tracts of land abutting a street conveyed one, with the privilege of using a spring on the other, on a subdivision of the grant into lots each lot is entitled to an interest in the easement.
3. Where an easement in fee in the use of a spring was created by grant, neither mere non-user, nor the use on the dominant estate of water from the public water supply, extinguishes the easement.
4. The owner of a part of land to which an easement attached, and who was entitled to use it for his part only, could neither extinguish the easement, nor give to his grantee a right to an easement in gross.
5. Where the owner of opposite tracts of land abutting a street conveyed one, with the privilege of using a spring on the other, reserving the right to use it as a watering place for stock, whether the reservation was for the grantor's life or an exception, it is not available to a plaintiff seeking to compel a defendant owning the land on which the spring is situated to allow him to carry away, for household purposes, water, the right to which is annexed to the opposite tract, in which plaintiff had no interest.

Report from superior court, Berkshire county; Henry N. Sheldon, Judge.

Bill by John H. Blood against Norman L. Millard for an injunction. Facts found and case reported to the full court for consideration. Bill dismissed.

The following is the report:

"This was a bill in equity brought April 27, 1897, to restrain the defendant from using water of a certain spring situated on defendant's land, and called 'Oak-Tree Spring,' and from interfering in any way with the

plaintiff's rights in said spring. The plaintiff also in October, 1897, filed by leave of court a supplemental bill, setting up additional rights which he claimed to have acquired to take and use the water of said spring. * * * At the hearing before me, the following facts appeared: Prior to September 15, 1837, David Richmond, under whom both parties claimed, was the owner of two large tracts of land (one, of about a hundred acres, on the easterly side, and the other, of about fifteen acres, on the westerly side, of Church street) in North Adams. Upon the first tract, and about one-fourth of a mile from the other tract, was the spring of water in question. In September, 1837, Richmond by deed conveyed to Edward P. Hunt, his heirs and assigns, forever, the second or westerly tract, and, in the following words quoted, certain rights to said spring, and other rights in connection therewith, viz.: 'Also conveying the right to a trench or ditch, and to lay pipes therein, from the aforegranted premises to the "Oak-Tree Spring" (so called) in said Richmond's pasture, and the right to take the water of said spring, through said trench and pipes, onto said granted premises; leaving at all times a sufficient and convenient watering place, of fresh water for cattle and other stock, near the head of the spring. Also, the right to go upon said Richmond's land, in a prudent and careful manner, to construct and repair said pipes and ditch, when necessary, and to do in the same manner such other things as necessarily appertain to the occupancy of said rights and privileges; meaning hereby to convey all the right which I have to the water at and near the head of said spring, except the afore-mentioned watering place, which is reserved, and all the right which I have to take the same across the public highway; the ditches to be all filled, except in the wet land, where they may be left open to concentrate the water. After said pipes are once located and laid, their location shall be and remain permanent.' This land and the rights to the water passed by several mesne conveyances, under the same description, to William S. Blackinton, who by deed dated March 22, 1875, conveyed the same, under the same description, to Franklin R. Blackinton; and said Franklin R. had the land plotted into building lots and placed on the market about 1887, and shortly after some lots were sold, and houses built, and these houses were supplied with water by the city of North Adams. On June 19, 1889, said Franklin R. Blackinton made a deed to John L. Scott, under whom the plaintiff claims the right to the water of the spring, as stated in his original bill. The description in said deed is as follows: 'The right to take and carry away the water of a certain spring, known as the "Oak-Tree Spring," situated on a certain parcel of land [being the land now owned by defendant] with the right to enter upon said premises for the purpose of taking

said water, and also all the privileges pertaining to said spring and water therein conveyed to me,' which were the same privileges mentioned in the deed of Richmond to Hunt. No land was conveyed by this deed, and neither said Scott nor the plaintiff ever owned any part of the tract of fifteen acres conveyed by Richmond to Hunt, and afterwards owned, as aforesaid, by said Blackinton. But said Scott was then the owner of certain land, being a part of the easterly or larger tract formerly owned by Richmond, and this is the same land now owned by the plaintiff; having been conveyed to the plaintiff by the heirs of said Scott on or about April 1, 1893, together with the rights to the spring obtained by the deed aforesaid from Blackinton to Scott. This land had appurtenant to it no right to the water of said spring. May 9, 1866, David Richmond conveyed to Jerome B. Jackson and another, by warranty deed, all the lands on the east side of Church street, being Richmond's larger tract above mentioned; and immediately following the description of the land was the clause, 'Excepting out of the above-bounded premises the Oak-Tree spring, and privileges therewith, conveyed by said Richmond to Edward P. Hunt.' November 1, 1866, Jackson conveyed to William Martin the same premises, by warranty deed containing the following clauses: 'Being the same premises as conveyed to us by David Richmond and wife by deed dated March 9th, 1866. Excepting and reserving the same rights and privileges as therein mentioned, reference being had to said deed for the same.' February 1, 1869, Martin conveyed this land by warranty deed to Eli T. Clark, without any mention of any right in the spring, or any rights connected therewith, belonging to other persons. November 6, 1872, Eli T. Clark and Frank Davis, who had become a joint owner, conveyed in fee to said Martin, by quitclaim deed, the following (quoting from said deed): 'All our right, title, and interest in and unto a spring called the "Oak-Tree Spring," located about twelve rods north of Bradley street, and about one rod west of land owned by Edwin Thayer. It is the same spring conveyed by said Martin to F. F. Colgrove. And we, the said grantors, remise, release, and quitclaim unto said grantee the right to lay pipes to said spring across our lands to Church street and Bradley street, and also the right to build a suitable reservoir for the purpose of taking said water, and locate the same on our land.' And the plaintiff, by deed of the heirs of said Martin, now deceased, dated October 28, 1897, purchased the same premises conveyed and described in the same deed of Clark and Davis to said Martin, and obtained thereby all the rights conveyed to said Martin by Clark and Davis, which are the newly-acquired rights mentioned in plaintiff's supplemental bill. January 15, 1874, Eli T. Clark sold and conveyed to Sylvester A. Kemp the

land on which said spring was situated, containing some eighteen acres, and being the land now owned by the defendant. In this deed are these words: 'Excepting and reserving out of the above conveyance all the rights heretofore conveyed by myself and Frank Davis to William Martin, his heirs and assigns, to lay aqueduct, and to take water from a certain spring on said land, for a particular description of which rights reference may be had to the deed of myself and said Davis to said Martin. Also, excepting and reserving out of the above conveyance all the rights in and to the said spring, laying aqueduct, and taking water therefrom, which were conveyed by deed of said William Martin to William S. Blackinton, his heirs and assigns, for a more particular description of which rights reference may be had to the deed of said Martin to said Blackinton.' And on August 21, 1896, said Kemp conveyed to the defendant the same land by warranty deed, which contained the following, viz.: 'That the said premises are free from all incumbrances, except a right which the heirs of William Blackinton have to take water from a spring on said premises, and a like possible right in the heirs of William Martin.'

'It was proved at the trial of the cause that there was no water for domestic use on the lands conveyed to Hunt when conveyed to him; that the water of said spring had never been conducted to said lands, but the town water was conducted to that property in about the year 1887; and, by the deeds hereinbefore referred to, that the plaintiff was the owner of a portion of the said first tract of land, as set forth in the bill, but never owned any of said westerly tract; that the plaintiff had never actually used, but he now proposed to use, the water of said spring on that land and elsewhere. It was in evidence that the plaintiff owned five building lots, and buildings on them, situated on the west side of Church street, and southerly from Bradley street; that the land from this spring slopes westerly and southerly, towards Bradley and Church streets. David Richmond died September 24, 1869. All the deeds and plans, being exhibits, may be referred to at the argument on this report. The defendant's evidence showed that he found the spring as a small hole in the ground, with not a large amount of water in it, running to waste, spreading out over the ground; that he enlarged it, and built a curb around it, of stone laid in cement, some six feet in diameter, and four or five feet high, and put a cover over it to keep the water pure, and to prevent others from meddling with it; that at the time the bill was brought he had made no use of the water, but afterwards did conduct some of it through a pipe to two houses on the same land; that the plaintiff had not heretofore made any use of the water, and, if the defendant had not used it, it would then have gone to waste. And I found that the curb

and building put around the spring and roof over it were reasonable acts for the preservation of the spring, and were not injurious to any of the plaintiff's rights. I also found that the defendant was now drawing the water away from the spring, in pipes, for the defendant's own domestic use, and that this was detrimental to the plaintiff's intended use; that the plaintiff, if entitled to relief on either his original or his supplemental bill, was entitled to nominal damages of one dollar for the injury already done. The plaintiff claimed to recover on his original bill on the ground that the right or easement which he claimed in and to the spring was created as an easement appurtenant to the land conveyed by the deed of Richmond to Hunt, which land and easement finally came to Franklin R. Blackinton, and that by the deed of Blackinton to Scott this easement vested in Scott as an easement in gross, and passed to the plaintiff by the deed of Scott's heirs to the plaintiff. The plaintiff also claimed under his supplemental bill that his other title was created by Richmond's having reserved to himself in his deed to Hunt a right to a watering place, which right he claimed passed by Jackson's deed to Martin, then to Clark and Davis, and finally by the deed of Clark and Davis again to said Martin, and by the deed of Martin's heirs to the plaintiff, of October 28, 1897, vested in the plaintiff; and if the effect of the deed aforesaid from Blackinton to Scott was not to transfer to Scott, as an easement in gross, the right or easement to the spring formerly appurtenant to the Blackinton land, but to extinguish that easement, then the plaintiff claimed that this second title of his became by such extinguishment an exclusive right to the whole spring, with the right to lay pipes, etc., as stated in his supplemental bill. The defendant admitted that, if the plaintiff had exclusive right to take the waters of the spring, the defendant had interfered with that right; and I found that the defendant was now drawing the water away from the spring in pipes for the defendant's own domestic use, and that this was detrimental to the plaintiff's intended use. The defendant claimed that the water of the Oak-Tree spring was annexed as a permanent easement to the land conveyed to Hunt; that it could not be separated from it, or used at any other place, and that John L. Scott took nothing by the deed of F. R. Blackinton to him, and that the watering place or drinking place reserved in the deed of Richmond to Hunt was limited to the life of said Richmond, for want of the word 'heirs' in said reservation; and that, even if this was not so, the Oak-Tree spring was expressly excepted in the deed of Richmond to Jackson, and in the deed of Jackson to Martin, and no right to the spring passed by the deed of Martin to Clark and to his grantees, so that the plaintiff got no right to the spring by the deed of Martin's heirs. He also claimed that the bill could not be

maintained on the evidence, and that the plaintiff had an adequate remedy at law, and that the damage shown did not entitle him to relief in equity. I ruled that the plaintiff, if otherwise entitled to maintain his bill, had not an adequate remedy at law, and thereupon, at the request of both parties, I report the case to the supreme judicial court for its determination; such decree to be entered as on these findings justice and equity may require."

Beer & Dowlin and E. M. Wood, for plaintiff. A. Potter, for defendant.

BARKER, J. The deed of Richmond to Hunt created an easement in fee for the benefit of, and appurtenant to 15 acres conveyed to, Hunt. *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253. Upon the subdivision of the 15 acres into building lots, each lot had an interest in the easement. *Durkin v. Cobleigh*, 156 Mass. 108, 111, 80 N. E. 474, and cases cited. As the easement was created by grant, neither mere nonuser, nor the use upon the 15-acre tract of water from the city water supply, extinguished the easement; and the deed of June 19, 1880, made by an owner merely of part of the land to which the easement was attached, and whose interest in the easement was only a right to use it for his part of the 15 acres, could neither extinguish the easement, nor give to his grantee a right as to an easement in gross. The right of the original grantor to a watering place for cattle and other stock, whether a reservation for the grantor's life, or an exception, cannot avail the plaintiff, who does not ask such a watering place, but seeks the aid of the court to compel the defendant to allow him to carry away for household purposes water, the right to which is annexed to lands in which the plaintiff has no interest. Upon the facts stated in the report, the bill should be dismissed, with costs. So ordered.

(172 Mass. 178)

PARMENTER MFG. CO. v. HAMILTON
et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 3, 1898.)

BANKRUPT LAW—EFFECT ON LOCAL INSOLVENCY PROCEEDINGS.

Since the United States bankruptcy law (Act July 1, 1898) declares that the act should go into full force and effect on its passage, and saves only proceedings commenced under state insolvency laws before the passage of the act from being affected by it, it supersedes all state insolvent laws from the date of its passage.

Case reserved from supreme judicial court. Bill by the Parmenter Manufacturing Company against H. Warren Hamilton and others for an injunction. On a demurrer to the bill, questions were reserved for the full court. Demurrer overruled.

Morgan & Stewart, for plaintiff. Rice, King & Rice, for defendants.

KNOWLTON, J. The United States bankruptcy law, passed on July 1, 1898, ends with the following provision: "This act shall go into full force and effect upon its passage: provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary proceedings shall be filed within four months of the passage thereof. Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." The question in this case is whether this act so far superseded the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. This depends upon the intention of congress, as manifested by the language above quoted. Of the power of congress to pass an act having this effect, there is no doubt. Const. U. S. art. 1, § 8, cl. 4; *Griswold v. Pratt*, 9 Metc. (Mass.) 16; *In re Klein*, 1 How. 277, 280, 281; *Sturges v. Crowninshield*, 4 Wheat. 122-192; *Ogden v. Saunders*, 12 Wheat. 213, 369. The language is materially different from that of the bankruptcy act of 1867, and from that of the earlier bankruptcy law of 1841. See United States statute of 1867, c. 176, Rev. St. U. S.; *Day v. Bardwell*, 97 Mass. 246; *Judd v. Ives*, 4 Metc. (Mass.) 401; *Swan v. Littlefield*, 4 Cush. 574. The argument that the change in question was intentional is almost irresistible. The act is "to go into full force and effect upon its passage"; that is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (section 3), to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (section 4), and to have preferences and liens governed by the provisions of it (sections 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions, and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases com-

menced in those courts before the passage of the act. The plain implication is that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute. Demurrer overruled.

(172 Mass. 167)

DAVIS v. CARPENTER.

(Supreme Judicial Court of Massachusetts. Berkshire. Oct. 31, 1898.)

BASTARDY PROCEEDINGS — VENUE — WAIVER OF JURY.

1. A minor resident of Vermont with consent of her father went to Massachusetts to make her home with a friend. On the day she left home and arrived in Massachusetts she instituted bastardy proceedings against defendant, who also resided therein. Subsequently she went to Vermont to visit her father, and while there gave birth to the child, which had been begotten there. She afterwards returned to Massachusetts. *Held*, that she might maintain the proceedings in Massachusetts.

2. In bastardy proceedings, defendant, by proceeding to trial without a jury, waives his right to a jury.

Exceptions from superior court, Berkshire county.

Bastardy proceedings by Alena H. Davis against John O. Carpenter. There was an order overruling pleas in abatement, and defendant brings exceptions. Overruled.

O. P. Niles and C. S. Chase, for complainant. F. L. Greene and W. A. Davenport, for respondent.

HAMMOND, J. The second plea was not in abatement, but in bar. It set out enough to show, not only that the present action could not be maintained, but that there was no cause of action under the statute. *Allin v. Lumber Co.*, 150 Mass. 560, 23 N. E. 581; *Chit. Pl.* (16th Am. Ed.) 462; *Grant v. Barry*, 9 Allen, 459. The issues raised by the first plea and this second plea were tried together without a jury, and the court, after hearing the evidence, "overruled the pleas." We do not understand by this entry that the ruling was that the facts set forth in the second plea would not, if proved, constitute a complete defense, but that the court found that the allegations of the plea were not all proved. The respondent excepted to this, as also to certain rulings made during the trial concerning the admission of evidence. The only question really in dispute at this trial was whether at the time of making the complaint the complainant was, and thereafter continued to be, such a resident in this commonwealth as

to be able to maintain this action; and inasmuch as the child was begotten in Vermont (the mother being then resident and domiciled there), and was born in Vermont, this was a vital issue. *Grant v. Barry*, supra. On this issue, did the evidence warrant a finding for the complainant? We think it did. It is to be remembered that the object of the statute is to compel the father to assist the mother in the maintenance of the child, and to secure the municipality or state against any loss or expense for its maintenance. *McFadden v. Frye*, 18 Allen, 472. The court might have found upon the evidence that, before the day on which the complaint was made, the father of the complainant told her that he could no longer support her; that she must earn her own living, and might have her own wages, and that she must leave his house; that, with the assent and assistance of her father (thus being driven from the paternal roof), she made an arrangement with the Browns to go and live with them in Clarksburg as their daughter; that in the forenoon of the day on which the complaint was made, in pursuance of this arrangement, and with the full assent of her father, she left her home in Vermont, and came with all her personal effects to the house of the Browns, in Clarksburg, for the purpose of making her home with them, in their family, as their daughter, for an indefinite period, and with no intent of returning to Vermont; and that at the time she made the complaint she was thus living with the Browns. The court might further have found that her subsequent visit to her father in Vermont was not for the purpose of resuming her relations with her prior home, but was simply for a temporary purpose, and that her home still continued with the Browns up to the time of the trial; that both father and daughter had determined that she should become a resident at Clarksburg with the Browns; and that all this was honestly done for the purpose of having a bona fide residence in Clarksburg. Whether, she being a minor, and her father still domiciled in Vermont, all this worked a change of her legal domicile, it is not necessary to decide. She was residing here, and she was intending to continue to reside here. In fact, she had no other place which she called or considered her home. If she had fallen into distress under these circumstances, it would have been the duty of the town or state to provide temporarily, at least, for her relief; and a like duty would have existed with reference to the child, if born alive. Pub. St. c. 84, §§ 14, 17. Here, then, was a liability to be provided against by obtaining security from the putative father; and the case comes within the statute, so far as the residence of the complainant is material.

We see no error in the various rulings of the court as to the admission of evidence at the trial without a jury. As to the admission of the letter of July 24th from Mrs. Brown, it is sufficient to say that its contents are

not before us. The evidence that she had previously "made her own trades" for work she had done, and "herself received the pay therefor," as well as that concerning the conversations with her father between the 12th and 27th days of July, and also that concerning the conversation which took place upon her arrival at Mr. Brown's house, both as testified to by the complainant and her father, all had a bearing, at least, upon the relation she sustained to her father and the relation she sustained to the Browns, and as a part of the circumstances; and the same may be said of the evidence at the close of the cross-examination of the complainant. The conversation with the respondent, and the fact that he left Readsboro, were admissible, at least, as bearing upon the question of her real purpose in coming to Clarksburg. Upon the trial before the jury upon the plea of not guilty, the respondent proposed to try anew the questions which had been raised and tried by the court without a jury. The court refused to permit him to do so, and excluded the evidence offered for that purpose. There was no error in this. This is a civil suit, and the respondent, by proceeding to trial without a jury upon these issues, must be held to have waived whatever right he might otherwise have had to a jury trial upon them. Exceptions overruled.

(172 Mass. 154)

BERGNER & ENGEL BREWING CO. v. DREYFUS.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 29, 1898.)

**ACTION BY FOREIGN CORPORATION—DEFENSE—
DISCHARGE IN INSOLVENCY.**

A foreign corporation established an office in the state, and procured a license for the sale of its goods. It also, under St. 1884, c. 330, § 1, appointed the commissioner of corporations its attorney upon whom all lawful process in any action or proceedings against it might be served. Held not to bring such corporation under the operation of the state insolvent law, so as to make a discharge of a debtor in insolvency a bar to an action by it to recover for goods sold.

Exceptions from superior court, Suffolk county.

Action by the Bergner & Engel Brewing Company against Arthur Dreyfus. Judgment for plaintiff, and defendant excepts. Affirmed.

Hayes & Williams, for plaintiff. T. F. Strange and B. S. Ladd, for defendant.

HOLMES, J. This is a suit by a Pennsylvania corporation to recover a debt for goods sold and delivered here. The only defense is a discharge in insolvency under our statutes, which, of course, commonly is no defense at all. This was reaffirmed unanimously in 1890, after full consideration of the objections now urged, and it was decided also—not for the first time—that the general language of the insolvent law was

not intended to affect access to Massachusetts courts by a local rule of procedure unless the substantive right was barred by the discharge. *Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917. The grounds urged for an exception in the present case are that the plaintiff, although its brewery and main offices are in Pennsylvania, has an office in Boston, and maintains here a complete outfit for the distribution of its products, that it has a license of the fourth class, under Pub. St. c. 100, § 10, and that it has complied with the laws regulating foreign corporations doing business here, including, we assume, that which requires the appointment of the commissioner of corporations its "attorney upon whom all lawful processes in any action or proceeding against it may be served." St. 1884, c. 330, § 1. See St. 1895, c. 157.

We are of opinion that these facts are not enough to bring the plaintiff under the operation of the state insolvent law. It is settled that doing business here does not have that effect upon a citizen or corporation of another state. *Guernsey v. Wood*, 130 Mass. 508; *Mill Co. v. Holmes*, 150 Mass. 11, 30 N. E. 176. It is not pointed out what the license, whether valid or void, has to do with the matter, and we do not perceive that complying with the laws concerning foreign corporations ought to have any greater effect. We think it plain that the words first quoted from St. 1884, c. 330, § 1, do not mean that by appointing the commissioner of corporations their attorney foreign corporations agree not only that publication of notice in insolvency proceedings shall have the effect of personal service upon them in an action, but also that, as a result, they shall be subject to the jurisdiction of the state insolvency proceedings, so as to be bound by a discharge.

The most that could be deduced from the appointment would be that if, on other grounds, a foreign corporation were subject to the operation of the insolvent law, publication of notice should have the same effect upon it as upon other creditors in making it a party to the proceedings. But we do not suppose that it would be suggested that a natural person—a creditor, who was a citizen of another state—lost his immunity, and became a party to the proceedings, merely by his accidental presence in the commonwealth at the moment when the notice appeared. *Olivieri v. Atkinson*, 168 Mass. 28, 46 N. E. 422. No greater direct effect than the actual presence of a natural person can be attributed to the presence of an attorney authorized to receive service of process. Furthermore, we doubt whether the act of 1884 purports to give the appointment even so much effect as that. The language discloses no thought about insolvent proceedings; and when, at a later date, it was decided to make foreign corporations subject to be put into insolvency here, it was thought proper to provide expressly that service upon

the commissioner of corporations should be a sufficient notice to the corporation of the presentment of the petition by creditors against it. St. 1890, c. 321, § 1. If the act of 1884 attempted to do more than we have construed it to attempt, its validity might be drawn in doubt as requiring the corporation to surrender a privilege secured to it by the constitution and laws of the United States. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 207, 13 Sup. Ct. 44.

The independent ground on which it is urged that the plaintiff is subject to the insolvent law in the present case is that the plaintiff is domesticated in this state, as shown by the facts above recited, of which the appointment of an attorney is only one. The word "domesticated," which was used in the argument for the defendant, presents no definite legal conception which has any bearing upon the case. We presume that it was intended to convey in a conciliatory form the notion that the plaintiff was domiciled here—"resident," in the language of Pub. St. c. 157, § 81,—and therefore barred by the language and legal operation of the act. It could not be contended that the corporation was a citizen of Massachusetts. In such sense as it is a citizen of any state it is a citizen of the state which creates it, and of no other. But there are even greater objections to a double domicile than there are to double citizenship. Under the law as it has been, a man might find himself owing a double allegiance without any choice of his own. But domicile—at least for any given purpose—is single by its essence. *Dacey, Conf. Laws*, 95. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice, or on technical grounds of birth or creation, has a domicile in one place, it cannot have one elsewhere, because what the law means by domicile is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is settled that a corporation has its domicile in the jurisdiction of the state which created it, and, as a consequence, that it has not a domicile anywhere else. *Boston Inv. Co. v. City of Boston*, 158 Mass. 461-463, 33 N. E. 580; *Shaw v. Mining Co.*, 145 U. S. 444, 450, 12 Sup. Ct. 935; *Martine v. Society*, 53 N. Y. 339, 346. The so-called modifications of this rule by statutes like the act of 1884 do not modify it, because jurisdiction of the ordinary personal actions does not depend upon domicile, but only upon such presence within the jurisdiction as to make service possible. See *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221. But the operation of our insolvent law, by its very terms, may, and in this case does, depend upon the domicile of the creditor, and, as there can be no doubt, either in fact or in law that the plaintiff was

domiciled in Pennsylvania in such a sense that a statute like Pub. St. c. 157, § 81, would hit it there, it cannot have been domiciled here for the same purpose at the same time.

Judgment for the plaintiff affirmed.

FIELD, C. J. (dissenting). The defendant, who is and was a citizen of Massachusetts, filed a voluntary petition in insolvency in the court of insolvency for the county of Suffolk, on which he was adjudged an insolvent debtor, and, due proceedings being had, he received his discharge. The plaintiff is a corporation organized under the laws of Pennsylvania. Its principal offices are in Philadelphia, and it manufactures and sells malt liquors. It has complied with the statutes of this commonwealth regulating foreign corporations having a usual place of business in the commonwealth, and it has an office and storeroom in Boston, which it hires in its own name, where it sells its products at wholesale. It hires an agent, styled a manager, a bookkeeper, and delivery men, for the conduct of its business in Boston; and it owns there a complete set of office furniture, and horses and wagons sufficient for the delivery of the goods which it sells in Boston. All the employes reside in this commonwealth. It received from the board of police of the city of Boston a license in its name, of the fourth class, to sell intoxicating liquors in that city as a wholesale dealer. The defendant ordered of the plaintiff, at its office in Boston, beer and ale, which were delivered to him in Boston, from the plaintiff's storeroom there; and some time after this purchase was made, and the goods delivered, the defendant filed his petition in insolvency. The plaintiff did not prove its claim in the proceedings in insolvency, and now contends in this action that the discharge is not a bar, because it is a citizen of the state of Pennsylvania. There is no doubt that the words of the statutes relating to discharges in insolvency, as well as the words of the discharge itself, make the discharge a bar. Pub. St. c. 157, § 81, provides that the debtor, upon obtaining his discharge, shall be absolutely discharged from all provable debts founded "on any contract made by him subsequently to the last day of July in the year eighteen hundred and thirty-eight and while an inhabitant of this state, if made within this state, to be performed within the same, or due to any person resident therein at the time of the first publication of the notice of the issuing of the warrant." The contract sued on was made while the defendant was an inhabitant of this state, and was made within the state, and was performed within the state; and therefore it is exactly within the terms of the statutes. Whether or not the debt is due to a person resident within this state at the time of the first publication of the notice may depend upon the question whether the plaintiff corporation had a dom-

icile within the state. If our statutes relating to insolvency are constitutional and valid statutes, the courts of this state must enforce them. If they are in violation of the constitution of the United States, in its application to the case, to that extent they are void. Whatever may be the rule of comity adopted by other courts in enforcing our statutes, the courts of Massachusetts must enforce the statutes of Massachusetts according to their meaning, if they are constitutional and valid statutes. There is no contention that our statutes relating to insolvency are in violation of the constitution of Massachusetts. The contention is that in their application to creditors who are citizens of other states than Massachusetts they are in violation of the constitution of the United States. Whether the courts of other states than Massachusetts or the courts of the United States will enforce these statutes in suits brought before them is for such courts to determine. The decisions of the supreme court of the United States upon questions of comity, although entitled to the highest respect, are not conclusive upon us. The decisions of that court upon the meaning of the constitution of the United States are conclusive. The real difficulty is in determining the principle on which the supreme court of the United States has decided that a discharge granted under a state insolvency law enacted before the contract sued on was entered into will not discharge a debt due under the contract, if due to a citizen of another state than that in which the law was passed. This difficulty has often been noticed. In *Marsh v. Putnam*, 3 Gray, 551, Mr. Justice Thomas, speaking for this court, in carefully reviewing the decisions of the supreme court of the United States up to the time of the decision, says: "When, after the most mature consideration, it has been settled by the appropriate tribunal, first, that the power given to congress to pass bankrupt laws is not exclusive, and that, when congress does not exercise the power, the states may; and, secondly, that the fair and ordinary exercise of that power by a state law which operates only upon contracts to be made after the law takes effect, does not, within the meaning of the constitution of the United States, impair the obligation of contracts,—I have never been able to see any conflict between our insolvent acts, taken in their full force, and any provision of the constitution of the United States. So far, however, as the question has been settled by the decisions of the supreme court of the United States, our judgment is concluded." He also says: "In this state of the opinions of that tribunal to which, on these subjects, we look for guidance, we know of no safe rule but stare decisis, and yet not go beyond the precise limits of the decisions." See *Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917.

The principal decisions of the supreme court of the United States on this subject

since those considered in *Marsh v. Putnam* are *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank*, Id. 234; *Gilman v. Lockwood*, 4 Wall. 409; and *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134. *Baldwin v. Hale* was a suit brought in the circuit court of the United States for the district of Massachusetts. The plaintiff was a citizen of Vermont, and the defendant a citizen of Massachusetts. The suit was upon a promissory note given by the defendant to the plaintiff, dated in Boston, and payable in Boston. The conclusion of the opinion is as follows: "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation; and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and, of course, there can be no legal default." *Baldwin v. Bank*, 1 Wall. 234, in this respect simply follows *Baldwin v. Hale*. Since the decision in *Baldwin v. Hale* this court has followed it when the facts were the same or similar. *Kelley v. Drury*, 9 Allen, 27. *Gilman v. Lockwood* was a suit brought in the circuit court of the United States for the district of Wisconsin. The conclusion of the opinion is as follows: "State legislatures may pass insolvent laws, provided there be no act of congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one state cannot discharge the contracts of citizens of other states; because such laws have no extraterritorial operation; and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceedings, has no jurisdiction of the case." In *Denny v. Bennett*, 128 U. S. 489, 497, 9 Sup. Ct. 134, the opinion in *Gilman v. Lockwood* is quoted, and it is said to be a clear and accurate statement of the doctrine of the preceding cases. The court there say: "Any one who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a state insolvent law is that it cannot, like the bankrupt law passed by congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not

impair the obligation of contracts, is conceded, but the power to release him—which is one of the usual elements of all bankrupt laws—does not belong to the legislature where the creditor is not within the control of the court." This last proposition, which is also suggested in the opinions in *Baldwin v. Hale* and *Gilman v. Lockwood*, seems to me somewhat different from anything relied upon by Mr. Justice Johnson in his final opinion in *Ogden v. Saunders*, 12 Wheat. 213. In *Stoddard v. Harrington*, 100 Mass. 87, a case decided in 1868, after the decision of the supreme court of the United States in *Gilman v. Lockwood*, this court held that, if a contract is made between two citizens of this state, within the state, and one of them afterwards removes therefrom, and becomes a citizen of another state, and the other then obtains in this state, where he continues to reside, a discharge under the insolvent laws which were in force when the contract was made, the discharge is a bar to an action against him on the contract. The court say: "Regret has been frequently expressed by judges of the courts of the United States, as well as by those of the several states, that, with all the learning and ability which have been bestowed upon the discussion, it has not been found practicable to place the decisions on this important subject upon some clear and intelligible basis of principle. But the reasons given by different judges for coming to the same conclusions have been so diverse, and the grounds assigned for judgments not certainly repugnant to each other have been sometimes so apparently inconsistent, that it is difficult to do more than follow adjudged cases in their liberal application, without attempting to gather from them a rule which affords a sure solution of new questions." The court also say: "The suggestion that the power of a state over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency does not seem to us well founded, because we think that the effect of the insolvent law qualifies the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction." This decision has not been overruled, so far as I am aware, but the precise case does not seem to have come before the supreme court of the United States.

The doctrine that the statutes of a state, *ex proprio vigore* have no extraterritorial operation, is a doctrine of the common law, and not a provision of the constitution of the United States. The decision in *Ogden v. Saunders* was made 40 years before the adoption of the fourteenth amendment of the constitution of the United States, and was not put upon the principle declared in *Pennoy v. Neff*, 95 U. S. 714. A discharge under the

bankruptcy laws of England is held in the courts of England to be discharge of debts due to citizens or subjects of other countries, without any regard to the question whether the courts of England have any jurisdiction over the foreign creditors whereby they could render personal judgments against them. See Dicey, *Conf. Laws*, p. 448 et seq. Without considering whether this court, in any event, would follow the decision of the supreme court of the United States in *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, it appears that the plaintiff corporation has appointed the commissioner of corporations to be its true and lawful attorney, upon whom all legal processes in any action or proceeding against it may be served, pursuant to St. 1884, c. 330, and the amendments thereof, so that a personal judgment could be rendered against it in the courts of Massachusetts which would be recognized as valid everywhere. It is true that a corporation established by the laws of a state of the United States is, for the purpose of the jurisdiction of the courts of the United States, regarded as a citizen of the state by whose laws it was created, although it is not a citizen within the meaning of the clause in the constitution of the United States which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. I am unable to see that the question discussed depends upon the citizenship of the parties, in any proper sense of the word "citizenship." It may be that it depends upon inhabitancy or domicile. I am unable to believe that the supreme court of the United States would hold that the insolvent laws of Massachusetts did not apply to contracts made after the passage of the laws with a citizen of Massachusetts by a subject of Great Britain, domiciled in Massachusetts at the time. See *Olivieri v. Atkinson*, 168 Mass. 28, 46 N. E. 422. The fourteenth amendment of the constitution of the United States now defines who are citizens of the United States and of the states. Whether a corporation cannot have a domicile other than that in the state under whose laws it was incorporated is undoubtedly a question of some difficulty. Many corporations are organized by citizens or inhabitants of Massachusetts under the laws of other states, for the sole purpose of doing business in Massachusetts, and they have a place or places of business only in Massachusetts; and to hold that contracts made by them in Massachusetts, with the inhabitants of Massachusetts, since the passage of our insolvent laws, are not subject to be discharged under those laws, seems to me unwarrantable, particularly when the corporations bring their suits in the courts of Massachusetts. If the operation of the insolvent laws of Massachusetts upon contracts made here between persons domiciled here can be avoided upon the ground that they were made in behalf of corporations organized under the laws of other states, although having usual places of business here, and subject

to be sued here, then it will be possible for foreign corporations to obtain substantially all the business advantages in Massachusetts conferred by our laws without subjecting themselves to the liability of having debts due to them and contracted within the commonwealth discharged by proceedings in insolvency on the part of inhabitants of the commonwealth with whom the contracts were made. I know of no decision of the supreme court of the United States upon exactly the state of facts appearing in the present case, and on principle I do not see why the contract made and performed here by the parties in this case is not subject to be discharged in accordance with the laws of Massachusetts in force when the contract was made. The contract undoubtedly is to be governed generally by the laws of Massachusetts, and the plaintiff has elected to bring its suit in a Massachusetts court. To enforce our insolvency statutes in the case of such a contract between such parties does not seem to me to give the statutes any extraterritorial force; and the plaintiff corporation seems to me, in reference to contracts made here with citizens or inhabitants of Massachusetts, to be subject to our laws. I am not aware that any one has pointed out the particular provisions of the constitution of the United States which our insolvency statutes would violate if it were held by the courts of Massachusetts that the discharge pleaded in the present action was a bar to the action. It is evident that this court, in its anxiety to do nothing which might seem to be in violation of the constitution of the United States according to the decisions of the supreme court of the United States in recent years, has rendered decisions which go far in the direction of the decision of the court in the present case. *Guernsey v. Wood*, 130 Mass. 503; *Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917; *Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176. In *Guernsey v. Wood* the plaintiff was not a corporation, but a citizen of Pennsylvania, never resident in Massachusetts. In *Bank v. Batcheller* it does not appear that the plaintiff corporation had any usual place of business in Massachusetts, or had complied with our statutes regulating foreign corporations doing business here. The same is true of *Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176. In none of these cases was there anything in the nature of the license shown in the present case. These distinctions seem to me important. Whether such a license could lawfully be granted to a foreign corporation is a question which has not been argued, but, if the license was void, the liquors were sold in violation of law, and the plaintiff cannot maintain its action. Certainly it is going beyond the "precise limits" of the decisions of the supreme court of the United States if it is held that the discharge pleaded in the present suit is invalid. I think that this court ought to uphold the validity of the discharge in the present case until the supreme court of

the United States has decided to the contrary. The question, of course, becomes of little importance when there are bankruptcy laws of the United States in force; but such laws have been in force only for short periods of time, and the insolvency laws of Massachusetts are not repealed, but only suspended, by the bankruptcy laws of the United States.

(171 Mass. 575)

HOWE v. CITY OF LOWELL. WILSON et al. v. SAME (two cases). GOODALE v. SAME. UNDERWOOD v. SAME. (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. Aug. 31, 1898.)

WRIT OF ENTRY — DESCRIPTION — AMENDMENT — DEEDS — CONDITIONS SUBSEQUENT — BREACH — WAIVER — ESTOPPEL — APPEAL — REVIEW.

1. Where the description of the premises in a writ of entry for breach of condition of a deed did not correspond with that in the deed, the description of a portion laid out as a public street being omitted in the writ, the allowance of an amendment making the description conform to the deed was not error.

2. A deed conveying land to a city provided that the portion of the premises not taken for a highway should "be improved, dedicated, and forever used by the said grantee as and for a common, park, or boulevard, and for no other purpose," in default of which the land was to revert in the grantor or his heirs. No reservation was made of subterranean waters in the land. The grantor owned lands adjacent to those conveyed. *Held*, that the construction and maintenance of a system of pipes below the surface of the ground for the purpose of supplying water to the city was not a breach of condition, since it was not inconsistent with the use prescribed.

3. But the construction and maintenance on the land of a building containing boilers and engines, as a pumping station in the water system, was a breach of the condition.

4. The grantee in a deed of land for park purposes only erected a pumping station thereon, in violation of the condition. The grantor did nothing actively to induce the grantee to erect the station, but he made no objections, and, after its erection, he gave the grantee a deed to adjoining land, in which reference was made to the right of the grantee to throw water from the station into a river. *Held*, that there was no waiver of the breach of the condition as a matter of law.

5. Where a writ of entry was directed against only a portion of land covered by a deed, breach of condition of which was the basis of the action, the balance of the land being omitted because used as a highway, the omission was not a waiver of the breach.

6. Where it appears to the full court on report that a matter has not been fully argued, and it is doubtful whether it was fully presented in the court below, the matter will not be reviewed.

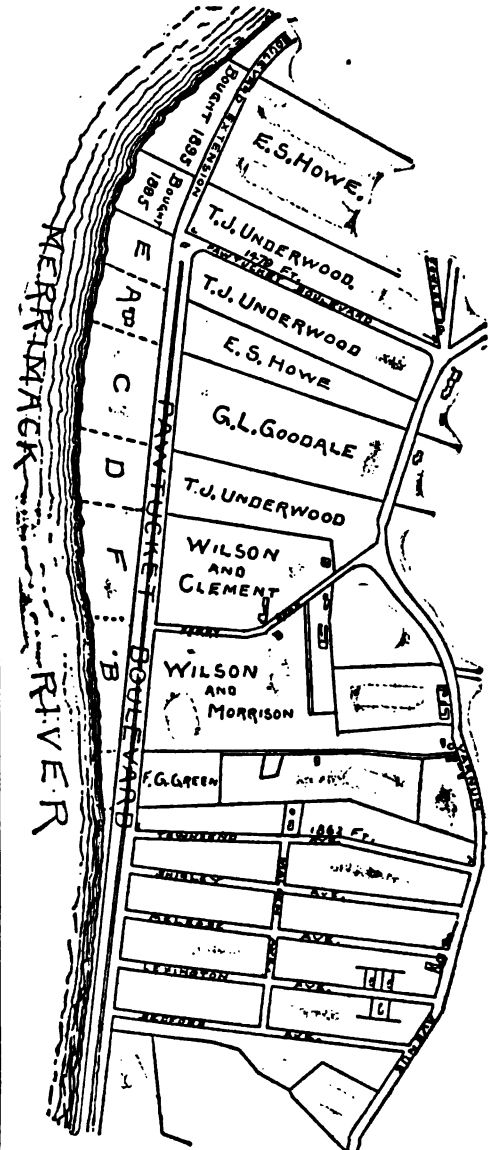
Report from superior court, Middlesex county; J. B. Richardson, Judge.

Separate writs of entry by Edward S. Howe and by five others against the city of Lowell. The superior court ruled in favor of defendant in each case, and reported the cases to the supreme judicial court. Judgment for tenant, except in the Howe case.

The court found on certain matters as follows, viz.:

"In the fall of 1889 and spring of 1890 the

city of Lowell purchased from the several owners thereof a strip of land along the northerly bank of the Merrimack river, about one and one-half miles in length from the easterly to the westerly end, and varying in width from two hundred to six hundred feet or thereabout, the lands conveyed by the deeds above mentioned being the westerly portion of said strip. The land conveyed by Joseph M. Wilson and Benjamin C. Morrison, being the lot on said plan marked 'B,' was conveyed to the city, without consideration and as a gift.



"On November 27, 1889, a resolution was duly passed by the city council of Lowell, and approved by the mayor; and a public street, fifty feet in width, was laid out and accepted by the city council of Lowell, under and in pursuance of said resolution, such

street running longitudinally through said strip of land, the northerly line of said street being the northerly line of said strip of land, and the northerly boundary line of the first tract described in said deed of Underwood to the city of Lowell, dated April 14, 1890, and the northerly boundary line of the tract described in each of said other deeds. Said public street also covered and included all of the second and third lots described in said deed of Underwood, dated April 14, 1890. That, within three years from the date of any of said deeds of the demandants, said street and a driveway or carriageway, seventy-five feet wide, were wrought and constructed through said strip of land; the said carriageway being parallel with said street, and about twenty-five feet distant therefrom, the intervening space being turfed over and planted with shade trees. (Said driveway is hereinafter called the 'speedway,' to distinguish it from said public street.) Trees were also planted along the northerly line of said street, and on the southerly line of said speedway. All this land was situated in the suburbs of Lowell, the easterly portion being nearest the city proper. Nearly all of it had been farming land before it was conveyed to the city. At about the time the street and speedway were constructed, the city expended considerable money in paths and improvements for park purposes in the portion situated nearest the city, but did not at that time expend any money for paths and improvements for park purposes except as aforesaid in that portion conveyed by the demandants. Since then there has been annually spent a considerable amount for extending and maintaining such improvements, all pursuant to a general plan designed by a landscape gardener for the improvement of the property for the uses and purposes described in said deeds. The actual work of construction of the park and boulevards under said general plan began on lands lying nearest the city, and down to the present time very little, if anything, has been done on the lands in question, except the construction of the street and speedway and the planting of trees as aforesaid. A large amount of dirt, two hundred loads or more, and turf, had been removed from lots F and B, to be used in filling and improving other parts of the land conveyed nearer the city, but pursuant to carrying out of the said general plan of improvement. Portions of the land embraced in said strip, lying near the river, including portions of the premises demanded in each of said writs, are low and sandy; and the water of said river covers the same during periods of high water, and deposits sand and silt thereon, rendering the land unfit for cultivation. That the land conveyed to the city of Lowell by each of the deeds above mentioned was, prior to the laying out of the street and the conveyances aforesaid, a part of a much larger tract then owned by the grantor or grantors in said

deeds respectively. That one of said large tracts was owned by the demandants Wilson and Morrison as tenants in common, and one by the demandants Wilson and Clement as tenants in common. That the demandant Underwood owned two of such tracts, separated from each other by the two tracts owned respectively by the demandants Howe and Goodale. That these larger tracts of land were each bounded southerly by the Merrimack river, and extended northerly to Varnum avenue, so called, a public street, running nearly parallel with said river, and at a distance of from fifteen hundred to two thousand feet therefrom. That these lands, though a part of the city, were all quite a distance from the thickly-settled residential portion thereof, and used chiefly for agricultural purposes. The city paid for all of the lands so purchased, except the land of Wilson and Morrison, as aforesaid, the sum of two hundred and fifty dollars per acre for all such land except a portion thereof, namely, a strip one hundred and fifty feet in width which was included between the northerly line of said street and the southerly line of said speedway, which was excluded in estimating the area for the purpose of fixing the amount to be paid in each case.

"In October, 1891, the water board of the city of Lowell, duly authorized thereto, commenced experimenting in different parts of the city to test the feasibility of supplying the city with pure water by means of driven or artesian wells. Such experiments were conducted by driving iron pipes two and one-half inches in diameter from thirty to fifty feet into the ground, and, if water was thereby obtained, testing its quality. If no water was obtained, or the water was not of the quality desired, such pipes, with one or two exceptions, were removed, and the wells at that place were abandoned. In the prosecution of such experiments, in 1891, two such pipes were driven in the lot marked 'B,' two were driven in the lot marked 'F,' one was driven in the lot marked 'E,' and one was driven in the lot marked 'C.' A portable engine was used on different lots to pump the water from these wells in making the tests. In 1892, ten such pipes were driven in the lot marked 'B,' three in the lot marked 'F,' one in the lot marked 'E,' sixteen in the lot marked 'C,' one in the lot marked 'A,' and one in the lot marked 'D.' These wells were all connected by a pipe with a portable engine, and were pumped for a period of nine days or thereabouts. None of these experiments proving satisfactory, all of these pipes, with the exception of one or two, were withdrawn. But in these experiments the ground was in places dug up, and left in a rough condition, one or two pipes were left projecting above the surface, and, in a number of cases where the pipes were removed, the holes were not filled in, so that it was hardly safe to walk over it. Some trees originally on the land at the time of the conveyances were de-

stroyed. A sluiceway was dug to carry off waste water to the river. Some refuse coal drawn for the engine was also left upon the ground. But in 1895, by order of said water board, there were driven into the land conveyed by said deeds of the demandants one hundred and forty such iron pipes, to the depth of thirty-five or forty feet. These pipes were driven in the land between the speedway and the river, most of them in the low land near the river; and said pipes were connected with an iron pipe through which the water is pumped by an engine, located as hereinafter set forth, from said wells into a large iron pipe running longitudinally in the speedway aforesaid. The water is conveyed from said large iron pipe by gravity into the conduit of the city. Of these wells, eighteen are located in the lot marked 'B,' seventy in the lot marked 'C,' twenty-seven in the lot marked 'A,' and twenty-five in the lot marked 'D.' The large iron pipe before mentioned runs in said speedway underground through each of said lots. This pipe is twenty-four inches in diameter, and was laid from four to six feet under the surface of the ground. The pump used for raising the water from said wells into said large iron pipe is a steam pump, and, together with the engine and boiler for operating the same, is placed in a wooden building which is about forty feet square, situated on the lot marked 'A.' All this has been done for the purpose of getting an additional water supply for the city and its inhabitants for all the purposes for which the city is authorized to procure water, the city receiving compensation for such water from the inhabitants who use it. These iron pipes or wells have been driven into the ground below the surface out of sight, and the large longitudinal iron pipe is also laid below the surface of said speedway; but, for a few weeks, during the experiments to test the water before it was finally determined to make the driven wells a permanent source of water supply, the iron pipes projected above the ground, and the pipe that connected them with the engine was not covered. It will, however, be necessary occasionally, about once or twice each year, to dig down to the top of the well pipes, a foot or so below the surface, and remove the caps of these pipes, and clean the same, and also to repair these pipes, and renew them whenever needed. Except on these occasions no part of said pipes will appear on the surface. When the longitudinal pipe was being laid, the speedway was dug up, and was substantially closed to public travel for about two weeks. At no time was permission asked of any of the demandants to make these experiments on the granted premises, nor at any time was any express permission given.

"I find that the taking of water from these driven wells is now a permanent part of the source of supply of water for the city of Lowell, and that it would injure the water to use ordinary fertilizers upon the land, but spe-

cially prepared fertilizers may be used without such injury. It is the intention of the city also soon to replace the wooden building upon said lot A, used for the pumping station, with a new structure of brick or stone, constructed with artistic taste, and which may be made an attractive feature of the landscape. While experiments to get water were going on, the driving of the wells and their use and the use of the pumping station interfered to some extent with the use of the land in which they were as a boulevard or park or common; but I find that the city in good faith intends to improve all the land, and forever use it for the purposes mentioned in said deeds; and I find that the city can so lay it out, and can so use and maintain the wells and pipes, and can so build and use its pumping station as that they will not interfere, except as herein stated, if at all, with its uses mentioned in the deeds; but I find that the use of the land for the purpose of driving wells and drawing water therefrom, and the erection of engines and boiler house, are uses and purposes not in the minds of the grantors, or even of the grantee, when the deeds were given. I find that, during all of the time that said experiments were being conducted, said wells driven, said pipes laid, and said pumping station located and established by the authority of the city of Lowell, as aforesaid, all the demandants, except the demandants Goodale and Clement, who do not live in Lowell, and at no time knew anything of these experiments, or that water was being taken, had knowledge of all said acts and doings, and the object and purpose of the same, and that the same involved the expenditure of large sums of money. That neither of the demandants made any objection thereto or to the establishment of said driven-well plant on said land. That, soon after the commencement of the work of driving the wells, the demandants Howe, Underwood, and Wilson met together, and came to an understanding, at the suggestion of demandant Wilson, that they would not then make any objection to the work or say anything about their rights under the conditions in the several deeds. That the object of this understanding was not to raise then any question of the authority of the city to establish its driven-well plant as aforesaid on said premises until the same should have been established, if it should be established. In a conversation between the demandant Wilson and the city engineer, under whose advice the work was being done, and some time during the progress of the work, said city engineer asked Wilson what he was going to do in regard to the condition or restriction in his deed, and Wilson replied that he would treat the city fairly. That the amount expended by the city on said driven-well plant up to the present time, including the cost of pumping for about one year, is about seventy thousand dollars.

"On the 2d day of December, 1895, the de-

mandant Underwood conveyed to the city of Lowell a tract of land containing about 2.88 acres, bounded on the south by the river, lying westerly of and adjoining the lot marked 'E.' The price paid for the tract so conveyed was five hundred dollars per acre, in all fourteen hundred and forty dollars. On the same day, the demandant Howe conveyed to the city of Lowell a tract of land containing about 4.38 acres, bounded on the south by the river, and situated westerly of and adjoining said last-mentioned Underwood tract, for which said city paid to said Howe the sum of five hundred dollars per acre, in all twenty-one hundred and ninety dollars. Said last-mentioned deeds of demandants Underwood and Howe to said city both contain, immediately following the description of the land therein conveyed, the following: "The grantor hereby reserves to himself, and his heirs and assigns, the right to cut ice on Merrimack river wherever the same flows over the granted premises in its natural channel; but this reservation shall not be construed to give to the grantor, or his heirs or assigns, any right of way over the granted premises except where the same is covered by the water of said river, and shall not be so construed as to prevent the grantee from making any change in the bank of said river that may be desired, nor to prevent the grantee from throwing steam or hot water from its engine or pumping station, or any sewerage or drainage, into said river at any point on said bank." The negotiation for the purchase of the last two mentioned tracts was made between said Underwood and Howe, respectively, and the Lowell water board. The conveyance was made after all the wells had been driven, pipes laid, and work on the foundation for said pumping station had commenced, but before it had been fully and finally decided to make the driven wells a permanent source of water supply. Both Howe and Underwood knew at the time, December 2, 1895, the last-mentioned deeds were given to the city, that experiments had been made on the boulevard lands for obtaining water. They also knew that the city might locate its pumping station upon the land by them conveyed at that time to the city, and that the said lands were purchased for use in connection with said water plant. While the negotiations for the purchase of this land conveyed in said deeds, dated December 2, 1895, were made, a question between Howe and Underwood and the water board arose as to the conditions concerning the right to cut ice on the river which they desired to have inserted in the deeds to be given by them to the city. While this discussion was going on, in the presence of the water board, a member of the board told them that if they did not come to the terms of the board in respect to this condition, that they would have the land seized; and I find that this statement had some influence upon both Howe and Underwood in the giving of the

deeds as aforesaid. I also find that the reference in the condition to the engine and pumping station was inserted because it was thought that the city might finally establish its engine and pumping station on this land. Both of the last-named conveyances are warranty deeds, containing the usual covenants; and I find that neither Howe nor Underwood intended the conveyance of these lots of land, or any of the other acts done by them, as a waiver of any of the conditions in any of the other previous deeds."

F. W. Qua and H. A. Brown, for tenant.
Trull & Wier, for demandants.

FIELD, C. J. These are six writs of entry, to recover possession of six different lots of land, which are designated on the plan as lots "A," "B," "C," "D," "E," and "F." The plea in each case is nul disseisin, with a specification of an equitable defense by way of estoppel, under St. 1883, c. 223, § 14, and a claim for an allowance for improvements under Pub. St. c. 178, § 19. Lot A was conveyed by the demandant to the city of Lowell by deed dated January 17, 1890; lot B by deed dated December 20, 1889; lot C by deed dated January 30, 1890; lot D by deed dated December 17, 1889; lot E by deed dated April 4, 1890; and lot F by deed dated December 20, 1889. Each of the deeds except that of lot E conveyed but one parcel of land, and, after the description of the parcel, contained the following clause: "This conveyance is made on the express condition that the grantee shall, within three years from the date hereof, lay out and construct, and thereafter forever maintain, a public highway over the within-described premises, at least fifty feet in width, having the northerly line of the within-described premises as the northerly line of such highway; and also on the express condition that that part of said premises not taken or used for said highway shall be improved, dedicated, and forever used by the said grantee as and for a common, park, or boulevard, and for no other purpose; and that, if said grantee shall fail to keep and perform said conditions or either of them, then and in such event this deed shall become and be absolutely null and void, and all and singular the above-described premises, and all improvements and betterments thereon, shall revert to and reinvest in me, the said grantor, and my heirs and assigns, as fully, completely, and effectually as if these presents had not been executed. The right to take ice on the Merrimack river where it flows over the premises herein conveyed is hereby expressly reserved to the grantors, their heirs and assigns, or other person or persons who now have that right. It is, however, understood that the grantors, their heirs and assigns, or other person or persons above mentioned, shall not have the right to pass over or cross any part of said premises except such as is covered by the river, or such

part as is or may be laid out or in use as a public highway, public road, or ferry way." The deed which conveyed lot E conveyed two other lots; the first lot, lot E, containing about 3.49 acres, the second about 575 square feet, and the third about 1.87 acres. After the description of the first lot, the deed contained this clause: "The conveyance of this lot is made on the express condition that the grantee shall, within three years from the date hereof, lay out and construct, and thereafter forever maintain, a public highway over the above-described premises, at least fifty feet in width, having the northerly line of the above-described premises as the northerly line of such highway; and also on the express condition that that part of the above-described premises not taken or used for such highway shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose." After the description of the second and third lots, the deed contained this clause: "The conveyance of the last two described lots is made on the express condition that the grantee shall, within three years from the date hereof, lay out said last two described lots as a public highway, and construct and thereafter forever maintain said public highway; and the conveyance of all the above-described premises is made on the express condition that if the grantee shall fail to keep and perform said conditions, or either of them, then and in such event this deed shall become and be absolutely null and void, and all and singular the above-described premises, and all improvements and betterments thereon, revert to and reinvest in me, the said grantor, and my heirs and assigns, as fully, completely, and effectually as if these presents had not been executed. The right to take ice found on the Merrimack river where it flows over the premises herein conveyed is hereby expressly reserved to the grantor, his heirs and assigns, or other person or persons who now have that right. It is, however, understood, that the grantor, his heirs and assigns, or other person or persons above mentioned, shall not have the right to pass over or cross any part of said premises, except such as is covered by the water of the river, or such part as is laid out as a public highway." We do not understand that the deeds conveyed these lands to the city expressly to be held for the purpose of a common, park, or boulevard, but conveyed them to the city without limitation, except as provided in the conditions in the deeds. Copies of the deeds are not before us.

The report of the presiding justice recites as follows: "After counsel for the demandants had made his opening, counsel for the tenant inquired if the description of the premises demanded in the several writs covered and corresponded with the description of the premises conveyed in the several deeds to the city. Counsel for demandants replied that the descriptions in the writs

were the same as those in the deeds, except that that portion of the several tracts conveyed to the city by said deeds which had been laid out as a public street was not included in the description in the writs, and stated that neither of the demandants made any claim to the land within the limits of said public street, alleging as a reason that that land had been taken by right of eminent domain for a street. Counsel for the tenant then claimed and requested the court to rule that, as the demandants had brought their actions for a part only of the land to which the condition attached, they had thereby waived the condition as to the remaining portion of the land, and such waiver operated to destroy the condition in toto, so that these actions cannot be maintained. Without making any ruling at that time on the question thus raised, I allowed the trial to proceed, and on the second day of the trial, after a portion of the evidence was in, on motion of counsel for demandants, against the objection of the tenant, I allowed each of the demandants to so amend the description of land contained in each writ that, as amended, all land described in the several deeds of the demandants to the city of Lowell was included in such amended descriptions, and was claimed to have been forfeited. There was no other evidence offered as to whether the writs as amended were for the cause of action intended in and by the writs as originally brought."

We are of opinion that it was within the power of the court to allow these amendments. The presiding justice found the facts which appear in the statement of the case by the reporter. We understand that the speedway was southerly of the public highway, but was not a part of it, and that the demandants concede that the highway was properly laid out. The first ruling of the court is as follows: "That the construction and maintenance by the city of said wells and pipes and pumping station, and the work done in connection therewith, and other facts found, constitute a breach of the condition contained in each of the six deeds first above described." As the highway has been constructed, the question is whether there has been a breach of the conditions that the parts of the premises not taken for a highway "shall be improved, dedicated, and forever used by the said grantee as and for a common, park, or boulevard, and for no other purpose." The title in fee to all the parcels vested in the city of Lowell, subject to conditions subsequent, by the breach of which its title would be divested, and would revert in the grantors and their heirs. The subterranean waters in the parcels were a part of the parcels, and the grantors in the deeds have not preserved to themselves the property in these waters while the deeds are in force. The grantors owned other lands northerly of the lands granted to the city, and they had an interest in imposing the

conditions that the lands granted, so far as they were not used for a highway, should be "improved, dedicated, and forever used as a common, park, or boulevard." From the form of the conditions it is apparent that the city could use the lands in part as a common, in part as a park, if there be any distinction between a common and a park, and in part as a boulevard. The word "boulevard," as now commonly used in this commonwealth, has not a very definite meaning. It sometimes means little more than a wide street or highway. In the Century Dictionary it is said: "The name is now sometimes extended to any street or walk encircling a town, and also to a street which is of especial width, is given a park-like appearance by reserving space at the sides or center for shade trees, flowers, seats, and the like, and is not used for heavy teaming." It seems to us that the "speedway" may properly be said to be a boulevard, within the meaning of that word in the conditions of the deeds. The ruling of the presiding justice indicates that he was of that opinion, for he only ruled that the construction and maintenance by the city of said wells and pipes and pumping station, and the work done in connection therewith, and the other facts found, constituted a breach of the conditions. Except as to lot A, the question is whether the construction and maintenance by the city of Lowell, as shown by the report, of the system of pipes below the surface of the ground for the purpose of obtaining and distributing water to the inhabitants of the city, constitute a breach of the conditions.

In *Re Wellington*, 16 Pick. 87, 99, the terms of the grant of the town commons by the proprietors of common and undivided lands, to the town of Cambridge, were that "the same is hereby granted to the town of Cambridge to be used as a training field, and to remain for that use forever, provided, nevertheless, that if the said town should dispose of, grant, or appropriate the same or any part thereof, at any time hereafter, to or for any other use than that aforementioned, then in such case the whole of the premises hereby granted to the said town shall revert to the proprietors granting the same," etc. Of this the court say: "By the grant the town became owners of the soil, with full power, as such owners, to make any use of the property which owners of land can make, subject only to the restraint and limitation expressed in the condition. All such limitations and restrictions, especially those which go to create a forfeiture, are to be construed strictly, and not to be extended beyond the plain terms of the clauses in which they are expressed, and the obvious purposes for which they are introduced. Any other construction would impose a useless embarrassment upon the rights of property in the grantee, without benefit to the grantor. It appears to us, con-

struing this grant according to these rules, that the intent of the restriction and condition in this deed was that the lands should remain common and open, in contradistinction to being divided to be held in severalty, and appropriated to private use, and that no disposition or appropriation should be made of it, inconsistent with its use as a training field." In *French v. Quincy*, 3 Allen, 9, it is said in the opinion that "it is sufficient if a condition is performed in substance." In *Crane v. Hyde Park*, 135 Mass. 147, it is said in the opinion: "The demandants' claim is *strictissimi juris*. It is well settled that such a condition, when relied on to work a forfeiture, is to be construed with great strictness." In *McKelway v. Seymour*, 29 N. J. Law, 321, 327, it is said in the opinion: "So long as the land was used primarily and mainly for the purposes of a race way, and the embankment necessary to support it, any use of it for other purposes, either for the water-power company or by other persons, with or without their consent, so long as these uses were not inconsistent with its use for the main purpose, could not operate as a breach of the condition. The condition is to be construed in accordance with the manifest intention of the parties and the end they had in view. Conditions, when they tend to defeat estates, are *stricti juris*, and to be construed strictly." See *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335; *Southard v. Railroad Co.*, 26 N. J. Law, 13.

It seems to us in the present cases that the conditions were intended to relate to the use to be made of the surface of the lands granted. We think that the demandants, continuing to be the owners of adjoining lands, provided that the lands granted to the city be used only for a public highway, common, park, or boulevard, and for no other purpose, because other uses might be detrimental to their adjoining estates. The presiding justice has found "that the use of the lands for the purpose of driving wells and drawing water therefrom, and the erection of engines and boiler house, are uses and purposes not in the minds of the grantors, or even of the grantee, when the deeds were given." As the grantee took the lands in fee, it is entitled to make any use of the lands not prohibited by the conditions in the deeds, whether the parties thought of it or not. It is not a new use to lay water pipes in lands taken and used as a highway. Water pipes are sometimes laid in and through commons, and through lands taken or purchased for a public park; but we are aware of no case in which it has been held that it requires a new taking to do this, or that such a laying of pipes is not within the terms of the deeds granting lands for these purposes. On the theory of the demandants, the subterranean waters of the lands cannot be used by the city without forfeiting the lands, and cannot be used by themselves, because they have not reserved the waters or

excepted them from the grant. We are of opinion that the contention of the tenant is the more reasonable one, namely, that the conditions mean that the lands shall be used for a common, park, or boulevard, and for no other purpose which shall interfere or be inconsistent with such use. The experiments made on the lands were but incidental to the use afterwards made of the lands in obtaining a water supply for the city, and were temporary in character, and cannot be held to work a forfeiture of the lands if the construction and maintenance of the system of pipes are not a breach of the conditions; and we are of opinion that they are not.

With reference to lot A, the presiding justice found that "the pump used for raising the water from said wells into said large iron pipe is a steam pump, and, together with the engine and boiler for operating the same, is placed in a wooden building, which is about 40 feet square, situated on the lot marked 'A'"; and that "It is the intention of the city also soon to replace the wooden building upon said lot A, used for the pumping station, with a new structure of brick or stone, constructed with artistic taste, and which may be made an attractive feature of the landscape." It may be, when large tracts of land granted are granted for a public park, that a pumping station for irrigating the land granted, or for supplying it with water sometimes, would be reasonably necessary for the maintenance of the park. But this pumping station was not erected and is not used for that purpose. So far as appears, none of the water is used on the lands granted, but it is a pumping station for supplying the inhabitants of the city of Lowell with the water. The city has been authorized by the legislature to take and hold lands, and erect buildings and other structures, for the purpose of obtaining a supply of water for its inhabitants. St. 1893, c. 412; St. 1870, c. 321. By Pub. St. c. 27, § 50, the selectmen of towns are authorized to establish and maintain such public drinking troughs, wells, and fountains within the public highways, squares, and commons of their respective towns as, in their judgment, the public necessity and convenience may require. And this section applies to cities. Pub. St. c. 28, § 2. Id. c. 54, § 16, provides that "no building exceeding six hundred square feet in area upon the ground shall be erected in or upon a common or park dedicated to the use of the public without leave of the general court." These statutes, however, have no application to the present cases, because the question is whether the conditions contained in the deeds have been broken. The building erected on lot A, with its boilers and engines, is not incidental to the maintenance of a common, park, or boulevard. The erection and maintenance of it seem to us inconsistent with the use of the surface of the land solely for a common, park, or boulevard. It is a distinct and different use of

the surface of the land, and we are of opinion that the construction and maintenance of this building in the manner and for the purposes shown by the report are a breach of the condition contained in the deed of lot A. This is the land demanded in the first-named action, that of Howe against the city of Lowell.

Has the demandant Howe waived this breach, or is he estopped from insisting upon it? The presiding justice ruled on the facts found that there was no waiver or estoppel. Whether this is a ruling of law or a finding of fact, it is to be sustained, unless the facts found, as matter of law, require a different ruling or finding. It is to be noticed that the terms of the deed were equally well known to both parties, and whether the city was violating the condition of the deed was a matter of which the city could judge as well as Howe. Howe did nothing actively to induce the city to erect the pumping station. He simply stood by, and saw it done, without making objection; and he afterwards gave a deed to the city of another lot of land, in which reference is made to the right of the city to throw steam or hot water from its engine or pumping station into the river at any point on the bank. Underwood gave a similar deed of another lot. The presiding justice has found "that neither Howe nor Underwood intended the conveyance of these lots of land, or any of the other acts done by them, as a waiver of any of the conditions in any of the other previous deeds." All the evidence on which the justice made this finding is not before us. It is not found that the city understood that Howe had waived any of the conditions contained in his deed, and that it relied on this waiver in proceeding to erect the pumping station. The inference to be drawn from the report is perhaps the other way. On the facts before us, we cannot say that the rulings or findings on this part of the case are erroneous.

The bringing of the action for a part only of the land—a defect which was cured by the amendments allowed by the court—was not, we think, a waiver of the breach of the conditions. It was a natural mistake, the reasons for which appear. There was no intention to waive the breach, and the law does not attribute any such absolute effect to a mistake like that.

The ruling of the presiding justice with reference to the claim for the value of improvements is as follows: "(5) That on these facts, and there being no evidence of the value of the improvements to—if of any value to—the demandants having been put in, the tenant is not entitled to any compensation in either of said actions for the value of improvements made by it on the demanded premises; and found for the demandants in each case, and the tenant excepted." This ruling is general, and relates to all the cases. The report concludes as follows: "By agreement of the parties, I report the cases to the

supreme judicial court for its determination. If the above rulings are correct in law, and said amendments were properly allowed, judgment is to be entered for the demandant in each case. If either of the first four rulings as to any of these cases is not correct, then, in that case, judgment is to be entered for the tenant. If judgment is to be entered for any of the demandants, and the fifth ruling is erroneous, then the cases in which such judgment is rendered may, if the supreme judicial court shall decide that it ought to be done, be sent back to the superior court for the assessment of the sums to be allowed for improvements." In Howe's case, whether the demandant is entitled to anything for rents and profits, and whether the tenant is entitled to anything for the value of improvements, are questions which have not been fully argued in this court, and we doubt whether they were fully presented to the superior court. We therefore think it best to leave these questions open for the further consideration of that court. See Pub. St. c. 173, §§ 21, 28.

According to the terms of the report, there must be judgment for the tenant in each of the cases except in that of Edward S. Howe against the city of Lowell. In that case there must ultimately be judgment for the demandant, but the questions whether the demandant should recover anything for rents and profits, and the tenant should recover for the value of improvements, are to be determined by the superior court. So ordered.

(58 Ohio St. 639)

BALTIMORE & O. R. CO. v. LERSCH.

(Supreme Court of Ohio. Jan. 26, 1897.)

DAMAGES AGAINST RAILWAY COMPANY—INJURY TO PROPERTY—ACTION—PLEADING—MEASURE OF DAMAGES—EVIDENCE—STATUTE OF LIMITATIONS.

1. When a railroad company has laid upon and along a street of a city a railroad track, and is running trains thereon, and the owner of abutting improved property, in an action brought under section 3283, Rev. St., to recover damages on account thereof, specifically alleges that the injuries of which he complains were caused by noises, smoke, dust, and sparks of fire, resulting from passing locomotives and cars, but does not set up any easement, fee, or other interest in the street, or aver any injury thereto, he should not be permitted on the trial of the action, over the objection of the railroad company, to establish, as the measure of his recovery, the difference between the value of the property before and after the track was laid.

2. Where, in such case, the trial court, over the objection of the railroad company, permits the plaintiff to offer evidence of damages that did not result from the causes so specifically alleged, or if the court, over the objection of the railroad company, should instruct the jury to consider, in estimating damages, any impairment of the easement to his property, each of such rulings will constitute prejudicial error, for which a judgment for the plaintiff will be reversed.

3. The provision of section 3283, Rev. St., by which an action brought under that section is required to be commenced within two years

after the completion of the track, is a statute of limitation, and a delay beyond that period does not extinguish the right of recovery. If the railroad company does not, either by demurrer or answer, interpose an objection on account of the lapse of time, but proceeds to trial on the merits, it will be deemed to have waived the benefit of the provision.

(Syllabus by the Court.)

Error to circuit court, Richland county.

Action by Christian Lersch, Sr., against the Baltimore & Ohio Railroad Company. This action was brought in the court of common pleas of Richland county for damages sustained on account of the railroad company having laid a railroad track along a street of the city of Mansfield, upon which the property claimed to be injured abutted. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed.

Cummings & McBride and J. H. Collins, for plaintiff in error. Jabez Dickey, for defendant in error.

BRADBURY, J. The petition which is the basis of this action is in the following words: "Christian Lersch, Sr., Plaintiff, v. The Baltimore & Ohio Railroad Company, Defendant. Petition. Defendant is a foreign corporation, duly organized under the laws of the state of Maryland, and in April, 1888, did, and yet does, own and operate a certain railroad running through Mansfield, Ohio, and known as the Baltimore & Ohio Railroad. That, at the time of the grievances hereinafter complained of, the said plaintiff was, and still is, the owner of fifty-five feet off of the south side of in-lot number two hundred and eighty-seven (287), and, by last numbering, No. 960, in Bentley's addition to the town, now the city, of Mansfield, Ohio. That said lot is situated on the northeast corner of the crossing of West Diamond and Bloom streets, in said city of Mansfield, with fifty-five feet fronting and abutting on said West Diamond street, and one hundred and eighty feet bounding and abutting on said Bloom street. That, at the time of the grievances here complained of, there was situated on said plaintiff's said lot a certain two-story brick building, containing three business rooms on the ground floor, fronting on said West Diamond street, together with a frame barn situated thereon. That, without the consent and against the will of the said plaintiff, the said defendant, the Baltimore & Ohio Railroad Company, wrongfully, about the month of April, 1888, built and extended its switch railroad track across said West Diamond street, at its crossing of said Bloom street, and east along Bloom street, by the side of the flouring mill, on the south side of said Bloom street, and directly opposite to said plaintiff's lot and buildings. And that said defendant at the same time, about the month of April, 1888, built and extended its branch line of railroad track across said West Diamond street, at its crossing of Bloom street, and along said Bloom street, east, near by and past said

plaintiff's said lot and buildings. By reason of which said defendant runs its cars and locomotives along said switch track, and along said branch railroad track, close by said plaintiff's said lot, business building, and improvement, causing discordant noises, and filling said premises with vapor, smoke, and dust, and emitting sparks of fire, to the great damage and discomfort of its occupants, and whereby said premises were and are greatly diminished in value, to the damage of the said plaintiff in the sum of eight thousand dollars. Wherefore said plaintiff prays judgment against said defendant for said sum of eight thousand dollars and costs of suit." To this petition the railroad company interposed the following answer: "The defendant, the Baltimore & Ohio Railroad Company, answering the petition of the said plaintiff, says that it admits that it is a corporation, organized as stated in the petition of the plaintiff, but it denies that it owns the railroad therein described. This defendant does not know whether the said plaintiff is the owner of the premises described in said petition or not, and the averment of said petition with regard to said ownership is therefore denied. And the defendant admits that it built and extended its switch across West Diamond street, in said city of Mansfield, at its crossing of Bloom street, and thence east, along Bloom street, by the side of the flouring mill, on the south side of said street, and opposite the lot described in plaintiff's petition. And the defendant admits that its purpose in building said switch was to switch cars from its main track over said switch to the flouring mill referred to in the said petition, and to other points, for the purpose of being loaded with freight. And the defendant denies each and all of the other averments contained in said petition."

Upon the issues raised by the foregoing pleadings, the parties went to trial. The plaintiff below sought to establish, as the measure of his damages, the difference between the value of his property before the railroad track was laid and its value afterwards. To this course of the evidence the railroad company objected, and, the objection being overruled, it excepted. After the evidence had closed, the railroad company requested the court to instruct the jury that "It is not claimed by the plaintiff in this case, in his petition, that his access to the street from his property described has been obstructed or impaired by the location and construction of this railroad track in the street, and no recovery can be herein based on any such claim." This instruction was refused, to which refusal the railroad company excepted. An inspection of the pleading will disclose that while the plaintiff below set forth, as a foundation for relief, his ownership of the premises, and the construction and operation by the defendant, without his consent, of a railway in and along the street upon which his premises abut, yet, when he

comes to state the acts which injured those premises, and the injuries in fact suffered by them, he confines himself to such as result from "discordant noises, filling said premises with vapor, smoke, dust, and emitting sparks of fire, all of which are caused by passing cars and locomotives." He makes no complaint on account of the street being occupied by the railroad track, nor of any obstruction or impairment of access to the premises by reason of the existence of the railroad track in the street, or the running of cars or locomotives thereon; nor does he complain that such acts have affected or infringed upon any fee or easement he may have in the street, or even state his ownership of any such fee or easement.

The action was brought under section 3283, Rev. St., which reads: "If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals, but every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track." This language is so comprehensive that, if alone considered, no violence would be done to it by a construction which would permit, in an action brought under the statute, a full recovery for every injury inflicted to abutting property by the construction and operation of a railroad track along the street or other highway upon which the property abuts, including, if the averments of the petition are broad enough, not only damages for annoyance and injury resulting from smoke, sparks, dust, noises, caused by passing cars and locomotives, interruption of ingress and egress to the abutting property, but for appropriating to the use of the railroad whatever interest, whether a fee or easement, the abutting owner might own in the street. If the law affords no other remedy than that provided by this statute for such injuries, the inference might be very strong—perhaps irresistible—that full relief as above recited might be had in an action brought under it. This view of the subject seems to have been taken by Owen, C. J., in *Railway Co. v. Gardner*, 45 Ohio St. 322, 13 N. E. 69. And, in such

state of the law, a petition in such action might be regarded as sufficient to authorize that full measure of relief, if couched in terms broad enough, although failing to set forth specific injuries. Where, however, the party injured, as in the present case, specifies the injuries sustained, there seems to be no sound reason for affording him relief on account of other injuries of which he has not complained; and in this connection it is immaterial that the statute, or the rule of common law, under which the action was brought, authorizes a demand for more extended relief. The plaintiff, by his own averments, having limited his demand, should be held to the claim he has made. The claim thus put forth is the only one of which the defendant has notice, or is presumed to have made preparation to contest.

To permit the plaintiff to recover the difference between the value of the property before the railroad track was laid and its value afterwards would be to allow a recovery, not only for the injury he set forth, which was that which resulted from passing cars and locomotives, causing "discordant noises, and filling said premises with vapor, smoke, dust, and emitting sparks," but, in addition, for such damages as the jury might have thought were caused by the railroad track and passing trains impairing access to and from his property, and also for the value of the fee or easement which he might own in the street as appurtenant to that property. In so far as he possessed any property rights in the street which the railroad company had taken for its track, chapter 8 of title 2 of the Code of Civil Procedure would seem to afford an ample remedy. This chapter and title provide for the appropriation of private property; and section 6415, Rev. St. (a part of that chapter), authorizes an appropriation of an easement in lands, as well as the appropriation of the land itself. In *Railroad Co. v. Williams*, 35 Ohio St. 168, this court held that "where a railroad company occupies a public highway for its track, without appropriating or otherwise acquiring the right to do so, an owner of abutting lands, having the fee in the highway, may proceed, under section 21 of the act of 1872 (69 Ohio Laws, 95), to compel the company to appropriate the right of way for its road." As section 6415, Rev. St., before referred to, in respect to proceedings in appropriation, places an easement upon the same footing with a fee, it would seem to follow from the above holding, as to appropriating a fee in a highway, that an easement therein might also be the subject of such proceedings. An easement in a street or other highway, appurtenant to an abutting lot, partakes of the nature of land. It is a part of the lot to which it is appurtenant, passing to a purchaser with a conveyance of the lot, and descending to the heir on the death of the ancestor. *Railway Co. v. Gardner*, 45 Ohio St. 318, 13 N. E. 69; *Railway Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14;

51 N.E.—35

Crawford v. Village of Delaware, 7 Ohio St. 469. This being so, it is immaterial, as concerns his remedy, whether the plaintiff below had a fee or only an easement in the street occupied by the railroad track, for in either case his property therein was a proper subject of proceedings in appropriation, and, for aught that appears in the record, may have been appropriated. And, if appropriated for railroad purposes, it would have been competent for the jury, in assessing damages, to consider the extent to which ingress and egress to the abutting property would be affected by the laying of a railroad track in the street, and operating a railroad thereon; and it must be presumed that such effect was considered, and damages allowed accordingly.

Whatever effect this right to resort to appropriation proceedings may have upon the extent of the recovery authorized by section 3283, Rev. St., under which this action was brought, the question is not before the court. It may be said, however, in passing, that considerations of considerable weight exist tending to the conclusion that the remedy provided by section 3283, supra, does not include that relief which may be had under the statute pertaining to proceedings in appropriation. An action under section 3283, supra, must be commenced within "two years from the completion of such track," while 21 years are required to bar a proceeding to compel an appropriation of the soil or easement in a street that has been occupied by a railroad company for its track. *Railroad Co. v. O'Harra*, 48 Ohio St. 343, 28 N. E. 175. The damages recoverable under this section are personal, and do not pass to a grantee, on conveyance of the property injured (*Railroad Co. v. Campbell*, 51 Ohio St. 328, 37 N. E. 266), while in the case of a fee or easement in a street appurtenant to abutting lands, it is quite clear that it would descend to the heir on the death of the ancestor, and pass to the grantee with a conveyance of the lands to which it is appurtenant (*Railroad Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14). But whatever the extent of the recovery permissible under section 3283, supra, may be, where, as in the case under consideration, the plaintiff, in his petition, sets forth specifically the acts which have injured his property, and the particular injuries such property has sustained, his recovery should be limited accordingly. Taking this view of the matter as the correct one, it is manifest that the court of common pleas erred in permitting the plaintiff below to introduce, as the measure of damages, evidence of the difference between the value of the property before the railroad occupied the street with its track and its value afterwards. And, for the same reasons, it was error to refuse the request of defendant below, that "it is not claimed by the plaintiff in this case, in his petition, that his access to the street from his property described has been obstructed or impaired by the location and construction of this rail-

road track, and no recovery can be based on any such claim."

The plaintiff in error requested the court to instruct the jury to the effect that, if two years had elapsed between the completion of the railroad track and the commencement of the action, the plaintiff could not recover. This instruction was rightfully refused. The limitation of two years prescribed in section 3283, Rev. St., should be treated as any other statute limiting the time within which an action may be commenced. If the party entitled to its benefit does not plead it in some form, he waives his right to avail himself of its provisions. In this case, plaintiff in error did not interpose, by plea or demurrer, any objection in respect to the time which had elapsed after the track had been completed, before the petition was filed. The first objection made on this ground was after the evidence had been submitted to the jury. It was then too late. Judgment reversed.

(59 Ohio St. 45)

**JOHN HANCOCK LIFE INS. CO. v.
WARREN.**

(Supreme Court of Ohio. Oct. 11, 1898.)

LIFE INSURANCE POLICY—FALSE ANSWERS IN APPLICATION—MATERIALITY.

Section 3625, Rev. St., is a valid constitutional enactment, and, to constitute a defense to a policy of insurance by reason of false answers to questions in the application, it must be clearly proven that the answers to such questions were willfully false and were fraudulently made; that the same were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued; and that neither the company nor its agents had knowledge of the falsity or fraud of such answers at and before the delivery of the policy.

(Syllabus by the Court.)

Error to circuit court, Delaware county.

The action below was by William M. Warren against the John Hancock Mutual Life Insurance Company of Boston, Mass., to recover the amount of a policy of life insurance on the life of George E. Warren, son of the plaintiff below. The first ground of defense denied that George E. Warren was in good health at the time the policy was issued, and denied generally the allegations of the petition. The second ground of defense was in the words and figures following: "The defendant says that the policy of insurance set forth in the plaintiff's petition, and upon which his action is based, was issued upon an application made by the deceased, George E. Warren, to this defendant, which application is referred to and made a part of said policy of insurance, and that said policy of insurance provided that, if any of the statements made in said application are untrue in any respect, said policy shall be void. The defendant further says that the said application of the said George E. Warren contained certain interrogatories

therein, in answer to which interrogatories the said George E. Warren stated that at the time said application was made he was in good health; that he had not been obliged to consult a doctor during the 10 years last preceding the date of said application, except once, and that was in 1893, for malarial fever, which sickness was of one week's duration; that the last time he had consulted a physician was in the year 1893, on account of said attack of malarial fever; that he had never had or been predisposed to the disease known as syphilis; and that he had never had any illness or disease other than malarial fever, in 1893. The defendant says that, at the time said statements were made, they were all and each of them false and untrue, and were known to be so by the said George E. Warren at the time he made them, and that they were made by said George E. Warren for the purpose of defrauding this defendant. The defendant also says that at the time said application was made the said George E. Warren had syphilis, and he knew it; that he had been obliged frequently, during the ten years immediately preceding the making of said application, to consult a physician on account of said disease; that he had had a disease or diseases other than as stated in his said application; and that he was not, at the time said application was made, in good health. This defendant says that the said statements in said application contained were the basis upon which the said contract or policy of insurance mentioned in the plaintiff's petition was issued, and that said contract of insurance would not have been entered into, and said policy of insurance would not have been issued, except that this defendant relied upon the truthfulness of said statements; and this defendant is not liable upon said policy of insurance, and prays to be discharged from this action, and to recover its costs herein." The reply admitted that the policy was issued upon the application set out in the answer, and that George E. Warren stated in his application that he was in good health, and denied the remainder of the answer, and claimed that the insurance company was estopped from denying the truth of the application. On the trial evidence was given tending to support the answer, and by the plaintiff below tending to support the truth of his reply, and the verdict and judgment were in favor of the plaintiff below for the full amount of the policy. The principal controversy in the trial of the case arose upon section 3625, Rev. St., which is as follows: "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such

answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer." The circuit court affirmed the judgment of the court of common pleas, and thereupon the insurance company filed its petition in error in this court, seeking to reverse the judgment. Affirmed.

George K. Nash and W. Z. Davis, for plaintiff in error. F. M. Marriott and J. S. Jones & Sons, for defendant in error.

PER CURIAM. In this state the subject-matter of insurance is a franchise. *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828. And the state has a right to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits. Section 3625 was in force at the time this policy of insurance was issued, and therefore the legal effect is the same as if the section was copied into and made a part of the policy. The section is therefore a valid constitutional enactment. This section was held constitutional by this court in *Insurance Co. v. Brobst*, 56 Ohio St. 728, 49 N. E. 1113. The case of *Insurance Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, was decided before this section was enacted, and therefore cannot control the matter. This section was passed for the purpose of abrogating the rule laid down in that case. The court of common pleas, in the trial of the case, construed this section as requiring clear proof that the answers to the several questions by George E. Warren were willfully false, and were fraudulently made, and were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued, and that the company and its agents had no knowledge of the falsity or fraud of such answers at and before the delivery of the policy. In this there was no error. Such are the provisions of this section of the statute, and the statute should be construed so as to effect the intention of the legislature in passing the same. It will be noticed that the insurance company fails to allege that the answers to the questions were material, and without such allegation the answer failed to state a ground of defense, as it matters not how false and how fraudulent such answers may be, if they are not material they furnish no ground for defense to the company issuing the policy. There is therefore no error in the record, and the judgment is affirmed.

(59 Ohio St. 54)

DERBY v. HEATH.

(Supreme Court of Ohio. Oct. 11, 1898.)

JUSTICE OF PEACE—AUTHORITY TO GRANT NEW TRIAL.

The authority of a justice of the peace to grant a new trial is limited by the terms of

section 6560, Rev. St., by which it is conferred, and an order made by him for that purpose more than five days after verdict and judgment is void.

(Syllabus by the Court.)

Error to circuit court, Erie county.

Action by one Derby, Jr., against Eugenia Heath. Plaintiff recovered before a justice of the peace, and appealed to the common pleas. From the judgment of the circuit court affirming the judgment of the common pleas in dismissing the appeal, plaintiff brings error. Affirmed.

Plaintiff in error brought suit before a justice of the peace in Erie county against the defendant in error to recover the sum of \$300, the value of sheep and lambs alleged by him to have been converted by her to her own use. The transcript of the justice's docket shows the following entry on June 21, 1893: "Court charged the jury, and they were sent out, and after due consideration returned a verdict for plaintiff for ten dollars damage (\$10.00). Thereupon it is considered by me that the plaintiff recover of the defendant, Eugenia Heath, judgment for ten dollars, and costs of suit, taxed at forty-four dollars (\$44.00)." The following entry also appears on the same date: "Plaintiff filed a motion to set the verdict aside, and for a new trial. Motion to be heard June 28, 1893, at 4 p. m. Adjourned to that time." "June 28th, 4 p. m. Parties appeared. Motion for new trial argued, which motion was on consideration by the court granted. Defendant moved to set aside order of court granting new trial, and the same was argued, and court took until Monday, July 3, 1893, to decide the same. Court adjourned to July 3, 1893." The following entry was made July 3, 1893: "Motion of defendant and order granting new trial was set aside. It is therefore considered by me on said third day of July, 1893, that the plaintiff recover of the defendant, Eugenia Heath, judgment for ten dollars, and costs of suit, taxed at forty-four dollars and six cents (\$44.06). Plaintiff gave notice for appeal." And on July 11, 1893, plaintiff gave an undertaking for appeal. In the court of common pleas, on motion of the defendant, plaintiff's appeal was dismissed because no bond had been filed within the time required by statute. On error to the circuit court the judgment of the court of common pleas dismissing the appeal was affirmed. This is a petition in error to reverse both judgments.

Wickham, Guerin & French, for plaintiff in error. Phinney & Merrill, for defendant in error.

PER CURIAM. Since the undertaking for an appeal was entered into within 10 days after the order made by the justice on the 3d day of July, but not within 10 days after the judgment entered on the 21st day of June, we are required to determine which was the final judgment from which an appeal

might be taken under section 6383 of the Revised Statutes. It is admitted that the judgment immediately following the return of the verdict on the 21st day of June was regularly rendered in accordance with the duties of the justice as defined by the statute. Was it vacated or annulled by the subsequent motions of the parties, or the orders of the justice? The authority of a justice to set aside a verdict, and the time and manner of the application for its exercise, are conferred and defined by section 6560 of the Revised Statutes. It provides that the aggrieved party's application for that purpose "must be by written motion, setting out the ground for a new trial, and must be filed with the justice within two days after the judgment is entered, and must be determined by the justice within five days after the entry of judgment." Laws 1893, p. 358. The view generally taken that the liberality exercised with respect to the proceedings of justices of the peace in the exercise of their jurisdiction will not be extended to cases involving their jurisdiction is required by section 9 of article 4 of the constitution. It provides for the election of such officers, and, without conferring upon them any jurisdiction, that "their powers and duties shall be regulated by law." The power is therefore necessarily limited by the terms of the act granting it. The mandatory terms of the statute in question very clearly limit the power of the justice to set aside a judgment which he had entered according to law to five days from its rendition. Being, therefore, without authority at the time of making them, his orders were ineffectual to vacate the judgment entered on the 21st day of June, and it was and continued to be the final judgment in the case. This view of statutes conferring authority upon justices has been taken by this court in *Dunlap v. Robinson*, 12 Ohio St. 530, and *Eaton v. French*, 23 Ohio St. 560. The same view was taken of a provision identical with this in *Vogel v. Manufacturing Co.*, 49 Ind. 218. Judgment affirmed.

(174 Ill. 418)

LATIMER et al. v. LATIMER et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

DEEDS—UNDUE INFLUENCE—DELIVERY—EVIDENCE—LIVERY OF SEISIN—WILLS.

1. A son, who was the only member of the family that had always resided at home, worked his father's farm; the father, who was advanced in years, being provided with a comfortable home on the place. When contemplated improvements were discussed, the father had often expressed a desire to make such provision as should insure the son the future ownership of the farm, and, desiring to make a will, sent for an old friend, who was a notary. On being informed by the notary that witnesses would be necessary to a will, and that expenses would attend the probate and the administration of his estate thereafter, the father desired to effectuate the same result by some other method. He then decided to make a deed of the farm to the son, which

was not to go into effect until after the father's decease. The deed also provided for the payment to each of his daughters of a certain sum, which he had often expressed as being sufficient for them, the daughters having grown up, and always lived away from his home. *Held*, that there was no fraud or undue influence on the part of the son in the procurement of the deed.

2. A father, who desired to devise his farm to his son, on being informed that expenses would attend the probate and the administration of the estate under a will, expressed a desire to effectuate the same result by some other method, and executed a deed to his son, reciting that it was "to be in force from and after my decease, and not before." He gave the deed to a third person, with instructions to deliver it to his son on his (grantor's) death, remarking also that the third person, being a banker, had a safe place or vault in which to keep it. Afterwards the son incurred considerable expense in improving the farm, and at his death soon thereafter his wife inquired of the father whether she should continue the improvements then in course of construction, and his answer was, "Of course," remarking that the farm would belong to her and her children some time. The father also had told a number of persons of the arrangement with the son. *Held*, that there was a sufficient delivery of the deed.

3. Under Act 1827, abolishing livery of seisin, a deed to take effect on the grantor's decease, and conveying the fee to the grantee, based on a life estate, is not a testamentary devise.

Appeal from circuit court, Lasalle county; Charles Blanchard, Judge.

Bill by Lewis Latimer and others against Loretta Latimer and others. From a decree dismissing the bill for want of equity, complainants appeal. Affirmed.

This is a bill in chancery by Lewis Latimer, Eunice A. Flint, and Catherine A. Earing against Loretta Latimer, Arthur C. Latimer, administrator of the estate of James A. Latimer, deceased, Arthur C. Latimer, Matie D. Latimer, Bertie R. Latimer, Otho A. Latimer, and W. A. Morey, seeking to cancel a deed from Lewis Latimer to James A. Latimer, and for possession of the premises described in said deed, and also for an accounting of the rents and profits. Upon the trial of this cause in the circuit court of Lasalle county, the chancellor, at the time of the rendition of the decree, filed a written and carefully prepared statement of the facts. An investigation of the record leads us to adopt this statement of facts involved as being fair and complete. It is as follows:

"In the year 1845, Lewis Latimer, one of the complainants, was living in the state of New York. His wife had recently died, leaving three children of tender age,—two daughters and one boy. The daughters were from eight to twelve years of age, and the boy from five to seven. Lewis Latimer, the father, bound out the two girls, and emigrated to the state of Illinois, in the year 1845, and settled in Lasalle county with the boy. For about two years in Lasalle county he farmed as a renter. In 1848 he married, and bought the farm involved in this contention, and commenced improving the

same. The boy, James A. Latimer, lived with his father and worked upon the farm during his minority, and, from aught that appears in this record, he performed every filial duty. He was frugal, industrious, and obedient. On his twenty-first birthday—in 1861 or thereabouts—he enlisted in the army, and continued therein in active service until the close of the war. At the close of the war he returned to his father's home in Lasalle county, and by mutual agreement between himself and his father they worked the farm in question on shares for two years. Then James A. Latimer married, and worked the farm of his father on shares for another year. He then farmed several years as a renter of land from other persons. He then purchased eighty acres of land in Brookfield, Lasalle county, moved onto the same with his family, and commenced improving it. He continued thereon for about eleven years, making a living for his family, but did not succeed in paying for the land. About 1883 the second wife of Lewis Latimer, and the stepmother of James A. Latimer, died. An arrangement was then made between Lewis Latimer and his son, James, whereby James Latimer moved onto the farm in question. There were two houses on said farm. Lewis Latimer continued to keep house in one of the houses, hiring a housekeeper. Lewis Latimer was then well advanced in years, unable to perform hard labor, and James took charge of the management of the farm, made some improvements thereon from year to year, and kept the farm in good condition and repair until September, 1894, when the deed in question was executed. It is a fair assumption from the evidence in this case that there was an implied understanding, during all this time, between Lewis Latimer and his son, James A. Latimer, that James was ultimately to have the farm. The matter was spoken of between them on several occasions. On or about the 1st day of September, 1894, the question of sinking a well upon the farm was discussed between Lewis Latimer and his son, James. James said, in substance, to his father, that he was unwilling to sink the well, and pay for it, without knowing who was to have the farm. The talk between them upon that subject led to the conclusion that Lewis Latimer would execute a will, or some paper, which would secure the farm to James A. Latimer at the time of his (Lewis') death, and it was agreed that Woodruff A. Morey, then living in Marseilles, Lasalle county, should be procured to come out to the farm and make the necessary papers. Mr. Morey had formerly lived and grown up in the neighborhood where Lewis Latimer lived, and they were well acquainted with each other. In pursuance of that understanding, James A. Latimer, on or about September 20, 1894, called upon Woodruff A. Morey at his place of business in Marseilles, and arranged with him

to come to the residence of Lewis Latimer, and make the necessary papers. On September 21, 1894, said Morey came to the home of Lewis Latimer and prepared a deed, which was executed by Lewis Latimer, and properly acknowledged. After the execution of said deed the grantor, Lewis Latimer, handed the same to Morey, saying, 'I want you to take that deed and keep it, and after my decease to deliver it to James Latimer.' Thereafter James A. Latimer and Lewis Latimer continued to live upon said farm, as theretofore, until March 18, 1895, when James A. Latimer died, leaving a widow and several children, who continued to live upon the farm, Lewis Latimer making his home with the widow until August 30, 1895, at which time Lewis Latimer, with some members of the family, were visiting his grandson, Arthur Latimer, in Marseilles. While there, Mrs. Flint, who was living in Chicago, one of the daughters of Lewis Latimer, came, and an arrangement was made between Lewis Latimer, and the widow of James, and Mrs. Flint, that Lewis Latimer should return to Chicago with Mrs. Flint for the purpose of a visit, with an understanding between all parties that at the end of two weeks some member of the family of the widow of James Latimer should go to Chicago, and return with said Lewis Latimer. At the end of two weeks the said Arthur Latimer went to Chicago after his grandfather, Lewis Latimer. At that time Lewis Latimer was sick, or not well, and did not return to Lasalle county, and has not since returned, and has refused to return. On September 6, 1895, Lewis Latimer executed and acknowledged in due form of law a deed to appellants, Catherine A. Earing et al. On the 25th day of February, 1896, the bill in this case was filed, seeking to set aside the aforesaid deed to James Latimer, and have the same declared null and void, on the ground that the same was procured by the fraud and undue influence of said James A. Latimer, deceased. The complainants Catherine A. Earing and Eunice A. Flint are the daughters of said Lewis Latimer, and the same that were bound out by him about the year 1845, in the state of New York, as aforesaid, and since they were so bound out have never been members of, nor lived in, the family of their father, Lewis Latimer. They grew to womanhood in the state of New York, and ultimately married, and are now living,—Eunice A. Flint in the city of Chicago, and Catherine A. Earing in the county of Livingston."

Upon a hearing the court found the equities of the cause with the defendants; that the deed in question to James A. Latimer was the deed of the complainant Lewis Latimer; that it was not obtained by fraud or undue influence, and was duly signed and sealed by Lewis Latimer, and delivered by him to a third person for James A. Latimer. Complainants' bill was ordered to be dis-

missed, at their costs. From this decree dismissing the bill for want of equity, appellants appeal to this court.

Clark & Clark and Trainor & Browne, for appellants. Brewer & Strawn, for appellees.

PHILLIPS, J. (after stating the facts). It is urged by appellants that the decree of the circuit court dismissing the bill in this case for want of equity should be reversed, for the reason that the deed in question was obtained by fraud and undue influence on the part of the grantee; that such deed was never operative, for the reason that it was not delivered; and that it was a testamentary devise, and void, not having been attested as the statute directs; and for the reason it was to be in force from and after the decease of the grantor, and not before. The questions as to whether or not the deed was obtained by fraud and undue influence, and whether or not it was ever legally delivered, are questions of fact, which must be determined from the record presented to us. The son, who was the grantee in this deed, lived on the farm with his father, who was advanced in years, and unable to perform hard labor, which necessitated that the son take the charge and management of the farm from year to year, which he did do for a number of years. The son was the only member of the family who resided with his father, and it appears from the record that about the time some improvements were necessary the subject as to the future ownership of the farm was talked of between the father and son, as it had been on a number of occasions before. The father expressed a desire to make such provision as would insure his son the future ownership of this land, and expressed a desire to execute a will, or some paper, which would accomplish such result. An old friend and acquaintance of the family, who was a notary public and banker of Marseilles, was solicited to come to the farm, and prepare the necessary papers. On September 21, 1894,—the date of the deed in controversy,—in pursuance of this invitation, he went to the farm, and was told by Lewis Latimer, the grantor, that he desired to arrange his matters in such shape there would be no trouble over his property after his death. Upon being asked if he desired to make a will, he said he thought he did. Upon being informed by the notary that witnesses would be necessary to a will, and, in reply to an inquiry of Lewis Latimer as to whether any expense would be incurred in the transaction after his death, receiving the information that expense of probate of the will and administration would be necessary, he then declared he desired to arrange the matter in some other way. He was told the only other method would be to make a deed, with a proviso that he should have the control and use of the property so long as he lived, and that the deed should

not take effect until after his decease. To this he expressed his satisfaction, and said that was the way he wanted it, at the same time suggesting that he desired each of his daughters to have the sum of \$1,000, saying that he believed that was all they were entitled to. Upon the suggestion by the notary that he had considerable personal property out of which this might be paid, he responded that he did not have very much, and desired his son, James, to have that, and to pay to each of his daughters the sum of \$1,000. The deed was then prepared by the notary in the ordinary form, containing the description of the land and the following clause: "This conveyance to be in force from and after my decease, and not before." Also the further clause: "The said James A. Latimer to have all of my personal estate, and to pay to each of my daughters, Catherine A. Earling and Eunice A. Flint, the sum of one thousand dollars (\$1,000) after my decease." The notary having been furnished, from other papers, the description of the lands, the deed was prepared, and read over to the grantor, and he was asked if that was the way he desired it. The grantor then signed the deed, and directed the notary as follows: "I want you to take that deed, and keep it, and after my decease to deliver it to James Latimer." Something was said regarding a consideration, whereupon the son, James Latimer, in the presence of the notary, gave to his father a silver dollar, which the old gentleman laughingly took, making some jocular remark. The deed was taken and retained by the notary public upon the suggestion and request of the grantor, as above stated, Lewis Latimer remarking at the same time that the notary, being a banker, had a safe place or vault in which to keep it. Within less than one year after the execution of this deed and its delivery to Morey, James A. Latimer, the grantee, died, leaving his widow and children, the appellees in this case. Prior to his death he had made some improvements on the farm. He sunk a well at an expense of about \$400, besides which he had furnished lumber, assisted in the work, and boarded the men and teams for a number of months while they were engaged in the work. At the time of his death the work of boring the well was not completed, and the widow of James Latimer inquired of Lewis Latimer, who had continued to live with his son and family from the time of the execution of the deed until the death of the son, whether or not she should continue the work. His answer was, "Of course," remarking at the same time that the farm would be hers and the children's some time, and stating further that he desired her to take care of him, and that he wished the best of care. Before James Latimer died, he had borrowed \$97 from his father to make payment of some expenses on this well. This amount the father, after the death of James Latimer, collected from

Mrs. James Latimer. Lewis Latimer, as appears from this record, also told a number of persons that he expected to remain upon the farm where his daughter-in-law and her children, the appellees, were, where he had the best of care, and that the farm would be theirs some time. He also said he intended to leave things as he and his son had arranged them,—that all he wanted was his living. Some few months after the death of James Latimer, however, Lewis Latimer went to Chicago on a visit to one of his daughters, and, after remaining a number of months, he executed to his two daughters the deed mentioned in the statement herein, attempting, apparently, to revoke the deed which he had made to James Latimer.

A careful consideration of all of this evidence fails to convince us that the deed to James Latimer was obtained by fraud or any undue influence on his part. On the contrary, it seems to have been by premeditation and desire of the grantor that the property in question should be so disposed of. The evidence in this record convinces us that his intention was fully carried out by the notary public who prepared the deed at his suggestion, he reserving to himself a life estate, and giving to his son, James Latimer, the fee. All of the facts connected with the execution by and turning over of this deed to the notary public, who was a banker, to be kept by him in his safe or vault, with directions to be delivered to the grantee upon the death of the grantor, are conclusive, in law, of the delivery of this deed. The rule is well established in this state that if the grantor, by his act of delivery, loses all control over the instrument by which the grantee is to become possessed of the estate, then there is sufficient delivery. *Bryan v. Wash*, 2 Gillman, 557; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800; *Cline v. Jones*, 111 Ill. 563. The question is to be determined largely by the intention of the grantor, which may be ascertained by his acts and declarations, and by the circumstances attending the execution of the deed and its delivery to a third party. *Masterson v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; *Byars v. Spencer*, 101 Ill. 429. In the latter case it was said (page 433): "The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative and to pass the title to the land, has been the subject of much discussion in this court. * * * It may be delivered to the grantee or to his agent. Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other, but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control over it." In this case it was attempted on the part of the grantor, Lewis Latimer, to make a voluntary settlement or disposition

of his property. The law makes stronger presumptions upon the question of delivery in a case of such character. Such settlements, fairly made, are binding on the grantor. *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, supra; *Cline v. Jones*, supra; *Shults v. Shults*, supra. In all such cases, however, the intention of the grantor is the controlling element. From the evidence presented in this record there can be no question but the grantor, Lewis Latimer, intended to make a voluntary settlement,—to devise or deed the land in question to his son. He first had in mind the preparation of a will, and afterwards desired the execution of the deed in question. Upon the execution of this deed a delivery of it was made to a third person, with certain directions as to its delivery after his death, which was sufficient, and resulted in the grantor losing all control over the instrument. We hold, therefore, there was no fraud or undue influence in the procurement of this deed, but it was the deliberate and voluntary act and intention of the grantor. We hold, also, there was a sufficient delivery of the deed to pass the title to the grantee.

The third reason urged by appellants for a reversal of the decree in this cause is that the deed in question was but a testamentary devise, and contained a clause to the effect that it was to be in force from and after the decease of the grantor, and not before, and that it was, therefore, void. This involves a question of law, only. Under the statutes of this state livery of seisin is abolished. At common law a freehold estate could not be created to commence in futuro, except where there was a particular estate to support it as a remainder. This was because a charter of feoffment was the only common-law instrument for the conveyance of a freehold, and a feoffment was void without livery of seisin, and that ceremony was necessarily performed presently. In this state, by the act of 1827, livery of seisin was abolished, and it was provided, in substance, that every deed or other conveyance should be sufficient without livery of seisin for conveying or transferring lands, so as absolutely and fully to vest in every donee, grantee, bargainee, or purchaser of such estate or estates as should be specified in the deed or other conveyance. Since the act of the legislature of this state abolishing livery of seisin, the question as to whether or not a deed of conveyance reserving to the grantor a life estate, and giving and granting to the grantee an estate in fee, is a testamentary devise, has been frequently presented. The rule is well established, a conveyance of real estate, delivered, but not to take effect or to be recorded until the death of the grantee, is good and valid without the creation of an intermediate estate to support it, and such an instrument cannot be held to be one in the nature of a testamentary devise or disposition of the property. *Harshbarger v. Carroll*, 163 Ill. 636, 45

N. E. 565; Shackelton v. Seabee, 86 Ill. 616; Vinson v. Vinson, 4 Ill. App. 138; Calef v. Parsons, 48 Ill. App. 253; Golding v. Golding's Adm'r, 24 Ala. 122; Gillham v. Mustin, 42 Ala. 365; Elmore v. Mustin, 28 Ala. 309; Bryant v. Bradley, 16 Conn. 474; Wall v. Wall, 30 Miss. 91; Cumming v. Cumming, 3 Ga. 468. In the case of Shackelton v. Seabee, supra, the question was fairly presented to this court by a clause reading, "This deed not to take effect until after my decease,—not to be recorded until after my decease." The deed was properly executed and delivered. There, as here, the contention was urged that the deed was in the nature of a testamentary devise, and as such was not so executed and authenticated as to become operative and valid. In disposing of that contention it was said (page 619): "Was this deed void, or did it operate to convey the fee at the death of the grantor? Had he conveyed a life estate to another, or had he conveyed to another to hold in trust for him during his life, then it would have been free from all doubt; or had he, in the same instrument, reserved a life estate to himself, we apprehend that it will be conceded that the title would have passed to the grantee; * * * and, had he expressly reserved in this deed a life estate, he would have held in the same manner. If, then, in either of these cases the grantor could thus hold the title necessary to support a remainder, why not when, by operation of law and construction of the deed, he holds a life estate in legal effect the same? We are unable to perceive any reason in law or in fact." And further: "Here the remainder-man was in being, named as grantee, and no reason is seen, since livery of seisin has been abolished, why the fee in remainder did not vest on the delivery of the deed, which has been adopted as a substitute for livery." In Witham v. Brooner, 63 Ill. 344, it was said (page 346): "Livery of seisin is abolished by the first section of the conveyance act, and the title is thereby absolutely vested in the donee, grantee, bargainee, etc., independently of the statute of uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feoffment, and under the statute of uses a feoffment to A., for the use of or in trust for B., would pass the legal title to B. In a deed purely of bargain and sale, independently of the first section of the conveyance act, the rule would be different, and the title would vest in the bargainee. Without the first section, the legal title would be in the trustee in this case; but, as the trust was a passive one, the deed operated as a feoffment would at the common law, and vested the legal title in the cestuis que trustent by virtue of the statute of uses. Thus the statute executes itself. It conveys the possession to the use and transfers the use to the possession, and by force of the statute the cestuis que trustent had the lawful seisin, estate, and pos-

session." It is apparent, therefore, that the deed in question was not a testamentary devise, for the reason it was to be in force and effect after the decease of the grantor, and conveyed to the grantee the fee based upon a life estate. The decree of the circuit court of LaSalle county dismissing appellants' bill for want of equity is affirmed. Decree affirmed.

(174 Ill. 466)

CRICHFIELD et al. v. BERMUDEZ ASPHALT PAVING CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

CONTRACTS—PUBLIC POLICY—INFLUENCING CITY LEGISLATION—PAVING CONTRACTS—CONSIDERATION—VALIDITY—APPEAL

1. Defendant company employed plaintiffs as its agents "to solicit and promote" the asphalt-paving business in Chicago. The consideration was a small monthly salary, and a commission on contracts secured, which in fact amounted to 10 times the salary. The contracts for paving were to be confined to Chicago, and were to be made with said city. It appeared inferentially from the contract that the procuring of the passage of ordinances for paving streets was to be a part of plaintiffs' duties. Plaintiffs were to bear all incidental expenses in promoting the work, and "in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving." When a street is to be paved in Chicago, an ordinance for the improvement must first be passed, and objections may be filed later to the commissioners' report as to the cost of the improvement and the amount of assessments, by interested landowners; and the contracts must be let to the lowest bidder, after advertising for bids, except that a contract may be entered into without advertising for bids where two-thirds of the common council so vote. *Held*, that the contract was void, as against public policy, since in effect a contract to solicit, by the exercise of influence and other means, the passage of ordinances and the letting of contracts by the members of the common council.

2. The rule which makes void a contract for a contingent compensation for obtaining legislation applies to the common council of a city as well as to the legislature of a state.

3. A promise to solicit and promote the asphalt-paving business in a certain city, and to bear all expenses "in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving," in consideration of a certain sum per month, and a commission contingent on the paving contracts secured, is entire and indivisible, so that the illegal part, in regard to influencing city officers, makes the entire contract void.

4. On an issue whether an executed contract is void as against public policy, it is immaterial whether anything improper was done or was designed to be done thereunder by the party seeking to enforce it.

5. The objection that a contract is void as against public policy may be urged on appeal, though not raised in the pleadings or in the trial court.

Appeal from appellate court, First district.

Action by George W. Crichfield and others against the Bermudez Asphalt Paving Company. From a judgment of the appellate court (62 Ill. App. 221) reversing a judgment for plaintiffs, plaintiffs appeal. Affirmed.

This is an action in assumpsit, brought by the appellants against the appellee company to recover compensation claimed to have been earned by them under the agreement, dated April 17, 1894, hereinafter set forth. The declaration consisted of the common counts, with an affidavit of claim. Attached to the common counts was a copy of the said agreement or contract. The appellee pleaded the general issue. The contract in question was introduced in evidence. Witnesses were examined. The trial took place before the court and jury. The jury found the issues for the plaintiffs below, and assessed their damages at \$5,115.41. Motion for new trial was entered, and, plaintiffs having remitted the sum of \$439.27 from the amount of the verdict, the motion for new trial was overruled, also a motion in arrest of judgment was overruled, and judgment was rendered upon the verdict for the sum of \$4,626.14 and costs. An appeal was taken from this judgment to the appellate court. The appellate court has reversed the judgment of the superior court of Cook county, where the cause was tried below, and entered judgment in favor of the present appellee, the defendant in the trial court, and the appellant in the appellate court. The present appeal is prosecuted from such judgment of the appellate court. The agreement referred to is as follows: "This agreement, made and entered into on this the seventeenth (17th) day of April, 1894, by and between the Bermudez Asphalt-Paving Company, a corporation organized under the laws of the state of Illinois, with principal office in the city of Chicago, party of the first part, and George W. Crichfield and W. T. S. Crichfield, of the city of Chicago, county of Cook, state of Illinois, parties of the second part, witnesseth: That the said party of the first part has this day contracted to employ said parties of the second part as its agents to solicit and promote the asphalt-paving business in the city of Chicago, on the following terms and conditions, to wit: Sec. 1. This agreement is to the effect that the said parties of the second part shall be and continue in the employ of said party of the first part as its agents for the purpose of promoting the asphalt-paving business in said city of Chicago, and shall devote their whole time, attention, and best energies in and about the business of promoting asphalt paving in said city of Chicago, as the party of the first part may direct. And it is a part of the consideration of this agreement, and the essence of the same, that the said parties of the second part shall continue in the employ of said party of the first part for and during a period of not less than one year from date hereof. Sec. 2. Said party of the first part agrees to pay to said parties of the second part the sum of seventeen and one-half (17½) cents per square yard for all asphalt paving which may be promoted by them, and for which a contract or contracts may be made and entered into in the

city of Chicago, and said party of the first part shall further pay to said parties of the second part one-half (½) of the excess in the prices of curb or of the combination curb and gutter which may be secured by said party of the first part over and above the prices at which said party of the first part sublet the same to contractors of curb or combination curb and gutter: provided, however, that any work which may be promoted by the said parties of the second part, and for which said party of the first part shall fail to secure the contract, then no payment for said work shall be made by said party of the first part: provided, further, that, if said party of the first part shall secure the contracts for work which have not been promoted by them or by their agents, then and in that event it shall be their duty and it is hereby agreed that they will pay to the said parties of the second part their full commission on such an amount of such work as will equal the amount of work which may have been promoted by said parties of the second part, and for which contracts were not secured by said party of the first part; it being the true meaning and intention of this agreement that, if said parties of the second part promote a given amount of asphalt paving and curb and gutter, then in that event they shall be paid for such amount of work, provided that said party of the first part shall secure contracts for said amount of work, or for an equal amount of work. Sec. 3. The payment of commissions by said party of the first part to said parties of the second part shall be made upon the basis of the estimated amount of work for each contract, as and at the time the same shall be awarded by the city of Chicago; and when the work is actually done, and the amount of work is actually ascertained, a final settlement shall then be made, at which time, if it appears that the contract contained more or less work than that estimated, settlement shall be made accordingly for the actual amount of the work, when finally ascertained, and, if payment for a greater amount has been made, the said parties of the second part shall refund the same, and, if for a less amount, payment shall be made to them accordingly. Sec. 4. It is further understood and agreed that said party of the first part guaranties to the said parties of the second part the following sums of money, to wit: To the said George W. Crichfield the sum of one hundred and twenty (\$120.00) dollars per month, and to the said W. T. S. Crichfield the sum of eighty (\$80.00) dollars per month, and the said sums of money shall be paid to them monthly. The amount herein guarantied is to be deducted from commissions payable as they accrue, but said guaranty is to be paid at all events as herein stipulated. Nothing shall be paid, on account of percentage for work promoted, to said parties of the second part, until the amount of work promoted, in the manner herein indi-

cated and at the price herein named, shall exceed the sum total drawn on the guaranties herein specified. This guaranty shall constitute a lien in equity on any work for which ordinances shall have been passed prior to the 17th day of April, 1895. Sec. 5. It is further understood and agreed that all incidental expenses and trouble which said parties of the second part may incur in promoting said work, or in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving or of curb and gutter, as herein specified, shall be borne by said parties of the second part. It is further agreed that the said parties of the second part shall promote all the paving herein provided for in Bermudez asphalt, or for any other material which may be directed by said party of the first part. In witness whereof, said parties have hereunto set their hands and seals this the seventeenth (17th) day of April, 1894, executed in triplicate. Bermudez Asphalt Paving Co., by Francis Agnew, President. [Bermudez Asphalt Paving Co. Seal.] George W. Crichfield. W. T. S. Crichfield. Attest: John P. Agnew, Secretary. Witness to all signatures: Jas. R. B. Van Cleave."

Prentiss, Hall & Gregg and Shope, Mathis, Barrett & Rogers (Simeon P. Shope, of counsel), for appellants. Gurley & Wood and Wm. J. Donlin, for appellee.

MAGRUDER, J. (after stating the facts). The appellate court reversed the judgment of the court below upon the ground that the agreement sued on in this cause was against public policy and void, and that, therefore, the appellants were not entitled to recover upon the same. The only question which we deem it necessary to discuss in the case is whether the contract sued on is such a contract as the courts will refuse to enforce. If it is a contract which is against public policy, the maxim, "Ex turpi causa non oritur actio," applies.

1. A careful examination of the contract leads to the conclusion that the appellants entered into the service of the appellee as lobbyists, or, in the language of some of the cases, as "log rollers." The contract recites that the appellee company had on the day of its date contracted to employ appellants as its agents to "solicit and promote" the asphalt-paving business in the city of Chicago, on certain terms and conditions therein named. Section 1 provides that the appellants are to continue in the employ of the appellee as its agents for the purpose of promoting the asphalt-paving business in the city of Chicago, and shall devote their whole time, attention, and best energies in and about such business as the appellee may direct, and that the appellants shall continue in such employ for and during a period of not less than one year from April 17, 1894. Section 2 provides that the appellee shall pay

the appellants 17½ cents per square yard for all asphalt paving which may be promoted by them, and for which a contract or contracts may be made and entered into in the city of Chicago, and shall further pay them one-half of the excess in the prices of curb, etc., as stated in the agreement. This section shows clearly that the amount therein agreed to be paid was only to be paid for paving for which contracts should be entered into in the city of Chicago. The contracts to be made and the paving to be done were, by the terms of the agreement, to be confined to the city of Chicago. The first proviso to section 2 is to the effect that as to any work which may be "promoted" by the appellants, and for which the appellee shall fail to secure a contract, no payment shall be made by the appellee. It thus appears that the compensation agreed to be paid by section 2 was contingent upon the obtaining of the contract or contracts for paving from the city of Chicago. Section 2 further provides that, if the appellants "promote" a given amount of asphalt paving and curb and gutter, then in that event they shall be paid for such amount of work, provided the appellee shall secure contracts for said amount of work, or for an equal amount of work. This latter provision also shows that the compensation agreed to be paid by section 2 was dependent upon the contingency that the appellee should secure the paving contracts in the city of Chicago. Section 3 shows that the contracts referred to were not only to be made in the city of Chicago, but were to be made by the city of Chicago with the appellee. The language of section 3 is, "The payment of commissions by said party of the first part to said parties of the second part shall be made upon the basis of the estimated amount of work for each contract, as and at the time the same shall be awarded by the city of Chicago," etc. Contracts for paving made with the city of Chicago would necessarily be for the paving of public streets or alleys. The contract in question is therefore one which requires the appellants to "solicit and promote" contracts between the appellee and the city of Chicago for the paving of the public streets and alleys of the city. By the terms of section 4, appellee guaranties to the appellant George W. Crichfield the sum of \$120 per month, and to the appellant W. T. S. Crichfield the sum of \$80 per month, and agrees that said sums of money shall be paid to them monthly. Section 4 provides that the guaranty therein referred to shall constitute a lien in equity on any work for which ordinances shall have been passed prior to the 17th day of April, 1895. It thus appears from the language of the contract itself that a part of the duty of the appellants was to procure the passage of ordinances providing for the paving of the public streets and alleys. Section 5 of the contract is as follows: "It is further understood and agreed that all incidental expenses and trouble which said

parties of the second part [appellants] may incur in promoting said work, or in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving or of curb and gutter, as herein specified, shall be borne by the parties of the second part [appellants]." By section 5 "It is further agreed that the appellants shall promote all the paving therein provided for in Bermudez asphalt, or for any other material which may be directed by said party of the first part [appellee]."

In order to understand the precise nature of the services agreed to be performed under the contract in question, it will be necessary to refer briefly to some of the provisions of article 9 of the city and village act. When a public street is to be improved by the paving thereof in the city of Chicago, the first step is the passage by the common council of the city of an ordinance for the improvement. The council then appoints three of its members, or three other competent persons, to estimate the cost of the improvement contemplated; such persons to report the same in writing to the council. When such report is made, and approved by the council, the council may order a petition to be filed in the county court for proceedings to assess the cost of such improvement in the manner provided by the act. The petition shall be in the name of the corporation, and shall recite the ordinance for the proposed improvement, and the report of such commission, and shall pray that the cost of the improvement be assessed in the manner prescribed by law. The act then describes and fixes the duties of the commissioners, the assessment of benefits, the preparation of the assessment roll, the giving of notice, and proof of notice. Any person interested in any real estate to be affected by the assessment may appear and file objections to the report. As to all matters as to which objections are not filed within the time ordered by the court, default may be entered, and the assessment confirmed by the court. Provision is made for the hearing of the report of the commissioners, and the evidence in the case, as in other cases at law; and the court shall find the amounts for which the premises ought to be assessed, and enter judgment accordingly. The court is given power at any time before final judgment to modify or confirm any assessment returned, or cause the same to be recast, etc. The judgment which is rendered is to be certified by the clerk of the court, together with the assessment roll, to the officer of the city authorized to collect special assessments. Section 49 provides that "all persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village, in any event, except from the collections of special assessments made for the work contracted for." Section 50 provides that "all contracts for the making of any

public improvement, to be paid for in whole or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed \$500.00, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance; such contracts to be approved by the mayor or president of the board of trustees: provided, however, any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by a vote of two-thirds of all the aldermen or trustees elected."

These provisions of the statute and the terms of the contract sued upon, when considered in connection with each other, clearly lead to the conclusion that appellants, in agreeing to obtain paving contracts for the appellee with the city of Chicago, at the same time agreed to look to the passage of ordinances by the common council, and also to look to the letting of contracts, following upon the passage of such ordinances in accordance with the statutory provisions above set forth. Upon the face of the contract the meaning of the expression, "to solicit and promote the asphalt-paving business in the city of Chicago," is to solicit, by the exercise of influence and other means, the passage of ordinances and the letting of contracts by the members of the common council of the city of Chicago. The evidence of the appellants themselves confirms the interpretation thus given to the contract. The testimony of the appellants shows what they meant by "promoting" the asphalt-paving business. The appellant George W. Crichfield says that the methods adopted for promoting such business included "the influencing of a public sentiment in favor of that kind of improvement which will result in the passage of ordinances, the making of assessments, and the making of contracts." He says that he took whatever step he deemed advisable, that was honorable and fair, for the purpose of securing the paving of streets with asphalt. He admits in his testimony that in some cases he saw the aldermen, to get them to favor the passage of ordinances, and in some cases he did not see them. He also says that he was occasionally present at the council meetings when these ordinances came up. W. T. S. Crichfield testifies that he usually followed the ordinance up, to see "that it was properly drafted, and to see that it was passed, and that the proceedings were straight, and that, when the assessment was ready, if any objections were filed against the paving of the streets with asphalt, he would make an endeavor to get the objectors to withdraw the objections, and get the assessment confirmed, and get the contract passed." The language of section 5 is especially significant. From that section it appears that the appellants were to incur expenses in aiding and assisting in the election of officials. This part of the contract may be fairly interpreted to mean that members of the common council

were to be elected, who should favor the awarding of paving contracts to the appellee. The evidence shows that the appellant George W. Crichfield received, under this contract, from the appellee, \$5,432, and that W. T. S. Crichfield received \$4,240, making \$9,672. The evidence tends to show that they also received other moneys besides those thus mentioned. In addition to this, they claim in this case \$5,115.41.

2. There are some salient features of this agreement which stamp it as being against public policy. A special assessment for a public improvement, under our statute, is a species of taxation, and is authorized only as an exercise of the taxing power. A special assessment should not be levied, except for the purpose of making a needed public improvement. The property owner should not be assessed, and his property made to bear the burden of taxation, except to secure the benefits of a needed public improvement. The idea of making a contract to promote the levying of a public assessment, not for the purpose of securing to the public a needed improvement, but for the purpose of enabling a paving company to get a job, is not only against the public interest, but is abhorrent to all proper ideas of justice and honor. Property owners should not be assessed for the purpose of paying moneys into the pockets of paving contractors, and any contract by which parties agree to obtain ordinances by solicitation, and by the exercise of influence upon public officials, and with a view of obtaining contracts which result in the end from the passage of such ordinances, is against public policy, and will not be enforced by the courts. It makes no difference whether the parties were actually guilty of bribery and corruption, under the contract, or not. If the performance of the obligations imposed by the contract has an evil tendency, or furnishes a temptation to use improper means, the contract is illegal and *contra bonos mores*. One of the striking features of this contract is that, with the exception of the monthly allowance to be paid to the appellants, the compensation to be received by them is contingent upon their success in obtaining the necessary legislation for the levying of special assessments, and in securing the paving contracts consequent thereupon.

In *Marshall v. Railroad Co.*, 16 How. 314, a special contract was sued upon, whereby the plaintiff was employed to attend the sessions of the legislature of Virginia, in order to superintend and further any application or other proceeding to obtain the right of way through the state of Virginia on behalf of a railroad company; and the supreme court of the United States there said: "Bribes, in the shape of high, contingent compensation, must necessarily lead to the use of improper means, and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them. He is soon

brought to believe that any means which will produce so beneficial a result to himself are 'proper means,' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector." The court further say in that case: "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. * * * It is the interest of the state that all places of public trust should be filled by men of capacity and integrity, and that the appointing power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court. * * * Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confined. * * * Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors." The court, after referring to a large number of cases, concludes as follows: "The sum of these cases is that all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislatures, is void by the policy of the law." It is clear to our minds that the contract now under consideration is a contract which provides for a contingent compensation for obtaining ordinances for paving. An ordinance passed by the common council, providing for the paving of a public street, is a species of legislation, as much as an act passed by the legislature, though the body passing it is subordinate in its character, and created by the legislature itself. The rule, therefore, which makes void a contract for a contingent compensation for obtaining legislation, applies as well to the common council of a city as to the legislature of a state. In *Gil v. Williams*, 12 La. Ann. 219, the supreme court of Louisiana say: "We believe it has been uniformly held that a contract for a contingent compensation for obtaining an act of the legislature is void by the policy of law.

It is not necessary that improper influences should have been used in a particular case, to affect such a contract with nullity. The law looks to the general tendency of things. It opposes the beginnings of evil. It shuts the door against temptation by sweeping rules, which admit of no evasions." In *Doane v. Railway Co.*, 160 Ill. 22, 45 N. E. 507, we said (page 32, 160 Ill., and page 500, 45 N. E.): "Contracts for the purchase of the influence of private persons upon the action of public officials, either executive or legislative, are against public policy and void. It is sufficient that their tendency is bad. * * * Personal influence to be exercised over a legislative body is not vendible, in our system of law and morals." *Liness v. Hesing*, 44 Ill. 113; *Trist v. Child*, 21 Wall. 441; 3 Am. & Eng. Enc. Law, 877, 878, and notes; *Brown v. Brown*, 34 Barb. 533; *Oscanyan v. Arms Co.*, 108 U. S. 261. It is true that an agreement, expressed or implied, for purely professional services, will be held to be valid; but such services are clearly distinguishable from that personal solicitation which is usually practiced by all paid lobbyists in the prosecution of their business. *Trist v. Child*, supra. It is true, also, that a person may be employed to conduct an application to the legislature, when he prepares documents, collects evidence, makes statements of facts, or prepares or makes oral or written arguments before the legislature itself, or some committee thereof as a body. But the present contract provides for no such open and legitimate mode of presenting the subject of asphalt paving to the common council of the city of Chicago. Considerations looking to the public good should alone control the common council in making public improvements. No other consideration can lawfully enter into the passage of ordinances for public improvements. This is the rule of public policy, "and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds." *Tool Co. v. Norris*, 2 Wall. 45.

Counsel say that the expenses and trouble which are contemplated by section 5, and the object of which is to aid and assist in the election of officials, may not be incurred or suffered. In other words, it is said that the means provided for in section 5 for accomplishing the objects and purposes of the contract need not necessarily be resorted to, and may not be resorted to. But section 5 is as much a part of the contract as any other clause thereof. The contract provides for a contingent compensation, largely in excess of the fixed compensation, and which, as the facts show in this case, has amounted to a

very large sum of money, including what has already been paid and what is here sued for. It is the natural inference that such large compensation was provided for in order to meet just such expenses as are specified in section 5. The services mentioned in section 5 are a part of the consideration to be given by appellants for the compensation to be paid them. In *Henderson v. Palmer*, 71 Ill. 579, we held that if any part of the entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or common law, the whole contract is void. Where there are provisions in a contract for a compensation which is just, yet, if those provisions are blended and confused with others which are forbidden, the whole contract is a unit and indivisible. That which is bad destroys that which is good, and they perish together. *Trist v. Child*, supra. Here the obligation to secure the necessary legislation in the form of ordinances is so necessarily commingled with the other duties of the appellants under the contract that it cannot be separated therefrom. "All agreements, for pecuniary considerations, to control the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution." *Tool Co. v. Norris*, supra. That part of the present agreement which gives a pecuniary consideration to the appellants in order to enable them to control the passage of ordinances by the common council of the city of Chicago is unquestionably void, as against public policy, and, being commingled with whatever may otherwise be held to be valid, cannot but be regarded as part of an entire consideration. "It matters not that nothing improper was done or was designed to be done by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of extraneous influence over an important branch of the government." *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Odineal v. Barry*, 24 Miss. 9; *Bryan v. Reynolds*, 5 Wis. 200; *Shenk v. Phelps*, 6 Ill. App. 612; *Lodge v. Crary*, 98 Ind. 238. Counsel claim that the conditions of modern life are widely different from those of the times immediately preceding us, and that, in view of the revolutions in business methods which have taken place in modern times, what was decided to be against public policy in the past generations may be a common and ordinary method of doing business to-day, which is approved by the common sense of men. That which is against public morals and public decency should be subject to the condemnation of the courts in all generations. Righteousness is the same to-day as it was yesterday. The refinements of modern civilization may have increased the forms of bribery and corruption, and made them more dangerous and

insinuating, but they are none the less subject to the reprobation of honest men.

3. It is urged that the question of the invalidity of this contract is not raised by the pleadings in the court below, nor by objections to the introduction of evidence. Where a contract is in terms *contra bonos mores*, it is not necessary for the defendant to plead the objections. A court will not proceed to judgment upon it, even where both parties assent thereto. In such cases there can be no waiver. The defense is allowed, not for the sake of the parties, but for the sake of the law itself. "The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted by the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation." *Shenk v. Phelps*, supra; *Coppell v. Hall*, 7 Wall. 542; *Collins v. Blantern*, 1 Smith, Lead. Cas. 630, and notes. Where an action is founded upon an illegal contract, the law will leave the parties where it found them, and grant no relief to either of them. In *Wight v. Rindskopf*, 43 Wis. 344, which was an action begun for a failure to perform a contract, one of the considerations of which was an agreement to stifle prosecution, the point that this agreement was contrary to public policy was not raised in the pleadings or at the trial in the court below. But the supreme court of Wisconsin took cognizance of the question, saying in their opinion: "The learned counsel for the respondent contended that the question of the invalidity of the contract, as against public policy, relied on by the appellant, is not in the case, because the answer does not raise it. And he cited some cases here and elsewhere to sustain the position. But we do not think that they do so. They recognize the general doctrine that, when a contract valid on its face is impeached for fraud, the extrinsic facts going to the consideration only must be specially pleaded. They do not hold—we know of no case which does—that, when a contract is in terms *contra bonos mores*, it is necessary for the defendant to plead the objection, or that a court will proceed to judgment upon it, both parties even assenting. If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon

such a contract out of court whenever and however the character of the contract is made to appear." *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. 872. In *Gravler v. Carraby's Ex'r*, 17 La. 132, where the objection that an agreement was contrary to public policy had not been raised in the court below, and it was urged that the upper court could not consider it, the supreme court of Louisiana said: "Where an exception is put in at the argument in the supreme court, suggesting that the contracts between the parties to the suit are illegal, immoral, and contrary to public policy, the court is bound to notice it, even without any plea; and in such cases no recovery can be had." *Trust Co. v. Goodrich*, 75 Ill. 554. For the reasons above stated the judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 491)

ROYAL INS. CO. et al. v. SOUTH PARK COM'RS.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—ASSESSMENT BY PARK COMMISSIONERS—CONFIRMATION—PUBLICATION OF NOTICE.

1. On an application by park commissioners for confirmation of an assessment for a street improvement, they need not show the proceedings taken by which they obtained control of the street.

2. The 10-days notice required to be given of an application by park commissioners for the confirmation of an assessment for a street improvement is sufficient, when given by a single publication 10 days before the application is heard, and publication for 10 successive days prior thereto is unnecessary.

Error to circuit court, Cook county; Thomas G. Windes, Judge.

Application by South Park commissioners for confirmation of a special assessment for a street improvement. There was a judgment confirming the assessment, and the Royal Insurance Company and others bring error. Affirmed.

Taylor & Martin, for plaintiffs in error. Green, Robbins & Honoré, for defendants in error.

MAGRUDER, J. This is a petition, filed on January 27, 1897, by the South Park commissioners in the circuit court of Cook county, praying for the confirmation of a special assessment, levied against the property of the plaintiffs in error and others, to pay for the improvement of a portion of Jackson street, in the city of Chicago. The petition alleges that the South Park commissioners, by an ordinance passed on November 18, 1896, did select and take Jackson street, from the east line of the Chicago river to the east line of Michigan avenue, in the town of South Chicago, in the city of Chicago, in the South Park district, etc., and that on December 16, 1896, they had passed an ordinance for the improvement of the same. Notice was given

in the Inter-Ocean (a daily newspaper published in Chicago) that on February 10, 1897, the South Park commissioners would apply to the circuit court for the confirmation of the assessment. Plaintiffs in error did not appear in response to the notice, and did not file any objections. Consequently, judgment by default was entered against their property. The present writ of error is sued out from this court by the plaintiffs in error for the purpose of reversing the judgment of the circuit court, confirming said assessment.

1. The first objection made by plaintiffs in error is that, the present proceeding being a statutory proceeding, the record should show upon its face the facts upon the existence of which the right to take the street depended. It is claimed that it should affirmatively appear from the record in this case that the park commissioners, before selecting and taking Jackson street as a part of the park, obtained the consent of the corporate authorities having control of said street, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on said street. This point was considered in the two cases of *Aldis v. Commissioners*, 171 Ill. 424, 49 N. E. 565, and *Bass v. Commissioners*, 171 Ill. 370, 49 N. E. 549. The record in those cases was the same as the record here, except that the objectors were different persons. There, defaults had been entered against the plaintiffs in error in the court below. There, also, no bill of exceptions appeared in the record. So, here, there is no bill of exceptions in the record. In the *Bass* and *Aldis* Cases, *supra*, it was held that the proceeding for the acquiring of the street was a separate proceeding from the proceeding for the levying of the special assessment, and that, upon such a record as exists here, it need not affirmatively appear that the consent of the corporate authorities, and the consent in writing of the owners of a majority of the frontage of lots and lands abutting on the street, were obtained by the commissioners. It is unnecessary to repeat the reasoning upon this subject, as set forth in the cases referred to. What is there decided disposes of the objection as here made.

2. The next objection made by the plaintiffs in error is that the court below is without jurisdiction to enter judgment of confirmation, upon the alleged ground that the notice of application for the confirmation was insufficient. Such insufficiency is alleged to consist in the fact that only 1 day's notice was given, and that a 10 days' continuous notice should have been given. In *Aldis v. Commissioners*, *supra*, this objection was considered, and it was there held that a single publication, 10 days before the application, was sufficient, and that the park act did not require such notice to be published for 10 successive days.

3. The next objection made by plaintiffs in error is that the ordinance providing for the

improvement is void, because it provides that the old granite paving blocks should be advertised for sale, and sold to the highest bidder, and because this was not done. In this connection it is contended that the estimate of the cost was void, because made without first advertising for bids for the old granite blocks, and crediting the proceeds on the cost of the improvement. This latter objection was also considered in *Aldis v. Commissioners*, *supra*, and was there held to be without force. The reasons for this conclusion may be seen by reference to that case.

All the grounds here urged for a reversal of the judgment of the circuit court are disposed of by the *Aldis* and *Bass* Cases, *supra*. Accordingly, the judgment of the circuit court is affirmed. Judgment affirmed.

(176 Ill. 83)

McCLELLAND v. McCLELLAND et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

CANCELLATION OF DEED—FAILURE OF CONSIDERATION—ESTOPPEL—VENUE—WAIVER OF OBJECTIONS.

1. Where father and mother deeded to their son their homestead in consideration of his furnishing them a home and support during their respective lives, but he did not keep the agreement, and treated them with such unkindness as to force them to leave their home, equity will set aside the deed.

2. The fact of there being a mortgage on land to which a father and mother gave a warranty deed to their son in consideration of support is not such a default as will prevent the grantors from rescinding for nonfulfillment, where the son knew of the mortgage, and accepted subject to it, and made payments on it.

3. Directing a physician to call on the grantee for payment of his bill for services rendered the deceased wife, is not an election by the surviving husband to treat as in full force a conveyance based on a promise to support the husband and wife during life, and furnish medical aid, where the grantee owed the husband for rents and profits on account of the use of the premises.

4. Where the conduct of the grantee of a conveyance given under a promise to support the grantors raises the presumption of an abandonment of his contract and of a fraudulent intent in entering into it, he is estopped to claim that grantors have elected to keep the contract in force.

5. Failure to press a motion for change of venue for more than three years, and until after hearing before a master, is a waiver of the right to such change.

Error to circuit court, Dekalb county; Charles Kellum, Judge.

Bill by Mary McClelland and another against Elza McClelland. There was a decree for complainants, and defendant brings error. Affirmed.

This is a bill, as originally filed and as subsequently amended, against the plaintiff in error, Elza McClelland, for the purpose of setting aside a deed executed by Mary McClelland and Mason McClelland, her husband, the mother and father of plaintiff in error, to the plaintiff in error, on January 22, 1889, conveying to him a farm of 52 acres

of land in Dekalb county. The object of the bill is not only to set aside and declare void the said deed as a cloud upon the title, but also to obtain an accounting with the plaintiff in error with reference to the use and occupancy of the premises and the use of certain stock thereon, and also for the purpose of obtaining a decree against the plaintiff in error for such amount as may be found to be due upon such accounting. The original bill in the case was filed on October 11, 1893, returnable to the February term, 1894, by Mary McClelland. Subsequently, on June 5, 1894, Mary McClelland died testate at the age of 77 years, and by her will left all the residue of her estate, both real and personal, after the payment of her debts and funeral expenses, to her husband, Mason McClelland. Her will was admitted to probate in the county court of Dekalb county on June 21, 1894. Mary McClelland, in her lifetime, was the owner of the 52 acres of land conveyed to her son, the plaintiff in error, Elza McClelland, by the deed of January 22, 1889, in the execution of which her husband, Mason McClelland, joined with her. After the death of Mary McClelland, her death was suggested, and Mason McClelland, her devisee and executor, was substituted as complainant in the bill in the place of the said Mary McClelland, deceased. Answer was filed by Elza McClelland to the original bill and also to the amended bill. Replications were duly filed to the answers. On February 27, 1894, Elza McClelland, plaintiff in error here and defendant in the court below, filed and entered of record in said circuit court in said cause a notice that he would apply for a change of venue of the cause, and an acknowledgment of the service of said notice, and a petition for such change of venue, together with an affidavit to said petition. The notice was dated February 26, 1894, and stated that plaintiff in error would, on Tuesday, February 27, 1894, on the coming in of court, make application to the court for a change of venue in said cause on the ground that the presiding judge of said court was prejudiced against him. Service of said notice by a copy was accepted on the same day, to wit, February 26, 1894. The petition, dated February 26, 1894, and sworn to on that day by the plaintiff in error, represented to the court that the plaintiff in error feared and believed that he would not receive a fair trial of the said cause in said court, because the said judge was prejudiced against him; and further represented that the knowledge of such prejudice first came to the petitioner on February 26, 1894, in the afternoon of that day; and that at that time petitioner caused to be served upon the solicitor of the complainant, Mary McClelland, said notice, which was attached to and made a part of the petition. The record shows on February 27, 1894, the following, to wit: "And now, on this day, comes the said defendant, and

moves the court for a change of venue in this cause." On April 6, 1897, at the February term, 1897, of said court, the record recites that the parties came by their respective solicitors, and that the defendant's petition for a change of venue, filed on February 27, 1894, was by the court denied. At the October term, 1895, to wit, on December 9, 1895, the cause was, on the motion of the complainant, referred to a master in chancery, by the name of Lowell, to take the proofs in said cause, and report the same to the court, with his findings and conclusions of law. At the February term, 1897, it appeared that the said Lowell, the master in chancery, was unable to report in said cause on account of ill health, and he was thereupon ordered to report the proofs taken by him in said cause, which was done. It appeared that the proofs were closed, and no more testimony was to be taken, and it was thereupon ordered by the court on March 19, 1897, that said cause be referred to one Smith, as special master, to examine the proofs so taken, and report the same to the court, together with his findings and conclusions of law and fact. The special master examined such proofs, and made a report, setting forth his findings and conclusions of fact and of law. The defendant presented to the master six objections to the report, which were overruled by the master. On April 6, 1897, the master filed his report in the office of the clerk, and it was agreed that the objections so filed should be considered by the court as exceptions to the report. On April 9, 1897, the exceptions were heard by the court, and, after hearing had upon the pleadings and proofs taken by the master and heard in open court, and upon argument of counsel, the exceptions were overruled, and the court entered a decree sustaining the conclusions of fact as found by the special master, and also finding that the equities of the case were with the complainant below, the defendant in error here, and that said deed ought to be set aside and declared void. By the decree the report was approved, and the plaintiff in error ordered to pay the costs. By the terms of the decree the cause was referred to said Smith, as special master, to take proofs, and state an account between the parties, to commence on December 23, 1893, crediting the plaintiff in error with expenditures for improvements upon the premises, and for taxes, and for all sums paid by him for either Mary McClelland or Mason McClelland, and for funeral expenses, and for any tombstone that he may have erected; and crediting him with any sums paid by him and credited upon the mortgage upon said premises; and charging the plaintiff in error with reasonable rents, issues, and profits of the premises from December 2, 1893, up to the time of making such account, etc. The present appeal is prosecuted from the decree so entered by the circuit court.

Jones & Rogers, for plaintiff in error. W. O. Kellum, for defendants in error.

MAGRUDER, J. (after stating the facts). Mary McClelland and Mason McClelland were the mother and father of the present plaintiff in error, Elza McClelland. The deed, executed on January 22, 1889, by Mary McClelland, the owner of the 52 acres of land, and her husband, Mason McClelland, to the plaintiff in error, their son, was a warranty deed, conveying the 52 acres in question, and reciting upon its face that the consideration of making the same was the sum of \$2,500. The real consideration, however, of the deed was that plaintiff in error should furnish to Mary McClelland and her husband, for and during their natural lives, and during the life of the survivor of them, a good home and board, necessary clothing suitable to their condition in life, necessary medical aid, and the necessary services for carrying out such provisions; and that upon their decease he was to give them, respectively, decent interment, and erect a suitable tombstone to their memories; and the grantors in the deed were to have the right to keep their own horse, carriage, and harness on said premises, free of charge. On the same day on which the deed was executed a lease was executed by said Elza McClelland to his mother and father, leasing said premises to them for the term of their natural lives and during the life of the survivor of them, and reciting therein that, in consideration that Mary McClelland and Mason McClelland executed to the plaintiff in error said warranty deed, plaintiff in error agreed to furnish them a good home and board at his own expense, etc., as above stated. In his report the special master finds that under said agreement plaintiff in error entered into possession of the premises in the fall of 1889, and has been in possession of the same ever since, and has received the rents and profits thereof, and that the rental value of the premises is \$3.50 per acre per annum. The report of the special master further finds that the deed was, on the day of its execution, and in pursuance of an agreement between the parties, placed in the hands of one Nelson Silvright to be held by him unrecorded until the death of both of the grantors; that, on December 24, 1892, said Silvright, at the request of Mary McClelland, and with the knowledge of the plaintiff in error, but without the knowledge or consent of Mason McClelland, caused the deed to be recorded in the recorder's office of Dekalb county; that Mary McClelland died on June 5, 1894, testate, and leaving a will, in which she made her husband her sole devisee and executor; that the plaintiff in error, before December 24, 1892, or January 1, 1893, furnished his mother board, and medical aid, and services, and clothes suitable to her condition in life, and after her death gave her decent burial, and had made arrangements

for a monument to be erected on her grave; but that the plaintiff in error did not, in accordance with his agreement, furnish his father, Mason McClelland, with sufficient clothes, and was not willing that his father should make his home on the premises with his wife, and ordered his father, Mason McClelland, to leave the same, and told him that he would not have his horse upon the premises. The master finds in his report that plaintiff in error did not furnish either Mary McClelland or Mason McClelland a good home after January 1, 1893; that he refused to permit their children to visit them at their home, and used abusive and profane language to them, and at a time when his mother was sick; that he used vulgar and profane language in their presence, and rendered their home so unpleasant that on December 2, 1893, they removed therefrom, and went to the home of their son James McClelland, where the mother died, as above stated; that after December 2, 1893, plaintiff in error in no way contributed to the support of either Mary McClelland or Mason McClelland, except to furnish some underclothing for his mother, but he furnished medical aid, and paid the funeral expenses. The special master, in his report, found the equities in the case to be with the complainants, and that the deed dated January 22, 1889, should be set aside, and declared void. The master also found in his report that when said conveyance was executed to the plaintiff in error there was a mortgage upon the premises; that the conveyance was not made subject to the mortgage; that complainants never paid the mortgage, or any part thereof; that the plaintiff in error paid \$275 upon said mortgage; that plaintiff in error paid certain specified amounts for funeral expenses of his mother, and for a monument to her memory, and for medical treatment during her last sickness.

While there is much conflict in the testimony in the present case, we are not prepared to say that the findings made by the court below are not sustained by the evidence. Some of the witnesses testifying in behalf of the plaintiff in error state that his conduct towards his mother was unobjectionable, so far as they observed it. It would appear, however, that his kindness to her was for the most part prior to the time when the deed in question was filed for record, to wit, on December 24, 1892. Prior to this time, to wit, on August 16, 1892, his father left the premises, and remained away until January, 1893, but returned in January, 1893, and remained until December 2, 1893, when both he and his wife were obliged to leave the premises. The conviction forced upon the mind by reading the testimony is that the conduct of the plaintiff in error towards his mother changed after she had directed the custodian of the deed to record it. Mason McClelland, defendant in error, had dower and a homestead right in the premises. The

recording of the deed was without his consent. Viewing the testimony of the witnesses, so far as it is favorable to the plaintiff in error, as having relation to occurrences which preceded the recording of the deed, we are of the opinion that the findings of the special master and the decree of the court below are sustained by the testimony, so far as it relates to the conduct of the plaintiff in error after the recording of the deed. The case, therefore, is one where an aged father and mother deeded to their son their homestead farm in consideration of his furnishing them a home and support during the remainder of their lives, respectively. The evidence shows that he did not keep his agreement with them in this regard, but treated them with such unkindness as to force them to leave their home. Under these circumstances, it is well settled by the decisions of this court that a bill will lie to set aside a deed executed for such a consideration. In *Frazier v. Miller*, 16 Ill. 48, where one Miller and his wife conveyed all his real and personal property to one Frazier upon condition that Frazier should support and take care of Miller and his wife during their lives, and Frazier gave a bond to that effect, which he subsequently obtained possession of and withheld from Miller; and where Frazier did not perform his obligation, but greatly maltreated Miller and his wife,—it was held that Miller might proceed in chancery to have the conveyance rescinded, and obtain other relief, etc. In the *Frazier Case* it was urged that there was a remedy at law for the recovery of damages upon the bond given, but the court held that an action on the bond was inadequate to furnish such relief as the party injured was entitled to have. The ground upon which the jurisdiction of equity was there sustained was that the circumstances justified the inference of an abandonment of the contract by Frazier, and a presumption of a fraudulent intent in entering into the contract. It was there said that Miller had surrendered all—home and property—at once, and become wholly dependent upon Frazier for a subsistence and shelter, as well as a house and domestic comforts and enjoyments of society; and that to be treated with unkindness, harshness, and blows, under these circumstances, as a fulfillment of the obligation for a house, shelter, food, raiment, and social and domestic happiness, was more than human nature could bear, or a court of equity could tolerate. It was also said in that case that the contract on the part of Frazier was executory, and continued so on his part during the natural life of Miller and wife; and that what might be the cost of a support during one year might, with varying prices, be totally inadequate for another year, so that no assessment of damages could be made to meet the estimate of the cost of their support. In *Oard v. Oard*, 59 Ill. 46, where the facts showed that a father, upwards of 70 years

of age, induced by the promises of his son to support him and his wife in comfort during the remainder of their lives, conveyed his farm to his son's wife, and transferred to his son all his personal property, and the son took possession of the farm, and, by his continued unkindness and ill treatment, in about a year compelled his parents to leave, and take refuge with another child, it was held that a bill would lie by the father to rescind the contract; and the case of *Frazier v. Miller*, supra, was referred to and approved, the court saying: "If the rescission of the contract cannot be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent." In *Jones v. Neely*, 72 Ill. 449, it was again held, upon a similar state of facts, that the circumstances justified the inference of an abandonment of the contract and a presumption of fraudulent intent in entering into it. Again in *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267, we said (page 356, 143 Ill., and page 268, 32 N. E.): "The doctrine is well established in this state that where one conveys his real estate and property to another person, in consideration that such other person will support and maintain the grantor during his natural life, and the grantee afterwards refuses to perform his contract for such support and maintenance, a court of equity will grant relief by rescinding the contract and canceling the deed." The same doctrine was again announced by this court in the case of *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267.

It is said by counsel for the plaintiff in error that the deed executed to the plaintiff in error was a warranty deed, and that there was a mortgage upon the premises at the time the deed was executed. It is argued from this circumstance that defendant in error and his deceased wife were themselves in default in regard to the contract, and that the right to rescind belongs only to the party who is without default. 21 Am. & Eng. Enc. Law, p. 77. We think the evidence shows that the plaintiff in error knew of the existence of the mortgage when the deed was made to him, and accepted the premises subject to the incumbrance which was then upon it. He has paid certain amounts upon the mortgage since he has been in possession, without objection, and without any complaint that he was doing more than he was required to do by his contract. In the accounting ordered by the court it is directed that he have credit for the payments made by him and credited upon the mortgage. The result of the accounting will be that he will be reimbursed for his expenditures on account of the mortgage, so that, by the cancellation of the deed, he will not be injured in this regard.

It is furthermore said that the defendant in error, after the death of his wife, directed a physician, who had attended upon his wife in her last sickness, and presented a bill for his services, to call upon the plaintiff in

error for the payment of such bill. It is claimed that the defendant in error, by this act, elected to treat the contract in full force. The argument made upon this branch of the case is that a party having an election to rescind a contract must rescind it wholly or not at all, and that he will not be allowed to avoid the contract as to those parts which work him an injury, and confirm it as to those which are profitable to him. 21 Am. & Eng. Enc. Law, p. 91; Harzfeld v. Converse, 105 Ill. 534. This principle has no application to the facts of the present case. The evidence tends to show that the plaintiff in error was indebted to the defendant in error for rents and profits received by him on account of the use of the premises, and defendant in error could, therefore, with perfect justice refer the payment of the doctor's bill to the plaintiff in error as a debtor to the defendant in error in the manner stated. Inasmuch as the conduct of the plaintiff in error gives rise to the presumption of an abandonment of his contract and of a fraudulent intent in entering into it, he is estopped from urging that the defendant in error has elected to keep the contract in force. The right to relief in a court of equity in this class of cases is based upon the considerations already mentioned, rather than upon the right to rescind for failure to carry out the terms of the contract by the opposite party.

Another objection urged in favor of the reversal of the decree of the lower court is that error was committed in overruling the motion made by plaintiff in error for a change of venue. The petition and notice for change of venue were filed February 27, 1894, and nothing was done thereafter in reference to the same until April 6, 1897, a period of more than three years. We are of the opinion that on account of the long delay the plaintiff in error waived his right to insist upon a change of venue. It has been uniformly held by this court that a motion for a change of venue must be made at the earliest practicable moment, and not put off until just before the cause is to be called for trial. *Hudson v. Hanson*, 75 Ill. 198; *Newlin v. Snyder*, 78 Ill. 528; *Crane v. Crane*, 81 Ill. 165. It is urged by the plaintiff in error that, according to the showing of the record as made on February 27, 1894, the plaintiff in error on that day moved for a change of venue. It may be that, when the petition for a change of venue was filed together with the notice to the other side that the same would be applied for, a motion for such change was entered of record. But it does not appear that said motion was called up, or that the court was asked to act upon it, until more than three years had elapsed. During this time plaintiff in error had appeared before the master, and taken testimony, and had proceeded in all respects as though no change of venue was to be insisted upon. It is not sufficient merely that a motion for a change of venue should be made,

but the motion must be "pressed." *Hudson v. Hanson*, supra. After a careful examination of the record, we find no sufficient reason for reversing the decree entered by the court below. Accordingly, the decree of the circuit court is affirmed. Decree affirmed.

(175 Ill. 370)

BOYLES et al. v. CHYTRAUS.

(Supreme Court of Illinois. Oct. 24, 1898.)

BILL OF EXCEPTIONS—NECESSITY—CONFESSION OF JUDGMENT—REVIEW—RECORD—WAIVER.

1. In the absence of a bill of exceptions, it will be presumed that the necessary proof was introduced to sustain the allegations of the pleadings and the finding of the judgment.

2. When a judgment is rendered in term time, although upon a cognovit, it will be presumed on appeal that the court had jurisdiction.

3. A copy of a note sued on, although attached to the declaration, is no part of the record, and must be brought up by a bill of exceptions.

4. A warrant of attorney to confess judgment on a note, although attached to the declaration, must be brought up by a bill of exceptions, in order to become part of the record.

5. Where a warrant of attorney to confess judgment on a note by its terms waives all errors in any proceeding for the confession of a judgment, and agrees that no writ of error shall be prosecuted on the judgment, the defendants, after confession by the attorney, cannot object that the note did not show an assignment to the plaintiff, and that the power of attorney did not authorize the confession.

6. When errors are waived, so that a writ of error will not lie to review a judgment, a writ of error will lie to review an order overruling a motion to vacate such judgment.

Error to appellate court, First district.

Action by Axel Chytraus against Charles E. Boyles and another. From a judgment of the appellate court affirming a judgment by confession, the defendants bring error. Affirmed.

This is a judgment by confession entered in the circuit court of Cook county in term time in favor of the defendant in error against the plaintiffs in error, Charles E. Boyles and William H. Roche. The judgment was taken for review to the appellate court by writ of error issued from that court, and was there affirmed. The present writ of error is sued out from this court for the purpose of reviewing such judgment of affirmance entered by the appellate court.

Edward T. Cahill, for plaintiffs in error. Charles S. Deneen, for defendant in error.

MAGRUDER, J. (after stating the facts). The plaintiffs in error assign a number of errors. The most material of the errors thus assigned are embodied in the objections hereinafter referred to. In the first place it is said that the court below had no jurisdiction to enter the judgment, for the alleged reason that the note and warrant of attorney to confess judgment did not show any assignment of the note by the original payee therein to the defendant in error. The note

and power of attorney constituted one instrument, signed by "Boyles & Co." The note was payable to the order of the State Bank of Chicago. In the second place it is claimed that the power of attorney did not authorize a confession of judgment against both of the plaintiffs in error, composing the firm of Boyles & Co.; the record failing to show, as is contended by counsel, that the note was given for a partnership debt, and was signed by both members of the firm.

The record is not in such a shape as to authorize us to consider the objections thus made to the correctness of the judgment entered by the circuit court. This is true, because the record contains no bill of exceptions. There appears to be a copy of the note sued upon, together with a copy of the warrant of attorney accompanying it, attached to the declaration, or filed with the declaration. The declaration complains of the two plaintiffs in error, and alleges that on a certain day they executed the note sued upon, giving a description of the note, and that the State Bank of Chicago, to whom, or to whose order, the note was payable, indorsed said note in writing; that by said indorsement said State Bank of Chicago ordered and appointed the sum of money mentioned in the note to be paid to the defendant in error, and then and there delivered the note so indorsed to the defendant in error; and that thereby the plaintiffs in error became liable to pay defendant in error the sum of money mentioned in the note, and undertook and promised to pay the same to the defendant in error according to the tenor and effect of the note and of the said indorsement thereon. The cognovit recites that the plaintiffs in error come by Charles H. Pease, their attorney, and waive service of process, and say that they cannot deny the action of the defendant in error, nor but that the defendant in error has sustained damages on account of the nonperformance of the promises in the declaration mentioned, including a certain sum for reasonable attorney's fees for entering up the judgment. In their plea the plaintiffs in error further agree that no writ of error or appeal shall be prosecuted on the judgment entered by virtue thereof, nor any bill in equity filed to interfere in any manner with the operation of the said judgment, and that they thereby release all errors that may intervene in entering up the same or in issuing the execution thereon, and consent to an immediate execution upon such. Attached to the cognovit is an affidavit by a clerk in said bank stating that he is acquainted with the handwriting of the plaintiff in error William H. Roche, and that the signature of the note and warrant of attorney is the genuine signature of the said Boyles & Co., by William H. Roche, and that the said Roche was at the time said note was signed and delivered a co-partner with said Boyles, doing business as Boyles & Co., and that said Roche signed and delivered said

note with the consent of said Boyles. The judgment recites that the defendant in error came before the circuit judge, and filed his declaration in said case against the plaintiffs in error in a plea of trespass on the case upon promises; that thereupon Charles H. Pease, an attorney of the court, appeared in behalf of the plaintiffs in error, by virtue of a warrant of attorney for that purpose executed by the plaintiffs in error, and then and there duly proved and filed in open court; that the plaintiffs in error filed their cognovit, waiving the issuing and service of process, and acknowledged that they did assume and promise in manner and form as the defendant in error had in his declaration alleged; and that they confessed that the defendant in error had sustained damages to the amount of the note and attorney's fees. The judgment further recites that thereupon, upon evidence heard in open court, the court finds that said defendant in error has sustained the aforesaid damages, and orders and considers that he recover the amount so confessed, etc.

There being no bill of exceptions in the case, the presumption arises that the necessary proof was introduced in the court below to sustain the findings of the judgment and the allegations of the pleadings, as the same are above recited. As the judgment was rendered in term time, the same presumptions in its favor, although it was rendered upon a cognovit, will be indulged as are indulged in the case of original judgments of courts of general jurisdiction. Where a court of superior general jurisdiction has proceeded to adjudicate and render judgment in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *Osgood v. Blackmore*, 59 Ill. 261. As the court below found that a declaration, a warrant of attorney, note, and cognovit were filed, and that the appearance of the defendant below was entered, and the amount due on the note was confessed, we will presume the court heard evidence upon the question whether or not the note was properly assigned, and upon the further question whether or not the warrant of attorney was executed in such a way as to bind both the members of the firm. This court has held generally that the copy of a note sued upon, which is attached to a declaration, forms no part of the declaration. Whenever a defendant intends to raise a question upon an instrument sued upon, or upon a bill of particulars, filed with the declaration, he must preserve such question by a bill of exceptions. The copy of the instrument sued upon, or the bill of particulars, indorsed on the declaration, being no part thereof, is no part of the record, and a bill of exceptions can alone inform us of what it is. *Harlow v. Boswell*, 15 Ill. 56; *Franev v. True*, 26 Ill. 184; *Schofield v. Settle*, 31 Ill. 515; *Hess Co. v. Dawson*, 51 Ill. App.

146; 3 Enc. Pl. & Prac. p. 404, note. In addition to the general rule thus laid down, that a copy of an instrument sued upon, when it appears indorsed upon a declaration, is no part of the record, in the absence of a bill of exceptions presenting it, it is also settled law that, where a judgment by confession is entered in term time, the warrant of attorney, the affidavit of execution, plea of confession, and note upon which judgment is confessed, must be brought up by a bill of exceptions. *Waterman v. Caton*, 55 Ill. 94; *Magher v. Howe*, 12 Ill. 379; *Roundy v. Hunt*, 24 Ill. 598; *Hall v. Jones*, 32 Ill. 38; 3 Enc. Pl. & Prac. p. 407, note 2. We say here, as we said in *Waterman v. Caton*, supra: "The judgment having been entered in term time, the note and warrant of attorney cannot become a part of the record, unless introduced into it by a bill of exceptions. In this case there was no bill of exceptions taken." "We will, however, in the absence of a bill of exceptions showing what the evidence was, presume that the evidence was ample to sustain the judgment." *Miller v. Glass*, 118 Ill. 443, 8 N. E. 833.

If, however, it were allowable for us to regard the warrant of attorney in this case as a part of the record, the warrant of attorney by its terms waives and releases all errors which may intervene in any proceeding for the confession of a judgment, and consents to immediate execution upon such judgment. It authorizes any attorney of any court of record to appear and confess judgment, without process, in favor of the holder of the note, for such amount as may appear to be due thereon. By the *cognovit*, also, the defendants below agree that no writ of error shall be prosecuted on the judgment entered by virtue of such warrant of attorney. In view of such waiver and release, the plaintiffs in error cannot be permitted to assign as error that which they have solemnly released of record. They must be bound by their deliberate declarations entered of record in open court. All the objections here urged to the judgment are mere errors, and they were waived of record in the court below in the manner stated. If the plaintiffs in error had made a motion in proper time in the court below to vacate the judgment entered, and that motion had been overruled, and the action of the court had been presented by a proper bill of exceptions, this court could review a refusal of the court below to vacate the judgment in accordance with such motion. A writ of error will lie to review the overruling of a motion to vacate the judgment, but will not lie to review the judgment itself, when errors are waived and released in the manner above stated. *Lake v. Cook*, 15 Ill. 353; *Frear v. Bank*, 73 Ill. 473; *Hall v. Hamilton*, 74 Ill. 437; *Little v. Dyer*, 35 Ill. App. 85; *Werkmeister v. Beaumont*, 46 Ill. App. 369. In any view, therefore, in which this case is presented to us upon the present record, we see no rea-

son for interfering with the judgments of the lower courts. Accordingly the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed. Judgment affirmed.

(175 Ill. 526)

GREENWOOD v. GMELICH, Treasurer.

(Supreme Court of Illinois. Oct. 24, 1898.)

SCHOOLS AND SCHOOL DISTRICTS—BOARDS OF EDUCATION IN SCHOOL TOWNSHIPS—LEVY OF TAXES—AUTHORITY.

School Law 1889, art. 3, §§ 1, 3, 38, make each congressional township a township for school purposes, and provide that on petition an election may be held to decide for or against a township high school; and section 40 provides that, if a majority vote in favor of its establishment, an election shall be held for a township board of education, and that it shall be the duty of such board to "establish at some central point * * * a high school." Section 41 provides that, for the purpose of building a school house, the township shall be regarded as a school district, and the board of education shall have power to discharge the duties of directors for such district in all respects. Section 31 of article 5 forbids directors to purchase or locate school-house sites, or to purchase, build, or locate a school house, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called as therein provided. *Held*, that the power of the board of education, under said section 40, to "establish" high schools, is required to be exercised in the manner provided in said sections 41 and 31, and hence a levy of taxes by the board of education to build a high school without calling an election is invalid.

Appeal from Lasalle county court; H. W. Johnson, Judge.

Action by Gottlob Gmelich, treasurer and ex officio collector of Lasalle county, for a judgment against property of Alfred R. Greenwood, for delinquent taxes. From a judgment for the applicant, the owner appeals. Reversed.

This is an application by the county collector of Lasalle county for a judgment against the property of the appellant for taxes, certified to the county clerk, and by him extended upon the tax books of township 33 N., range 1 E. of the third P. M., as a special tax for the purpose of purchasing a site and building a school house in said township for a high school. Objections were made by the appellant to the entry of judgment against his land. The objections were overruled. Exceptions were taken to the ruling and decision of the county court in overruling the objections. The appellant moved for a new trial, which motion was overruled, and exception was taken to the ruling. Thereupon judgment was entered by the court against the property of the appellant. The present appeal is prosecuted from such judgment.

In March, 1896, at least 15 days before the regular election of trustees of schools in and for said township 33, a petition of not less than 50 legal voters of said township was filed with the township treasurer thereof, asking the said treasurer to submit to the

voters, at the regular election of the trustees then next following, the proposition of voting for or against establishing a township high school for the benefit of said township. On April 11, 1896, being the day for the regular election of school trustees of said township, there was submitted, in due form of law, to a vote of the voters of said township, the proposition of establishing a township high school for the benefit of said township. At said election the proposition of establishing a high school was carried, and the result thereof declared according to law. On May 16, 1896, in pursuance of an election called by the trustees of schools in and for said township, five members were duly elected as a township board of education. The returns of said last election were canvassed in accordance with law. The members met within the time prescribed by law, and elected one of their number president, and elected a secretary. On July 18, 1896, the said township board of education made its certain certificate of levy, as follows: "We hereby certify that we require the amount of twenty-five thousand dollars (\$25,000.00) as a special tax for the purpose of purchasing a school site, and for building purposes, on the taxable property of our district, viz. township 33 north, range No. 1, for the year 1896,"—which certificate was signed by the five members of the township board of education of said township who were elected on May 16, 1896, as above stated. Said certificate of levy was filed in the office of the county clerk of LaSalle county, and, in pursuance thereof, the county clerk extended on the books of the collector of the taxes in and for said township a tax on the real estate of the appellant.

Alfred R. Greenwood, pro se. Haskins & Panneck, for appellee.

MAGRUDER, J. (after stating the facts). The main objection relied upon for the reversal of the judgment of the county court is that the levy by the township board of education of a special tax of \$25,000 upon the property subject to taxation in said school district, for the purpose of purchasing a school site and for building purposes, was void, upon the ground that the question of extending and levying said special tax was not submitted to the voters of said township at any election held for that purpose. It is admitted by the appellee that the tax was extended and levied upon the property of the appellant without any submission of the question of taxation to the voters of said township. The only question presented for our consideration is whether the township board of education had the power to levy a special tax for the purpose of purchasing a site for a high-school building, and erecting a building thereon for the purposes of a high school, without a vote of the people at an election specially called for taking such vote. The solution of the question presented de-

pends upon the construction of several provisions of the present school law.

Section 1 of article 3 of the school law of 1889 provides that "each congressional township is hereby established a township for school purposes." Section 3 of the same article provides that the school business of the township shall be done by three trustees, to be elected by the legal voters of the township, as therein provided for. Section 38 of article 3 provides that "upon petition of not less than fifty voters of any school township, filed with the township treasurer, at least fifteen days preceding the regular election of trustees, it shall be the duty of said treasurer to notify the voters of said township that an election for or against a township high school will be held at the said next regular election of trustees, by posting notices," etc. The form of the notice of election named in section 38 is given in the statute, and recites that an election will be held "for the purpose of voting for or against the proposition to establish a township high school for the benefit of township No. —," etc. Section 40 of article 3 provides that, "if a majority of the votes at such election shall be found to be in favor of establishing a township high school, it shall be the duty of the trustees of the township to call a special election on any Saturday within sixty days from the time of the election establishing the township high school, for the purpose of electing a township board of education, to consist of five members, notice of which election shall be given for the same time and in the same manner as provided for in the election of township trustees. The members elected shall determine by lot, at their first meeting, the length of term each is to serve. * * *

Within ten days after their election, the members of the township board of education shall meet and organize by electing one of their number president, and by electing a secretary. It shall be the duty of the township board of education, to establish at some central point most convenient to a majority of the pupils of the township, a high school for the education of the more advanced pupils." Section 41 of article 3 is as follows: "For the purpose of building a school house, supporting the school and paying other necessary expenses, the township shall be regarded as a school district, and the township board of education shall have the power and discharge the duties of directors for such district in all respects." 3 Starr & C. Ann. St. (2d Ed.) pp. 3653, 3654, 3660, 3661. Section 31 of article 5 of the act of 1889 is as follows: "It shall not be lawful for a board of directors to purchase or locate a school house site, or to purchase, build or move a school house, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 4 of article 9 of this act. A majority of the votes cast shall be necessary to authorize the directors

to act: provided, that if no one locality shall receive a majority of all the votes cast at such election, the directors may, if in their judgment the public interest requires it, proceed to select a suitable school house site; and the site so chosen by them shall in such case, be legal and valid, the same as if it had been determined by a majority of the votes cast; and the site so selected by either of the methods above provided shall be the school house site for such district; and said district shall have the right to take the same for the purpose of a school house site either with or without the owner's consent by condemnation or otherwise." 3 Starr & C. Ann. St. (2d Ed.) p. 3680. Section 38, above quoted, provides for submitting to the voters of the township the question whether or not the township shall have a high school, or, in other words, whether a township high school shall be established for the benefit of the township. Section 40 provides for the election of five members of a township board of education. By the terms of the school law, only three trustees are elected for the purpose of doing the school business of the township. The township board of education, provided for by section 40 of article 3, is a different body from the school trustees. The township board of education, consisting of five members, is for the first time created by the act in section 40. Section 40 makes it the duty of the township board of education to establish, at some central point most convenient to a majority of the pupils of the township, a high school for the education of the more advanced pupils.

The position of the appellee is that authority is conferred upon the township board of education to purchase a school site, and erect a high-school building, without a vote of the people, by sections 38 and 40 of article 3 as above quoted. It is said that, when the voters of the township have voted under section 38 in favor of establishing a township high school, they have thereby voted in favor of conferring upon the township board of education the power to purchase a school site, and erect a high-school building, and levy a tax for that purpose. It is also said that, when the township board of education is given authority, by section 40, to establish a high school at some central point most convenient to a majority of the pupils of the township, it is thereby given authority to purchase a site for a high-school building, and to erect a high-school building thereon, and to levy a tax for the purpose of paying for the same. It is argued that the power of expending the money of the people in the purchase of a site and in the erection of the building is involved in the duty of establishing a high school, and that no vote of the people is necessary to enable the township board of education to act in such matter. We are unable to concur with this contention, in view of the provisions contained in section 41 of article 3, and section 31 of article 5, as above quoted. Counsel for

appellee admit that, independently of said section 41, no express power is given to the township board of education to purchase a school site, and to erect a high-school building, and to levy a tax to raise money for these purposes; but it is said that such power is implied from the power to establish a high school, as conferred by sections 38 and 40. We do not deem it necessary to discuss the question whether the power of taxation can be implied from such language as is used in the two sections last named. As a general rule, legislative authority must be shown for every levy of taxes, whether such levy is made by the political divisions of a state, or by the state at large. Cooley, Const. Lim. marg. p. 518. Cooley, in his work on Constitutional Limitations (marginal page 520), says: "Those who assume to seize the property of the citizen for the satisfaction of the tax must be able to show that that particular tax is authorized either by general or special law. The power inherent in the government to tax lies dormant until a constitutional law has been passed calling it into action, and is then vitalized only to the extent provided by the law." Therefore, when the power of taxation is claimed for a municipal body, the language of the act creating such body, and defining its powers and duties, should be examined for the purpose of discovering whether there is an express grant of such power. If the terms of the act can be so construed as to amount to an express grant, it is not necessary to search for evidence of an implied grant.

When we examine section 41 of article 3, we find that the township is to be regarded as a school district "for the purpose of building a school house, supporting the school and paying other necessary expenses," and that "the township board of education shall have the power and discharge the duties of directors for such district in all respects." By section 41 the township board of education is given the same power which is conferred upon the directors of a school district, and is required to discharge the same duties which the directors of a school district are required to discharge, so far as relates to the building of a school house, supporting the school, and paying other necessary expenses. The power and the duties of the township board of education, being the same as those of the directors of the school district, must necessarily be subject to the same restrictions. When we turn to section 31 of article 5 of the act, we find it stated that a board of directors cannot lawfully purchase or locate a school-house site, or purchase, build, or move a school house, or levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted in a specified way. Article 3 of the school law is entitled "Townships—Trustees of Schools." Article 5 of the school law is entitled "Board of Directors." It will not be denied that, under the provisions of section 31 of article 5, the

board of school directors would have no power to make the certificate of levy, which was made by the township board of education of township 33, without authority conferred upon it by a vote of the people. *Beverly v. Sabin*, 20 Ill. 357; *Pennington v. Coe*, 57 Ill. 118; *School Directors v. Fogleman*, 76 Ill. 189; *Chicago & A. R. Co. v. People*, 163 Ill. 616, 45 N. E. 122.

It is clear to our minds, in view of section 41 of article 3, and section 81 of article 5, of the school law, that the township board of education, created by section 40 of said article 3, has no power to purchase a high-school site, or erect a high-school building, or levy a tax to raise money for these purposes, without a vote of the people. The power of the township board in this regard is assimilated in all respects to the power conferred by the statute upon the board of directors of a school district; and the power can only be exercised upon the same conditions and subject to the same restrictions as are imposed upon said directors. Because, under section 38 of article 3, the people vote in favor of establishing a high school, they do not thereby indicate their will as to how much money shall be expended for the purchase of a site for a high-school building, or how much money shall be expended for the erection of a high-school building. It is true that, by the terms of said section 40, it is made the duty of the township board of education to establish a high school, and to establish it at some central point most convenient to a majority of the pupils. But this is a duty imposed upon it without specification as to the manner in which the duty is to be performed. Section 41 was designed to indicate how that duty should be discharged. The fact that the board of education is authorized to establish the school at some convenient central point does not necessarily authorize it to buy a particular site for such amount as it may, in its judgment, choose to expend; nor does it authorize it to erect a school building at such a cost as, in its judgment, seems proper. The voters must be consulted in relation to this matter, and it cannot and should not be left solely to the discretion of the township board of education. The language of section 40 should be construed in connection with the language of section 41 and the language of section 31, above quoted. Although the school law consists of different articles and different sections, yet it must be considered and construed as one entire act. When any portion of a written law, standing by itself, seems to be of doubtful meaning, it may be made plain by comparing it with other portions of the same law. "The whole is to be examined with a view to arriving at the true intention of each part. * * * If any section of a law be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. And in making this com-

parison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is that the effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. * * * One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another if, by any reasonable construction, the two can be made to stand together." *Cooley*, *Const. Lim. marg.* pp. 57, 58.

There is no conflict between any parts of sections 38 and 40, on the one side, and sections 41 and 31, on the other. It is perfectly consistent with the duty, imposed upon the township board of education, of establishing at some central point a high school for the benefit of the township, that such board of education should be restricted, in its power of erecting a high-school building and levying taxes therefor, by the will of the people of the township as indicated by their votes. By paragraph 5 of section 26 of article 5 of the school law, it is made the duty of the board of directors of each school district "to establish and keep in operation" for a specified time "a sufficient number of free schools for the accommodation of all children in the district" of certain ages, etc. 3 *Starr & C. Ann. St. (2d Ed.)* p. 3685. It certainly will not be claimed that, because the duty is thus imposed upon school directors to "establish" free schools, they are thereby given the power to raise by taxation and expend, without the vote of the people, all the money that is necessary to so establish free schools. The word "establish" is no more fruitful in its meaning as used in section 40 of article 3 than in section 26 of article 5. Section 35 of the school law of 1872 contained similar provisions to those contained in sections 38, 40, and 41 of article 3 of the present school law, as above quoted. Indeed, the language used in the last sentence of section 40 and the language used in section 41 correspond exactly with the language used in section 35 of the law of 1872, except that by the terms of the latter law no township board of education was created. In *Trustees of Schools v. People*, 87 Ill. 303, after quoting the provisions of section 35 of the school law of 1872, we used this language (page 307): "The powers and duties of the trustees being, with respect to the high school, the same as those of directors with respect to the district school, it becomes necessary to ascertain what are the powers and duties of directors with respect to district schools." In *Fisher v. People*, 84 Ill. 491, with reference to the language of section 35 of the school law of 1872, as above

referred to, we said (page 494): "To our minds it seems too plain to admit of argument that the language of the paragraph quoted, which gives to the trustees the powers and enjoins upon them the duties of directors 'for such district in all respects,' means that, as to such school, they are to have precisely the same powers and exercise the same duties that district directors have and exercise with respect to district schools, to the extent that such powers and duties are practically applicable to a school created, as it is to be, and for the purpose it is designed to accomplish. There are certain powers and duties possessed and exercised by district directors in subordination to the township trustees, which cannot possibly be applicable; and there may be others, also, which, from the difference in the organization of the schools, are inapplicable. But the power to levy taxes for the creation of a fund with which to pay indebtedness lawfully contracted is as essential to the high school as to the district school, and no reason is apparent why such a power might not be exercised by the trustees, as respects the township, upon the same principle and in the same manner that it is exercised by directors, as, respects the district." Here, the township board of education has become substituted for the school trustees, as designated in the act of 1872. The case of *Fisher v. People*, supra, clearly holds that the power of taxation is to be exercised by the trustees, or by the board of education created by the act of 1889, in the same manner in which it is exercised by the school directors of a district. As the directors cannot exercise such power of taxation without a vote of the people, it follows, of course, that the township board of education cannot make such a levy of taxes without a vote of the people. We are of the opinion that the county court erred in not sustaining the objection made by the appellant in the court below. Accordingly, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(175 Ill. 619)

SMITH v. MICHIGAN BUGGY CO.

(Supreme Court of Illinois. Oct. 24. 1898.)

MALICIOUS PROSECUTION—RESULTING DAMAGES.

An action will not lie for the malicious prosecution of a civil suit without probable cause, where the process in such suit was by summons only, and not accompanied by arrest of the person or seizure of his property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action.

Error to appellate court, First district.

Trespass on the case by Alfred A. Smith against the Michigan Buggy Company. From a judgment of the appellate court (66 Ill. App. 516) affirming a judgment for defendant, plaintiff brings error. Affirmed.

This is an action of trespass on the case, begun by the plaintiff in error against the defendant in error in the circuit court of Cook county on March 3, 1893. The action is brought for the purpose of recovering damages for the alleged malicious prosecution of an ordinary civil action without probable cause by the defendant in error against the plaintiff in error. The defendant below (the defendant in error here) filed a general demurrer to the declaration. This demurrer was overruled, and a plea of not guilty was filed to the plaintiff's declaration. A trial was had before the court and a jury. After the introduction by the plaintiff in error (who was the plaintiff below) of all his testimony, the defendant in error moved the court to take the case from the jury, without introducing any evidence whatever on its behalf. This motion was based upon two grounds: First, that such cases as the present are not maintainable in the state of Illinois; second, upon the ground that the evidence did not show a want of probable cause, or, in other words, did show that there was probable cause. After hearing the arguments of counsel, the court instructed the jury that the evidence did not establish a case on which the plaintiff was entitled to recover, and that their verdict should be in favor of the defendant. The action of the court in giving this instruction was duly excepted to by the plaintiff. Thereupon the jury returned a verdict of not guilty, and, after overruling a motion for new trial made by the plaintiff, judgment was rendered in favor of the defendant and against the plaintiff for costs. The plaintiff below (the present plaintiff in error) took an appeal to the appellate court. The appellate court has affirmed the judgment of the circuit court, and the present appeal is prosecuted from such judgment of affirmance. The original action, for the alleged prosecution of which without probable cause the present action is brought, was begun by the defendant in error against the plaintiff in error on February 1, 1892, in the county of Kalamazoo, in the state of Michigan. The Michigan suit so begun by defendant in error against plaintiff in error was an action of trespass on the case, in which a declaration was filed by the Michigan Buggy Company, and a plea of not guilty by Smith. That action was tried in Michigan before the court and a jury, and the jury returned a verdict in favor of the defendant therein (the plaintiff in error here). The Michigan Buggy Company, the present defendant in error, was a corporation organized under the laws of Michigan, having its place of business and principal office at Kalamazoo, in that state. From July, 1891, up to February 1, 1892, the plaintiff in error, Smith, had been in the service of the defendant in error, the Michigan Buggy Company, as a traveling salesman. By his contract of employment, the territory over which he was required to travel in order to sell the bug-

gles and carriages manufactured by the defendant in error was the state of Illinois. The suit brought against the plaintiff in error by the defendant in error in Michigan was for the purpose of recovering damages for fraudulent representations alleged to have been made by the plaintiff in error to the defendant in error in order to obtain employment with it. The declaration in the Michigan action charged that the plaintiff in error had represented that during two years prior to his employment by defendant in error he had sold, while employed by another company engaged in manufacturing carriages, by the name of the Abbott Buggy Company, from \$60,000 to \$65,000 worth of buggies and carriages per year in each of said two years among his friends and acquaintances in Illinois. The declaration in that suit also alleged that the plaintiff in error had represented to the defendant in error that the persons among whom he had made such sales were his friends and acquaintances, and that he could control their trade, and turn it over to the defendant in error, if the defendant in error would employ him as requested, and that he furthermore represented that he was a first-class salesman in the line of the business in which the defendant in error was engaged, and that he could sell for the defendant in error as many buggies and carriages per year as he had sold for the Abbott Buggy Company during the two years in which he had been engaged in making sales for the last-named company. The declaration then charged that these statements and representations were false, that the plaintiff in error had not sold as many goods within the time stated as he represented, that he was not able to control such a trade as he represented that he could control, and that he was not such a first-class salesman as he represented himself to be. It was also alleged in such declaration that through these representations the defendant in error had been induced to make a contract with the plaintiff in error, and to pay him large sums of money, and that the defendant in error had thereby suffered and sustained a great amount of loss, etc.

Smith, Shedd, Underwood & Hall, for plaintiff in error. Meek, Meek & Cochrane, for defendant in error.

MAGRUDER, J. (after stating the facts). The suit which was begun by the defendant in error against the plaintiff in error in Michigan was an ordinary civil suit, and resulted in favor of plaintiff in error. It is alleged in the declaration in the case at bar that the suit in Michigan was a malicious prosecution, and without probable cause; but it is not alleged or claimed that in that suit the plaintiff in error was arrested, or that any of his property was seized, nor does it appear that the plaintiff in error therein suf-

fered any special damage, over and above the ordinary expenses and trouble which are attendant upon the defense of an ordinary civil suit. The question, therefore, which is presented in this case, and the only question which we deem it necessary to consider, is whether damages can be recovered for the malicious prosecution without probable cause of an ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property. It is well settled that malicious prosecution is a proper action for the recovery of damages for the institution of a civil suit with malice and without probable cause, where the defendant is deprived of his personal liberty, or where there is an attachment or seizure of his property. But whether malicious prosecution will lie in such case in the absence of any interference with personal liberty, and in the absence of any seizure of property, is a question upon which the authorities are very much divided. The question above indicated has never been squarely decided in any case that has come before this court. In *Gorton v. Brown*, 27 Ill. 489, it was held that an action could not be maintained for maliciously suing out a writ of injunction. The conclusion reached in that case, however, was based mainly upon the ground that the party had a sufficient remedy upon the injunction bond given when the injunction was obtained, and that such bond was designed by the statute to cover the damages suffered by the party enjoined. But the drift of the opinion in that case was against the maintenance of an action for malicious prosecution without probable cause of an ordinary civil suit, unaccompanied by arrest or seizure of property. In *Gorton v. Brown*, supra, we said (page 493): "We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action, prompted by malice, by which the defendant has sustained some injury, for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made, and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be; for, in a litigious community, every successful defendant would bring his action for a malicious prosecution, and the dockets of the courts would be crowded with such suits." The question here under consideration has been much discussed of late years in legal periodicals and in textbooks, as well as in judicial decisions rendered by the courts in many of the states. We have examined the discussions upon this subject with great care, and are inclined to

hold in accordance with the intimation made in *Gorton v. Brown*, supra, that such actions ought not to be maintained.

An able discussion of this subject, and an extensive review of the authorities in relation thereto down to the year 1878, may be found in 21 Amer. Law Reg. pp. 281, 353. The articles there published were written by Mr. John B. Lawson. After his review of the cases, Mr. Lawson announces it as his own opinion 'that, while the weight of authority denies the action, the weight of reason allows it.' The conclusion announced by the author of these articles has been followed by courts of last resort in several of the western and newly-created states. But, as the weight of authority denies the action, we, as a court, feel it our duty to be governed by the weight of authority, rather than by the conclusion of any law writer, however able and ingenious his reasoning may be. The author of these articles, after giving the substance of the English and American decisions upon this subject, fairly and frankly states the following conclusion therefrom, before he announces his own judgment in opposition to such conclusion, to wit: "We have now reviewed all the American cases pro and con, and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text writers we have cited,—Swift, Townsend, Addison, and the editors of the American Leading Cases, who follow the English adjudications; Mr. Weeks, who limits the right to 'extremely vexatious suits, where special damage has been actually suffered'; and Judge Cooley, who discourages the remedy, without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all." Another review of the authorities may be found in 41 Cent. Law J. p. 449. The learned author of the article on "Malicious Prosecution" in 14 Am. & Eng. Enc. Law, beginning on page 32, also refers to and states the substance of the cases on both sides of the question. It is there said: "At common law the defendant in an action maliciously brought without probable cause has a right of action against the plaintiff in such action after its termination in favor of such defendant, and this regardless of whether the plaintiff had interfered with either the person or property of the defendant. But, after the enactment of the statute of Marlbridge, in the fifty-second year of Henry III., giving costs to successful defendants by way of damage against the plaintiff *pro falso clamore*, it came to be held that an action for malicious prosecution would not lie in civil actions, unless in cases where there had been arrest of the person, or seizure of property, or other special injury, which would not necessarily result in all suits prosecuted to recover for like causes of action. And this

is the rule adopted by some of the courts of this country. The contrary rule, adopted by courts equal in number and respectability, is that an action can be maintained, where neither the person nor the property was seized, for damages accruing in suits brought maliciously and without probable cause." We prefer to adopt, as the sounder rule, the rule first stated in the passage last above quoted. We are of the opinion, and so hold, that an action for the malicious prosecution of a civil suit without probable cause will not lie where the process in the suit so prosecuted is by summons only, and is not accompanied by arrest of the person, or seizure of the property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. This conclusion is sustained by the following authorities, to wit: *Potts v. Imlay*, 4 N. J. Law, 330; *Bitz v. Meyer*, 40 N. J. Law, 252; *Muldoon v. Rickey*, 103 Pa. St. 110; *Kramer v. Stock*, 10 Watts, 115; *Eberly v. Rupp*, 90 Pa. St. 259; *Mayer v. Walter*, 64 Pa. St. 283; *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. 870; *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744; *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Mitchell v. Railroad Co.*, 75 Ga. 308; *Newell, Mal. Pros.* § 32. Those who favor the doctrine that the courts ought to permit suits of this character to be brought and prosecuted urge in support of it the common-law maxim that for every wrong the law furnishes a remedy. It is said that, when a civil suit is maliciously prosecuted without probable cause, the defendant undergoes expenses, and suffers injury from loss of time, and often from loss of credit, and that these wrongs he must endure without a remedy, if he cannot bring suit for damages for the prosecution of such malicious action. On the other hand, it must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice, and claim what he deems to be his right, without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights, through fear of being obliged to defend a subsequent suit charging him with malicious prosecution.

It is urged that the costs which are awarded to the successful defendant in a civil suit, malicious in its character, and brought against him without probable cause, are inadequate compensation for the injury which he suffers. But the question of the amount of costs which are to be allowed the successful party is a question to be determined by the legislature, and not by the courts. As was said by Chief Justice Kirkpatrick in *Potts v. Imlay*, supra: "The courts of law are open to every citizen, and he may sue toties quoties upon the penalty of lawful costs

only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defense. They are given to him for this purpose, and he cannot rise up in a court of justice, and say the legislature has not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this state have thought, and, we will presume, have wisely thought, otherwise." Such ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government. *Muldoon v. Rickey*, supra. In the case at bar there was introduced in evidence a transcript of the record of the action which was tried in Michigan. This transcript shows that a considerably larger bill of costs is allowed against the defeated party in a civil action in the state of Michigan than is allowed in the state of Illinois and in many of the other states. It appears from the defendant's bill of costs in the Michigan suit that the present plaintiff in error was allowed attorney's fees for services before notice of trial, after notice of trial, and during the trial, and upon continuance of the cause, and that he was furthermore allowed a reporter's fee and witness' fees on trial, including days and miles traveled by the plaintiff in error, and a witness who went to Michigan from Illinois to testify. The total taxation of costs in behalf of plaintiff in error in the Michigan suit was \$74.70.

Those who favor this species of action also claim that, if the courts refuse to allow such actions to be maintained, litigation will be encouraged, and causeless and unfounded civil suits will be apt to be brought. On the contrary, the danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant who had secured a favorable result in the suit against him would be tempted to bring another suit for the purpose of showing that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable. Every unsuccessful action would be apt to be followed by another alleging malice in the prosecution of the former action. There would thus be substantially a trial of every lawsuit twice instead of once, because, in order to show that the first suit was malicious and without probable cause, it would be necessary to go over again the material facts that had been developed by the proof in such suit. Again, if every successful defendant should be encouraged to bring an action against the defeated plaintiff for the malicious prosecution with-

out probable cause of an ordinary civil suit, such defendant would be careless and extravagant in the matter of the cost of the defense made by him. It would be a matter of little importance to the successful defendant whether his contract with his attorney for the latter's professional services provided for extravagant or reasonable fees, if he could turn around at once and recover from the defeated plaintiff whatever he had expended. His expenses and trouble and loss of time and credit would assume larger proportions, and would be regarded as heavier burdens, if he knew that he was to be reimbursed for such outlay from the property of his adversary. In addition to this, there is no reason why a plaintiff may not bring an action against a defendant who has made a groundless and causeless defense, if the defendant may sue for damages which he has suffered for an unfounded prosecution. For the reasons stated, we are of the opinion that the court below committed no error in instructing the jury to find for the defendant below (the defendant in error here). Accordingly the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed. Judgment affirmed.

(174 Ill. 547)

**ROCK ISLAND & P. RY. CO. v. LEISY
BREWING CO. et al.**

(Supreme Court of Illinois. Oct. 24, 1898.)

**EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—
DAMAGES—VERDICT—SUBMERGED LANDS—
TRIAL—INSTRUCTIONS—ERROR CURED.**

1. Where the jury views the premises, in condemnation proceedings, their verdict, when supported by the testimony, will not be disturbed, even if it appears to be contrary to the preponderance of the evidence, unless the damages awarded are so grossly excessive as to show that the verdict was the result of passion or undue or improper influence.

2. A defective instruction may be cured by a subsequent one where it is not inconsistent with the former, but merely makes the explanation and qualification necessary to supply the defect.

3. An instruction, in proceedings by a railroad company to condemn lots bounded by a navigable river, that the owners have the exclusive right to the ice forming in the river in front of the lots to the middle thread of the stream, and may cut and remove it, was proper, as bearing on the assessment of damages, where the petition for condemnation stated that it was necessary to acquire for railroad purposes the whole of the lots, in which case the company would be authorized to fill the lots to the line of navigation, and the former owners would be unable to make use of the ice privileges.

4. An instruction that if the jury found a certain fact from the evidence they must give it such weight as, "in their judgment, it is entitled to receive," is not objectionable, as permitting the jury to make a determination from their own judgment, as the requirement to find from the evidence at the beginning of the instruction applied to the subsequent clause.

Appeal from circuit court, Peoria county;
T. M. Shaw, Judge.

Condemnation proceedings by the Rock Island & Peoria Railway Company against the Leisy Brewing Company and others. From a judgment on a verdict assessing the compensation to be paid for the condemned property, plaintiff appeals. Affirmed.

This is a condemnation proceeding, begun by the appellant company for the purpose of condemning seven lots in the city of Peoria, to wit, lots 29, 30, 31, 32, 33, 34, and 37 in Mills' Second addition to that city. Lots 29, 30, and 31 are the property of the appellee the Leisy Brewing Company, and lots 32, 33, 34, and 37 belong to the appellee Jane A. Guth. The lots front on Water street in the city of Peoria, and run back to or towards the Illinois river, or that part of the river which, at that point, is designated "Lake Peoria." Each lot has a frontage of 50 feet and a depth of between 150 and 210 feet, except lot 37, which has a frontage of 66 feet. The tracks of the appellant company and those of another railroad company, being five or six in number, lie along Water street, adjoining the property sought to be condemned. The petition for condemnation states that it is necessary for the petitioner to take, appropriate, and use said lots for the purpose of laying side tracks and switches thereon to enable it to properly do its business with the general public, and perform its functions as a railway company. The petition further alleges that it is necessary to take the whole of said lots for the purpose of constructing thereon side tracks and switches to be used with the other property of the appellant in the carrying on of its business, and that without said lots it cannot utilize its other property in said addition.

Upon a trial of the case before the court and a jury, the jury returned a verdict assessing the compensation to be paid for lots 29, 30, and 31 at \$4,500, and for the other lots, 32, 33, 34, and 37, at \$5,200; and, as compensation to one Spurck, for a tax title held by him on the property, \$1. After overruling a motion for new trial, judgment was entered upon said verdict in accordance with the terms thereof and of a certain stipulation according to the brewing company the privilege of connecting its brewery with the river for the purpose of obtaining water and sewerage and maintaining a pump station upon the river bank, subject to the condition that such use by the brewing company should not interfere with the use by the railroad company of said property for the purposes of laying railway tracks and operating cars thereon; and also subject to the condition that the said pumping station, if maintained by the brewing company, should be so constructed as not to prevent the filling in of said lots and laying tracks thereon. The present appeal is prosecuted from such judgment of condemnation.

Instructions numbered 1, 2, 3, 4, 6, 8, and 9 given for the defendants are as follows:

"(1) The jury are further instructed that, as owners of lands fronting upon and bounded by a navigable stream, the defendants in this case, subject to the rights of the public in such navigable stream, own their several lots to the middle thread of said stream, and the said defendants, as such lot owners, have the right to use and enjoy their several lots by building docks and wharves thereon, or by filling in the same with earth or other solid matter, to any extent whatever, so long as they do not interfere with the rights of navigation by the public in such stream. (2) The jury are further instructed that in determining the fair cash market value of the property sought to be condemned in this case you have a right to take into consideration, and should take into consideration, all the purposes for which said property is adapted and is used, or may be used, so far as such adaptation and uses are shown by the evidence or by your view of said premises, so far as the same may have affected the market value on 14th September, 1896. (3) The jury are further instructed that the defendants in this case are each entitled to the fair cash market value on the 14th day of September, A. D. 1896, of their respective lots sought to be taken, regardless of the causes which give them value at that time. If the jury believe, from the evidence in the case, including their own view, that the value of said lots, or any of them, on that day, was owing, in whole or in part, to the projection by the plaintiff of the improvement to its railroad facilities for which it seeks to condemn said lots, still the owners of said lots are entitled to the fair cash market value of said lots as they then stood. (4) The jury are further instructed that the owner of lands or lots fronting upon a navigable stream, and of which lands or lots such stream forms one of the boundary lines, has a lawful right to erect docks and wharves conforming to such boundary line in and along said river, conforming, however, to the regulations of the proper public authorities for the protection of the public rights in such stream; and such owner may so place such docks and wharves as to have the benefit of the navigable part of such stream, but not interfering with the public rights of navigation." "(6) The court instructs the jury that in fixing the amount of compensation to be paid to the defendants, severally, you should take into consideration the use for which the property is suitable and to which it is adapted, having regard for its situation, and the business wants of that locality, or such as may reasonably be expected in the near future, so far as the same appears from the evidence, and so far as the same affects its market value on the 14th September, 1896." "(8) The court instructs the jury that if you find, from the evidence in this case, that the lots in question, or any of them, are susceptible of en-

largement and extension by filling, thus giving increased areas for any use to which the property may be put, then you have a right to take that into account in arriving at your verdict, and give such fact the weight which, in your judgment, it is entitled to receive, so far as the same affected their market value on the 14th of September, 1896. (9) The court instructs the jury that the owners, severally, of the lots fronting on the Illinois river, and here sought to be condemned, own to the middle thread of the stream, subject only to the right of the public to use the navigable portions thereof for purposes of navigation. Such owners have also the exclusive right to any and all ice forming in said river in front of their lots, respectively, to the middle thread of the stream, and may themselves cut and remove the same, or sell such ice to another with the exclusive right to harvest it."

Stevens, Horton & Abbott, for appellant.
Page & Wead, for appellee Jane A. Guth.
Jack & Tichenor, for appellee Lelsy Brewing Co.

MAGRUDER, J. (after stating the facts).
1. The first ground urged by the appellant in favor of reversing the judgment below is that the damages awarded by the jury are excessive, and not warranted by the preponderance of the evidence. There is great conflict in the testimony of the witnesses as to the value of the property condemned. Such conflict always exists in cases of this character. The witnesses for the appellant estimate the value of the lots at from \$5 per front foot for the unfilled lots to \$12 per foot for the filled lots. The highest valuation put upon the lots by the testimony for the appellant is something less than \$4,000. The witnesses for the appellees estimate the value of the lots all the way from \$25 to \$50 per front foot, and the total value of all the lots at from about \$9,600 to about \$18,000. Some of the witnesses for the appellees, in making their valuations, allow a certain amount per foot for the cost of filling the lots. The jury went upon the premises, and viewed the same. So far as we are able to discover, the witnesses for the appellees are entitled to as much credit as the witnesses for the appellant, and their means of becoming acquainted with the value of property were equal to those possessed by the witnesses of the appellant. The property sought to be condemned appears to be located in the center of the city, and in the vicinity of extensive industries. Its location is six or seven blocks northeast of Main street in Peoria. Water street, upon which the lots front, is the street nearest the river, and substantially parallel with its general course, though at varying distances from the shore. The union passenger depot is six blocks below Main street, and Main street starts from the river at right angles to Water street. Passenger and freight depots are located along

Water street from three to eight blocks below Main street; and distilleries, malt houses, and other manufactories and warehouses line the river bank for two miles or more down the river from Main street. At a distance of about three blocks from Main street is the plant of what is called the Peoria Grape Sugar Company, above which are two ice houses. The lots slope from Water street towards the river, and require filling to be made available for permanent use. Further up the river are several rows of ice houses, built upon filled ground. It thus appears that the lots in question, lying as they do between the railroad tracks and Water street on one side and the river on the other side, are adapted for warehouses, ice houses, manufactories, and docks, having facilities for the receipt and shipment of freight by land and water. Two of the lots, to wit, lots 29 and 30, have been filled to some extent, and had been leased by the brewing company to a tenant who erected an ice house thereon, which was burned down before the filing of the present petition. On a portion of one of the other lots filling appears to have been done, and a small pump house appears to have been built thereon, and operated in connection with the brewery. Of course, the uses to which property of this character is adapted would be an important consideration in fixing its value. Its location, also, in the center of the city, and in the midst of industries already in full operation, would be an important factor in the estimate of its value. After a careful examination of the evidence, we are not satisfied that the verdict of the jury awarded an amount which was excessive. The question of the value of the property was a question for the jury to determine. The jury saw the witnesses, and observed their manner of testifying. The credibility of the witnesses, their intelligence, and their means of knowledge were matters for the determination of the jury. There is no standard value for real estate. The value of real estate is a matter of estimate or opinion. Its value is a conclusion arrived at, as a general thing, by comparing the value of the property in question with sales of like property, made under circumstances calculated to produce competition among purchasers. In determining the full value of real estate, its advantages and disadvantages, and its adaptation and use, present and prospective, may be considered. In addition to this, the evidence in this case was supplemented by a personal view and examination of the premises by the jury. When such an examination was made, the Illinois river was at an unusually high stage, and a part of the property was under water. Under these circumstances the property must have been seen by the jury in its worst condition. Where there is a personal view by the jury of the premises sought to be condemned, the conclusions drawn by the jury from their view are in the nature of evidence. What the jury learn from their

examination of the premises may be considered by them in passing upon the testimony of the witnesses, and, where the evidence is conflicting, they may resort to the results of their examination in determining the weight to be given to the conflicting estimates of the various witnesses; so that their verdict, if supported by the testimony, will not be disturbed merely because it is contrary to what appears to be the preponderance of the evidence. Where the jury make a personal inspection of the property sought to be condemned, the court is not justified in reversing the judgment based upon such verdict, unless the damages awarded are so grossly excessive as to show that the verdict was the result of passion, or of undue influence, or of improper means. It is the settled doctrine of this court that the damage awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, and the jury viewed the premises. Inasmuch as it cannot be known how much weight the jury gave to their own conclusions as derived from a personal inspection of the premises, and how much weight they gave to the testimony of the witnesses, it cannot be said that the verdict is against the weight of the evidence. *Railroad Co. v. Von Horn*, 18 Ill. 257; *Railway Co. v. Moore*, 124 Ill. 329, 15 N. E. 764; *Railroad Co. v. Jacobs*, 110 Ill. 414; *Kiernan v. Railway Co.*, 123 Ill. 188, 14 N. E. 18; *Railroad Co. v. Mitchell*, 159 Ill. 406, 42 N. E. 973; *Railway Co. v. Lyons*, 159 Ill. 576, 43 N. E. 377; *Chicago, B. & Q. R. Co. v. City of Naperville*, 166 Ill. 87, 47 N. E. 734.

2. The errors assigned by the appellant relate to the giving of certain instructions by the court below on behalf of the appellees. These instructions are set forth in the statement preceding this opinion, and will not be here repeated in full. Objection is made to the second instruction given for appellees. The objection thus made is twofold:

In the first place, the instruction is said to be bad upon the alleged ground that it leaves out of consideration any qualification to the effect that the uses and purposes mentioned therein must be those which enter into and affect the market value of the property. Where land is condemned, its value may be estimated, not only with reference to the uses to which it is actually applied, but also those to which it is adapted; but this rule is subject to the qualification that the latter uses must be those which enter into and affect its market value. *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78. This instruction does not contravene the requirements of the rule thus laid down. The instruction makes direct reference to the subject of the adaptation and uses of the property, and then closes with the words, "so far as the same may have affected the market value on 14th September, 1896," the latter date being the date of filing the petition for condemnation. The words "the same," as here used, refer back to the words "adapta-

tion and uses." Thus the instruction brings the subject of the adaptation and uses of the property, as disclosed by the evidence, into direct connection with the question of market value. The jury were directed to consider only those uses of the property which entered into and affected its market value.

In the second place, the second instruction is objected to upon the alleged ground that it contains no qualifying words limiting the element of value embodied in "adaptation and uses" to present demands, or such as may reasonably be expected in the immediate future. In *Boom Co. v. Patterson*, 98 U. S. 403, the supreme court of the United States said: "The compensation to the owner is to be established by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." To the same effect is *Chicago, B. & Q. R. Co. v. City of Chicago*, supra. In *Railway Co. v. Moore*, supra, we said (page 334, 124 Ill., and page 766, 15 N. E.): "The compensation is to be estimated with reference to the uses for which the property is suitable in its then condition, having regard to its location, situation, and quality, and to the business wants in that locality, or such as might reasonably be expected in the near future." If such a defect as is thus charged against the second instruction exists therein, it is cured by the instruction numbered 6, which was given for the appellees, and which conforms to the rule laid down in the authorities last above quoted. Counsel for the appellant say that the sixth instruction does not cure the defect alleged to exist in the second; but the principle which they invoke, that an erroneous instruction is not cured by an instruction which is correct, does not here apply, for the reason that the two instructions are not inconsistent with each other. The sixth merely explains and qualifies the second, without laying down any rule which is contradictory to it. The giving of a correct instruction upon a point in a case will not obviate an error in an instruction on the other side, where they are entirely variant, because then there is nothing to inform the jury which instruction to follow, but they are left at liberty to follow either, unenlightened as to which one is the law. *Linen Co. v. Hough*, 91 Ill. 63. Such variance or inconsistency does not here exist. The jury are presumed, in making up their verdict, to consider the instructions as a whole, and thus to notice the qualification which one makes of another. *Railway Co. v. Ingraham*, 77 Ill. 309; *Cunningham v. Stein*, 109 Ill. 375. It was said, however, in *Railway Co. v. Moore*, supra, that, if certain lots were available for dock purposes, for which there was no immediate demand, their value, when improved by the building of docks and the profits that might be derived therefrom, or the use of the lots at some future time when

business or the wants of the community might make profitable the making of docks or slips on the property, would be merely conjectural and remote, forming no proper element in estimating the damages to be paid; but that, if the fact that the lots were located with a frontage on the river, at a place where they could, at some future time, when demanded, be made available as dock property, enhanced their then market value in their then condition of improvement, or want of improvement, that fact would be competent and proper to be shown and to be considered by the jury in estimating the damages; that it could make no difference that there might be no present demand for docks upon the property; and that if, in consequence of their supposed adaptation to such use, they had an increased market value above what they otherwise would have, such value would form a proper basis of recovery.

Objection is also made to the third instruction given for the appellees. This third instruction is the same as an instruction commented upon in the case of *Sanitary Dist. v. Loughran*, 160 Ill. 362, 43 N. E. 359. We there held that such objections as are now urged were not sufficient to authorize us to regard the giving of the instruction as error. The reasons for this holding are given in that case, and need not be here repeated.

Objection is also made to the ninth, first, and fourth instructions given for appellees. It is not claimed that the legal principles announced by these instructions are not correct. The title of a person owning land bounded by a stream of water extends to the middle or center thread of the stream. *Middleton v. Pritchard*, 3 Scam. 510; *Braxton v. Bressler*, 64 Ill. 488; *Griffin v. Johnson*, 161 Ill. 377, 44 N. E. 206. It is said that the instructions, although making an abstract statement of the law which is correct, had the effect of inducing the jury to believe that the appellant was obliged to pay for what it had no right to take, and did not take. The instruction is said to mean that by this condemnation proceeding the appellees, as owners of the property, are compelled to part with their right to the ice forming on the river in front of their lots, respectively, and with their right to cut, remove, and sell the same to others, together with the right to harvest it. We do not regard the instruction as having any such meaning. Counsel quote section 13 of article 2 of the constitution of 1870, which provides that the fee of land taken for railroad tracks without the consent of the owners thereof shall remain in such owners, subject to the use for which it is taken. The argument is that the appellant acquired only the right to use such portions of the property as are necessary for railroad uses, and that the owner retains the fee of the land and all riparian and other rights not inconsistent with the railroad company's use of such portions of the land as

it actually appropriates. Undoubtedly, the property right which a railroad company acquires by condemnation does not extend beyond the exigencies of the road. The railroad company is entitled to use the earth, gravel, and stone within the location of the property condemned by it for all railroad purposes, but is not entitled to sell any of such material. To allow it to sell would be to permit an abuse of its privilege to take land by compulsory process, inasmuch as a railroad company only takes land for public use, and not to sell again, either wholly or in part. Counsel for appellant then refer to a number of cases, which involve the question whether a railroad company has the right to appropriate material along its right of way, obtained by condemnation, for purposes other than construction or reasonable repairs under all the circumstances. These cases are to the effect that a railroad company cannot sell or otherwise dispose of the material along its right of way, where its rights are limited to an easement. *Aldrich v. Drury*, 8 R. I. 554; *Chapin v. Railroad Co.*, 39 N. H. 564; *Blake v. Rich*, 34 N. H. 282; *Lyon v. Gormley*, 53 Pa. St. 261; *Lance's Appeal*, 55 Pa. St. 16; *Preston v. Railway Co.*, 11 Iowa, 15; *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.* (N. J. Ch.) 15 Atl. 227; *Rumsey v. Railroad Co.* (N. Y. App.) 21 N. E. 1066. We have no doubt as to the correctness of the doctrine laid down in the cases thus referred to. As was said by the supreme court of Pennsylvania in *Lance's Appeal*, supra: "No one can pretend that a railroad company can build private houses and mills, and erect machinery, not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries, and dwellings might be made to line the sides of the road outside of the track,—a thing not to be thought of under the terms of the acquisition of the right of way."

But the cases referred to by counsel have no relation to the matters here under consideration. The ninth, first, and fourth instructions given for the appellees do not inform the jury that the appellant company, as the result of the present condemnation proceeding, will have the right to establish ice houses, and cut all the ice which may form in the river to the middle thread of the stream. On the contrary, the instruction informs the jury that the appellees, as owners of the property, have the exclusive right to the ice formed in the river in front of their lots to the middle thread of the stream, and that they may themselves cut or remove the same, or sell the same to others, with the exclusive right to harvest it. But in its petition for condemnation the appellant company states that it is necessary for it to acquire for railroad purposes the whole of the lots in controversy, in order to place thereon switches and side tracks for the operation of

its business. The appellant will thus be authorized to occupy and utilize for its own purposes all of the lots in question between its present right of way along Water street and the line of navigation in the Illinois river. It may fill the lots to this line, and cover their whole extent with tracks, and use them in its business, the same as though it owned the land in fee. It will not be pretended that, after the lots have been condemned by the railroad company, the former owners will be able to erect ice houses or place any improvements upon the unoccupied portions of the lots. The fact that the ice forming in front of the lots belongs to the owners, and that they have the right to harvest and sell it, was an element in the value of the property, and therefore proper to be considered by the jury in arriving at a verdict. The taking of the property for the purposes named in the petition will unquestionably deprive the owners of the possibility of making any use of the ice privileges connected with the lots. If the appellant establishes at this point railroad yards for switching and storage purposes, it will be necessary for it to fill in these lots towards the channel of the river beyond the present low-water mark. This will prevent the use of the property by appellees for the purpose of harvesting ice. Under such circumstances the lots will continue to have no value for the purposes of ice houses. The testimony shows that ice houses must be located upon the river bank, or very near thereto, in order to be economically operated. The privilege of erecting ice houses and cutting ice from the river gave a value to the lots, and, when appellant takes the lots, it takes them so far as they are valuable for such purposes; and appellees are entitled to be compensated for the loss of such value. The instructions here objected to present this matter to the jury in the light thus indicated, and we are not able to say that they are erroneous. Undoubtedly, by the condemnation, appellant will take only an easement in the property, and not the fee of the property. The bare legal right will exist in the appellees as before, but the exercise of that right will probably be an impossibility.

The eighth instruction given for the appellees is objected to upon the alleged ground that by the use of the words, "and give such fact the weight which, in your judgment, it is entitled to receive," the jury are allowed to determine from their own judgment, and not from the evidence, or from their inspection of the premises, the extent to which the possibility of enlargement and extension of the lots by the filling of the same will affect their market value. The instruction is not subject to the criticism thus made upon it. At the beginning of the instruction the jury are required to find from the evidence, that the lots in question, are susceptible of enlargement, etc. The requirement to find from the evidence, as thus made at the be-

ginning of the instruction, applies and extends to all the subsequent clauses of the instruction. We have held in a number of cases that it is not necessary to tell the jury in each sentence of an instruction that they must believe from the evidence. If the first part of an instruction contains a clause requiring them to make a finding from the evidence, a jury of intelligent men will not be misled by the omission of such a clause in the remaining portion of the instruction. *Miller v. Balthasser*, 78 Ill. 302; *Gizler v. Witzel*, 82 Ill. 322; *Belden v. Woodmansee*, 81 Ill. 25. The judgment of the circuit court of Peoria county is affirmed. Judgment affirmed.

(174 Ill. 390)

SCOTT v. BASSETT et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

DEEDS—EVIDENCE—SUFFICIENCY—CROSS-EXAMINATION.

1. Where one seeking to secure the admission of record of deeds testified that he did not have the originals, that they were not in his hands, and that with one exception they never had been, and that the deed excepted was not in his possession or control, and that none of the deeds were destroyed, so far as he knew, it is insufficient, under 1 Starr & C. Ann. St. (2d Ed.) p. 955, § 36, providing that where a party testifies that the original of a deed is lost, or not in the party's power to use on the trial, and that, to the best of his knowledge, it was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, the record of such deed is admissible.

2. Where a party to a cause testifies by virtue of 1 Starr & C. Ann. St. (2d Ed.) p. 955, § 36, permitting him, in order to lay a foundation for the introduction of the record or a certified copy of a deed in evidence, to either file an affidavit or take the stand and testify orally, the opposite party is entitled to cross-examine him when he testifies.

Appeal from circuit court, Mercer county; John J. Glenn, Judge.

Ejectment by Isaac N. Bassett and others against Robert Scott. From a judgment for plaintiffs, defendant appeals. Reversed.

This is an action of ejectment brought in the circuit court of Mercer county by the appellees against the appellant to recover the possession of 40 acres of land in that county. The suit was commenced on August 1, 1895. The plea was the general issue of not guilty. The case was tried before the court and a jury. The jury found the defendant guilty, and that the plaintiffs were the owners of the premises in fee simple, and fixed the damages at one cent. Motion for new trial was overruled, and judgment was rendered upon the verdict. The present appeal is prosecuted from such judgment. The appellees, who were the plaintiffs below, did not attempt to show themselves to be the owners of the paramount title, but introduced certain deeds as color of title, and sought to establish, by proof, possession and payment of taxes for seven years under such color of

title. Appellees on the trial below introduced the records of the following deeds, to wit: (1) The record of a deed dated November 8, 1867, executed by the master in chancery of Mercer county to one Randolph Keig, conveying the lands described in the declaration, and other lands, and recorded in the recorder's office of said county. (2) The record of a deed dated February 19, 1867, executed by Randolph Keig to James C. Bell, conveying the said premises, and recorded in the recorder's office of said county. (3) After proving that James C. Bell died intestate in April, 1876, a widower, and leaving three children, viz. Joseph S. Bell, Omer Bell, and James T. Bell, as his only heirs at law, the appellees then introduced the record of a deed of assignment dated January 7, 1881, executed by James T. Bell and Joseph S. Bell, composing the firm of J. C. Bell's Sons, conveying said property and other property to one T. H. Bras, under the laws of the state of Illinois concerning voluntary assignments. (4) The record of a deed executed by Thomas H. Bras, assignee of J. T. and J. S. Bell, to Ella R. Bell, who was the wife of Joseph S. Bell, dated June 8, 1881, conveying the premises in question. (5) The record of a deed executed by Omer H. Bell to Joseph S. Bell, dated September 7, 1886, conveying the same premises. (6) The record of a deed executed by Joseph S. Bell and Ella R. Bell to F. C. Grabel, dated September 10, 1886, and conveying the same premises. (7) The record of a deed executed by F. C. Grabel to Frank C. Taggart, dated September 27, 1886, and conveying said premises. (8) An original deed from Frank C. Taggart and wife to the appellees, dated July 17, 1895, and recorded on July 29, 1895, conveying the said premises. The defendant below (the appellant here), for the purpose of showing title in himself, introduced a tax deed dated June 4, 1890, made in pursuance of a tax sale had on June 6, 1887, for nonpayment of the taxes of 1886, conveying the premises in question, and, in connection with said tax deed, also introduced in evidence an affidavit, together with the tax-sale notice attached thereto, etc., presented to the county clerk for the purpose of obtaining said tax deed.

Scott & Cooke and James M. Brock, for appellant. Bassett & Bassett, pro se.

MAGRUDER, J. (after stating the facts). In this case we forbear to express any opinion upon the question whether or not the appellees proved possession and payment of taxes under claim and color of title for seven years. We also forbear to express any opinion as to the validity or invalidity of the tax deed introduced by the appellant upon the trial below. The appellees introduced only the records of the deeds relied upon by them as color, but did not introduce the originals of any of such deeds, except the last deed from Taggart to themselves. Before they were

entitled to introduce the records of the deeds, it was necessary to lay a foundation for the use of secondary evidence. Such a foundation was not here properly laid, so as to justify the introduction of the records instead of the original instruments. Section 36 of the act in regard to conveyances is as follows: "Whenever, upon the trial of any cause in law or equity in this state, any party to said cause, or his agent or attorney in his behalf, shall, orally in court, or by affidavit to be filed in said cause, testify and state under oath that the original of any deed, conveyance or other writing, of or concerning lands, tenements and hereditaments, which shall have been or may hereafter be acknowledged or proved according to any of the laws of this state, and which, by virtue of any of the laws of this state, shall be required or be entitled to be recorded, is lost, or not in the power of the party wishing to use it on the trial of any such cause, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, the record of such deed, conveyance or other writing, or a transcript of the record thereof, certified by the recorder in whose office the same may have been or may hereafter be recorded, may be read in evidence in any court in this state, with like effect as though the original of such deed, conveyance or other writing was produced and read in evidence." 1 Starr & C. Ann. St. (2d Ed.) p. 955. The testimony introduced in supposed compliance with this statute did not meet its requirements. One of the appellees took the stand as a witness, and his testimony is the only evidence upon this subject in the record. That testimony is as follows: "I have not the original deeds. They are not in the hands of the plaintiffs in this case, and never have been, and I have never seen them. I think I did have the original deed from the master in chancery to Keig. That's the only one I ever had. * * * The deed from the master in chancery is not in my possession. I have no control over it. None of the deeds mentioned are destroyed, so far as I know." Joseph S. Bell, in his testimony, states that after the death of his father, James C. Bell, his brother James took his father's papers to Burlington, Iowa, and he says he expects those papers could be found. Section 25 of the Revised Statutes of 1845, being chapter 24, concerning conveyances, provided as follows: "If it shall appear to the satisfaction of the court that the original deed so acknowledged or proved and recorded is lost, or not in the power of the party wishing to use it, a transcript of the record thereof certified by the recorder in whose office the same may be recorded, may be read in evidence in any court of this state without proof thereof." Rev. St. 1845, p. 108. It will be noticed that the language here is, "If it shall appear to the satisfaction

of the court." In the interpretation of this statute it was held that evidence should be introduced which would satisfy the mind of the court that the production of the deed was not in the party's power. In *Newsom v. Luster*, 13 Ill. 175, it was said that the grantee in a deed is presumed to have possession of it; but where a party made affidavit that he had not the original, did not know where it was, and that it was out of his power to produce it, connected with proof that the grantee, when called upon for the original, answered that he had not had it for a long time, and did not know where it was, such affidavit was held sufficient to entitle a certified copy to be read in evidence without calling the grantee as a witness. In *Dickinson v. Breeden*, 25 Ill. 186, it was held that, where the affidavit of the party disclosed a knowledge of the residence of the grantee in a lost deed, the deposition of such grantee should be taken to prove the existence of the original deed, and that it was lost, or so mislaid that it could not be found after diligent search, and that such grantee had in good faith made such search with a view of finding it. In that case the court remarked upon the danger of allowing the introduction of copies of deeds conveying valuable lands without fully establishing the fact of the existence at some time of an original, and of its subsequent loss or destruction, so that after diligent search it could not be found. Subsequently, in 1861, the legislature amended the act of 1845 by passing what is now section 36 of the conveyance act, as above quoted, with the exception that in the act of 1861 the following words did not occur, to wit: "And that to the best of his knowledge said original deed was not intentionally destroyed, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original." *Gross' St. Ill.* 1871, p. 90. The words last quoted appeared as a part of section 36 for the first time in 1872, as will appear by reference to the conveyance act approved March 29, 1872. 1 *Starr & C. Ann. St.* (2d Ed.) p. 955.

While the act of 1861 was in force this court made several decisions construing its terms. In *Prettyman v. Walston*, 34 Ill. 175, the affidavit, offered as preliminary proof for the purpose of laying a foundation for the introduction of the record copy of a deed stated that the affiant "had not in his possession, power, or control" the instrument declared on, and that affiant had not had since the commencement of the suit the original instrument, and had never seen it, and that it was not "within his possession, control, or power to produce on the trial." The testimony in the case at bar does not go as far as the affidavit in the *Prettyman* Case. That testimony merely states that the appellee giving it, to wit, Isaac N. Bassett, had no control over the deed from the master in chancery to Kelg, but the testimony does not show that the witness may not have

had control over the originals of the other deeds mentioned in the statement preceding this opinion. Those other deeds were as necessary as the deed originally introduced as color of title, in order to connect the plaintiffs below with such color of title. *Pedro v. Carriker*, 168 Ill. 570, 48 N. E. 102. In *Bowman v. Wettig*, 39 Ill. 416, the plaintiff made oath "that he was not in possession of the original; that he had searched for it unsuccessfully, and could not produce it." This oath was held to be sufficient as preliminary proof, because no objection was made to it by the defendant. In *Fisk v. Kissane*, 42 Ill. 88, the plaintiff testified as follows: "I have not, and never had, in my power or under my control, the original of the deed from Patrick Kissane to Robert Rae, * * * nor do I know where the same now is." In *Nixon v. Cobleigh*, 52 Ill. 387, the plaintiff swore, in order to lay the foundation for the introduction of the record of a deed, "that he did not have the deed in his possession; that he did not know where it was," and his testimony was held to be sufficient. In the case at bar the appellee Isaac N. Bassett does not state that the original deeds are not in the power of the appellees to produce the same, but that they are not in the hands of the appellees. A deed might not be in the manual possession of the plaintiff, and yet might be where the plaintiff could control its possession and its production. The statute is that the preliminary proof must show that the original was lost, or not in the power of the party wishing to use it, etc. The testimony here does not come within the purview of the testimony or affidavits in the cases above referred to. Originals of the deeds referred to by the witness Bassett may never have been in the hands of himself or his co-appellee, and they may never have seen such original deeds, and yet it may have been in their power to produce the same. In addition to this, section 36 of the act of 1872, which is now in force, requires that the plaintiff in his affidavit or testimony should state that, to the best of his knowledge, the original deed was not intentionally destroyed, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original. The evidence of the appellee Bassett does not meet this requirement. He merely says, "None of the deeds mentioned are destroyed, so far as I know." They may not have been destroyed, and yet in some manner they may have been disposed of for the purpose of introducing copies in place of the originals.

We are also of the opinion that the trial court erred in refusing to allow the defendant below to cross-examine the appellee Bassett when he was testifying upon this subject. Section 36 provides that any party to the cause, or his agent or attorney in his behalf, shall orally in court, or by affidavit to be filed in the cause, testify and state under oath that the original is lost, etc. To

lay a foundation for the introduction of the record or a certified copy of the deed, the party has his option either to file an affidavit, or to take the stand and testify orally in court. In the present case the appellee Bassett, instead of filing an affidavit as provided in section 36, was sworn as a witness, and gave his evidence orally in court. After he gave his evidence, the record shows that defendant's counsel said, "We desire to cross-examine this witness." The court replied, "I don't think you have a right to cross-examine." Defendant excepted to the ruling of the court forbidding him to cross-examine the witness. We think this ruling was erroneous. We know of no reason why a witness testifying upon the subject here indicated, in behalf of one party, is not subject to cross-examination by the opposite party. When one of the appellees voluntarily placed himself upon the witness stand, instead of filing an affidavit as he might have done, counsel for the defendant had a right to test the correctness and accuracy of his statements by a proper cross-examination. For the reasons above indicated the judgment of the circuit court is reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(174 Ill. 413)

CHICAGO & N. W. RY. CO. et al. v. SCOTT et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

GARNISHMENT—PARTIES.

A judgment creditor of two joint judgment debtors cannot maintain garnishment for a debt due to one of such debtors.

Appeal from appellate court, First district. Garnishment proceedings by Lucius B. Mantonya against the Chicago & Northwestern Railway Company and others, as debtors of Frank E. Scott and another. From a judgment of the appellate court (67 Ill. App. 92) affirming a judgment against the garnishees, they appeal. Reversed.

Charles B. Keeler, William McFaddon, and Arthur W. Pulver, for appellants. L. L. Loehr and Rich & Stone, for appellees.

MAGRUDER, J. This was an original garnishment proceeding instituted in the circuit court of Cook county by Lucius B. Mantonya. The affidavit of garnishment upon which the proceeding was founded alleged that Lucius B. Mantonya recovered a judgment against Frank E. Scott and Ward Stockton in the circuit court of Cook county at the February term, 1895, and that execution had been issued thereon, and returned by the sheriff, "No property found"; and that the appellant railroad companies were indebted to said Frank E. Scott and Ward Stockton, or had effects or estate in their hands belonging to them. Service of process was had upon said railroad companies, to wit, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St.

Paul Railway Company, and Lake Shore & Michigan Southern Railway Company; and interrogatories were filed, wherein said companies, the garnishees, were required to answer whether, at the date of the service of the writ or since, they were indebted to said Scott and Stockton, or either of them, or had in their possession, charge, or control any moneys or effects due to said Scott and Stockton, or either of them. The answers of the garnishees disclosed that each of the companies owed a certain amount to Frank E. Scott, but that neither of them owed anything to Scott and Stockton, or held any property belonging to them. Exceptions were filed to the answers, and overruled. Motions were made by the garnishees to quash the writ, and overruled. The plaintiff, Mantonya, moved for judgment against the garnishees upon their answers. Judgment was thereupon entered up against each one of the garnishees, the railroad companies, in favor of Frank E. Scott, for the use of L. B. Mantonya, for the respective sums admitted in the answers of the garnishees to be due to Frank E. Scott. On appeal to the appellate court the judgment was affirmed, but the appellate court granted a certificate of importance, and the garnishees bring the record here by appeal.

The material question here involved is whether a judgment creditor of two joint judgment debtors can maintain garnishment for a debt due to one of such debtors. This question was answered in the negative by this court in the recent case of Siegel v. Schueck, 167 Ill. 522, 47 N. E. 855. As the railroad companies who were garnished here were not indebted to Scott and Stockton, no judgment could be rendered in favor of Scott and Stockton for the use of Lucius B. Mantonya. The amount due from the garnishees, the railroad companies, was in excess of the amount of the judgment upon which the garnishee proceeding was predicated, and therefore judgment could only be rendered for the surplus in the name of Scott and Stockton, when, at the same time, no part of the surplus belonged to Scott and Stockton, but all of it belonged to Scott alone. The garnishees here not having been indebted to Scott and Stockton, but to Scott alone, the judgment entered below against the garnishees was unauthorized and erroneous, under the rules laid down in Siegel v. Schueck, supra. Accordingly, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(175 Ill. 328)

GUYER v. WARREN et ux.

(Supreme Court of Illinois. Oct. 24, 1898.)

OPTION CONTRACT—MUTUALITY—CONSIDERATION—SPECIFIC PERFORMANCE—NOTICE OF ACCEPTANCE OF OPTION—DESCRIPTION OF PROPERTY.

1. An option contract to sell a farm, signed only by the owner of the land, is enforceable

when accepted within the specified time, though previous to such acceptance a unilateral contract.

2. An expressed consideration of \$1 for an option to purchase an \$8,000 farm at a certain price per acre may be treated as an adequate consideration, so as to warrant a decree of specific performance, especially where the real consideration is shown to be \$50.

3. An option contract under seal must be regarded as based on sufficient consideration.

4. An option contract stipulated that: "On payment of \$50 on or before May 1 next [1895], the option shall be extended until May 1, 1896. On receipt of 7 days' notice in writing at any time before the expiration of this option," the owners of the property will execute warranty deeds. The \$50 was duly paid, and the notice of the election to purchase was given April 30, 1896. *Held*, that the notice of election was given in due time, as it was not necessary to give it seven days before the expiration of the option.

5. A description of the property in an option contract as "our farm in Le Claire's reserve, Rock Island county, and consisting of 83 and $\frac{1}{100}$ acres, more or less," is sufficient to support an action thereon for specific performance, within the rule that that is certain which can be made certain.

6. A clause in an option contract, providing for a waiver by the owners of all homestead rights "reserved to us by laws of the state of Illinois," is sufficient to show that the county named as the place where the land was located was in the state of Illinois.

Appeal from circuit court, Rock Island county; Hiram Bigelow, Judge.

Bill in equity by Edward H. Guyer against Edwin E. Warren and Rilla Warren. From a decree sustaining a demurrer and dismissing the appeal for want of equity, complainant appeals. Reversed.

This is a bill for specific performance, filed on June 5, 1896, by the appellant against the appellees, Edwin E. Warren and Rilla Warren. The contract whose performance the bill seeks to enforce was dated February 14, 1895, and signed by the appellees under their respective seals, and was by them acknowledged before a notary public on the day of its date. The contract is as follows: "In consideration of one dollar to us in hand paid by R. R. Bemis, the receipt and sufficiency whereof is hereby acknowledged, the undersigned do hereby grant to said Bemis, his representatives or assigns, the option of purchasing, on or before May 1 next, our farm in Le Claire's reserve, Rock Island county, and consisting of eighty-three and $\frac{1}{100}$ acres, more or less, for the price of \$100.00 per acre, payment whereof is to be made as follows, viz.: One-fourth cash in hand at the time of the delivery of deed, and the balance on or before five years after the date of said deed, and secured by mortgage on said property. Said mortgage shall contain a provision for partial releases upon the payment on the total indebtedness of \$200.00 per acre for each acre for which release is demanded. Said mortgage shall bear six per cent. interest. On payment of \$50.00 on or before May 1 next, the option shall be extended until May 1, A. D. 1896. On receipt of seven days' notice in writing, at any time before the expiration

of this option, of the election of the said Bemis to complete said purchase, the undersigned agree to execute a warranty deed for said land, and convey thereby a clear title for said land, free from all incumbrances except those above stated. In case this option is exercised while any crops stand on the land, the said crops shall be reserved to the undersigned, with the right to cultivate them, and occupy buildings till harvest; but the purchaser may elect to take the crop on any particular field, and pay therefor the value thereof, to be fixed by arbitration in the usual way, in which case the purchaser shall have immediate possession of said field. In the case of purchase, the money paid for the option shall be considered as a part of the cash purchase money. We do hereby further waive and release all right of homestead in said property reserved to us by laws of the state of Illinois, and we do agree that the deed above provided for shall contain the usual homestead waiver and release." On April 16, 1895, there was indorsed upon the contract a receipt, signed by the appellee Edwin E. Warren, in which he acknowledges the receipt from R. R. Bemis of the sum of \$50, "being the sum mentioned in the foregoing option contract for its extension to May 1, A. D. 1896." On May 5, 1895, there was indorsed upon the contract an instrument of assignment, signed by R. R. Bemis, under his seal, which is as follows: "In consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I hereby assign the within option contract to E. H. Guyer, his heirs, successors, or assigns, this 5th day of May, A. D. 1895." On April 30, 1896, Edward H. Guyer gave the appellees seven days' notice in writing to furnish abstract of title, and to execute a warranty deed for the premises described in the bill of complaint and in said contract. The bill describes, in substance, the contract, and the indorsements thereon, and the notice above set forth, and refers to them as exhibits thereto. The bill further represents that since April 30, 1896, and on May 5, 1896, Edward H. Guyer applied to the appellee Edwin E. Warren, and offered to pay him the sum of \$2,033, being the amount of the first installment due by the terms of the contract, and also offered to deliver to him the mortgage and notes therein provided for, which mortgage and notes were executed by A. L. Carson, the person named as grantee in the said notice. The bill also alleges that Edwin E. Warren refused to comply with the agreement; that on May 6, 1896, appellant applied to the appellees, and tendered to them the said sum of \$2,033, and said mortgage and notes, and offered to deliver the same upon the delivery of a good and sufficient warranty deed for said premises; and that the appellees refused to comply with the agreement on their part. The bill was subsequently amended by alleging that on April 30, 1896, appellant informed the appellees that he would take the property on that day, and

demand a deed, and offered to pay the money, and to make the notes and a mortgage, but that the appellees refused to make said deed, and repudiated the contract. The amendment to the bill further alleged that, in case the appellees were not satisfied with the mortgage and notes of said Carson, appellant offered to deliver to them a mortgage and notes executed by himself on receiving a sufficient warranty deed; but that said Edwin E. Warren refused said offer, on the ground that the time limited in said agreement had expired. The amendment further alleged that when said contract was entered into the land in question was used solely for farming purposes; that in the vicinity appellant and others had recently laid out East Moline, with a view of inducing manufacturing establishments to locate there, and founding a manufacturing community, to give employment to mechanics and laborers; that this necessitated the purchase of large tracts of land; that much of the land needed was secured by like agreements to that above specified; and that for said purposes manufacturing and other buildings have been erected at a cost of \$50,000; and that the premises described in the bill are a part of the land embraced within the bounds of said East Moline, and are needed for manufacturing lots. The bill, as originally filed and as subsequently amended, was demurred to. The demurrer was sustained, and the bill was dismissed for want of equity. The present appeal is prosecuted from such decree of dismissal.

W. R. Moore, for appellant. Ambrose P. McGuirk and John T. Kenworthy, for appellees.

MAGRUDER, J. (after stating the facts). The first objection made to the bill is that the contract which it seeks to specifically perform lacks mutuality of obligation. The contention is that by the terms of the contract there is no obligation on the part of Bemis, or his assignee, the appellant, to buy the land, and that Warren and his wife cannot compel Bemis or his assignee to purchase the land. In other words, it is claimed that Bemis did not purchase the land, or any interest therein, but merely secured the right to an option to purchase in the future. It was formerly held with some degree of strictness that the want of mutuality would render a contract for the sale of land incapable of specific enforcement. But the doctrine of the earlier cases upon this subject has been considerably modified. There are well-established exceptions to the doctrine of mutuality. It is not necessary here to specify all these exceptions. It is sufficient to say that under the later decisions of the courts optional agreements to convey without any corresponding obligation or covenant to purchase will be specifically enforced in equity, if made upon sufficient and valuable consideration. "A written agree-

ment to convey land at the option of the proposed vendee within a given time and at a certain price, if made upon a sufficient consideration, with full knowledge on the part of the person extending the option that he is bound and the other is not, is such a contract as, though lacking mutuality of remedy, will be enforced in equity at the instance of the proposed vendee. Where the party holding an option signifies his acceptance within the time limited, and upon the terms stated, the obligation of the contract becomes mutual, and capable of enforcement at the instance of either party." *Johnston v. Trippe*, 33 Fed. 530; *Watts v. Kellar*, 56 Fed. 1; *Waterman v. Waterman*, 27 Fed. 827; *Willard v. Tayloe*, 8 Wall. 557; *Brown v. Slee*, 103 U. S. 828; *Estes v. Furlong*, 59 Ill. 298; *Perkins v. Hadsell*, 50 Ill. 216; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73; *Smith's Appeal*, 69 Pa. St. 474; *Houghwout v. Bollaubin*, 18 N. J. Eq. 318; *Hawralty v. Warren*, Id. 124; *Schroeder v. Franklin*, 10 Nev. 355. In *Estes v. Furlong*, supra, it was held that a unilateral contract, as an option to purchase, will not be regarded as invalid; and it was there said: "A party who has not signed an agreement relating to land may enforce it against one who has signed it, although he could not himself have been compelled to execute it." A unilateral contract of this kind, in which one party confers an option upon the other, is in reality a conditional agreement; and upon the happening of the condition—that is to say, when the option given is declared, or the election provided for is made—the agreement becomes absolute, and the obligations of the parties become mutual. *Pom. Cont. § 169*. We are of the opinion that the case at bar does not come within the class of cases where lack of mutuality will prevent the enforcement of the contract. The rule requiring mutuality has no application to an option contract like the one here under consideration. There is here an optional sale upon a fair consideration. The consideration named in the written agreement is one dollar. As the parties agree to sell an option to buy for the sum of one dollar, there is no reason why such an express consideration is not an adequate one. *Waterman v. Waterman*, supra. Again, when the option was extended to May 1, 1896, \$50 was paid in cash to the appellees for such extension, and was received by the appellees. By the terms of the contract the \$50 became a part of the purchase money when the vendee in the contract exercised his election to buy. When the notice was given of such election on April 30, 1896, the instrument became eo instanti a contract of purchase, mutually binding on both parties. The contract was also definite in its terms as to the amount to be paid for the land. In case of an election to purchase under the option mentioned in the contract, Bemis or his assigns were to pay for the 83.31 acres \$100 per acre,—one-fourth

in cash upon the delivery of the deed, and the balance on or before five years after the date of the deed, such balance being secured by mortgage on the property. We see no reason why the sum of \$50 was not an ample consideration for the right of the option to purchase the farm at the agreed price per acre. "Where one holding a buyer's option makes his election to purchase, and tenders the amount agreed to according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property. * * * Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them." *Watts v. Kellar*, *supra*. The covenant in the present contract, giving an option to purchase, was in the nature of a continuing offer to sell. It was made under seal, and hence must be regarded as having been made upon a sufficient consideration. When the offer to sell was accepted by the appellant by his notice to the appellees, the contract of sale between the parties was completed; and the appellees were not at liberty to recede from it. Our conclusion is that the bill was not demurrable by reason of the optional feature of the contract sought to be enforced.

The next ground upon which the bill is claimed to be demurrable is based upon the following provision in the contract, to wit: "On receipt of seven days' notice in writing at any time before the expiration of this option of the election of said Bemis to complete said purchase, the undersigned agree to execute a warranty deed for said land, and convey thereby a clear title for said land, free from all incumbrances except those above stated." Counsel for appellees claim that the last of the seven days' notice should have expired on April 30, 1896, while counsel for appellant contend that the notice could be given at any time before the expiration of the year, or before the expiration of the last day of the year, which the agreement had to run. This was all day of May 1, 1896. It is conceded that the notice of the election to complete the purchase was not given until April 30, 1896. In interpreting contracts, courts will look to the entire instrument, and give a meaning to each clause of the contract. Such construction will be adopted, if possible, as will render the whole contract operative. *Hayes v. O'Brien*, *supra*. Here, Bemis, his representatives or assigns, had until May 1, 1895, to exercise their election as to the purchase of the property. When the sum of \$50 was paid, the option was extended until May 1, 1896. After the extension, Bemis and his representatives or assigns had the whole period up to May 1, 1896, for the exercise of the election provided for. The clause in question must be construed with reference to this provision of the contract, which extended the time for the full period, expiring on May 1, 1896. If the vendee in the con-

tract was obliged to give the notice of his election seven days before May 1, 1896, then he would not have the full period, expiring on May 1, 1896, for the exercise of his option, but would have a period seven days less than that provided for in the earlier part of the contract. Such a construction as this would make the separate provisions of the contract contradictory of each other. The provision in regard to the seven-days notice was evidently inserted for the benefit of the appellees, the vendors in the contract. Its object was to give the vendors notice of the buyer's intention, so that the vendors could have time to prepare the deed. The meaning of the disputed clause is that if, at any time before the option expired, Bemis should elect to complete the purchase, the appellees should have seven days after the receipt of a notice in writing of such election to prepare and execute a warranty deed. Whenever, before the expiration of the option, Bemis elected to complete the purchase of the premises, he was to give seven days' notice in writing to the appellees of his election, and such notice was to bear date on or before the 1st day of May, 1896; and before the expiration of said seven days appellees agreed to execute a warranty deed. It could not have been intended that Bemis or the appellant should give the notice provided for seven days before the expiration of the option. The seven-days notice had nothing to do with the option. The giving of a notice was the method of exercising the option, and the day of giving the notice was the time of exercising the option. A conveyance was necessary only in the event that the option to purchase was exercised by the grantee. And the time during which this option could be exercised was to last until May 1, 1896. To so construe the clause in question as to make the option extend only until April 23 or 24, 1896, would be directly contrary to the express language of the contract. We are therefore of the opinion that the bill was not demurrable upon the ground that it did not show the giving of the notice of election to purchase seven days before the expiration of the period during which the vendee in the contract had the right to exercise his option.

It is said that a specific performance of the contract should not be enforced, upon the alleged ground that there is no proper description of the premises. The premises are thus described in the contract: "Our farm in Le Claire's reserve, Rock Island county, and consisting of eighty-three and $\frac{31}{100}$ acres, more or less." A deed or other written contract is not void for uncertainty in a description of the land sold or conveyed, if, from the words employed, the description can be made certain by extraneous evidence of physical conditions, measurements, or monuments referred to in the deed. *Hayes v. O'Brien*, *supra*. The word "our" indicates that the farm referred to was a farm owned

by the vendors in the contract. The balance of the description showed that the farm was located in Le Claire's reserve in Rock Island county. It can be shown with certainty what lands the appellees owned within the reserve and county named. The maxim is, "Id certum est quod certum reddi potest." In *King v. Ruckman*, 20 N. J. Eq. 316, Ruckman, by written contract, agreed to sell King certain tracts of land in Rockland county, N. Y., describing them as all the lands he owned and held contracts for in the township of Harrington; and the court there held that the description was sufficiently certain. *Hamilton v. Harvey*, 121 Ill. 469, 13 N. E. 210. It is said, however, that the name of the state in which the land is located is not given in the description, and that for this reason the description is indefinite. The last clause of the contract provides for a waiver and release of "all right of homestead in said property reserved to us by laws of the state of Illinois." We think that this reference to the state of Illinois is a sufficient indication of the fact that Rock Island county, where the land was located, was in the state of Illinois. We do not regard the bill as subject to demurrer on account of any indefiniteness in the description of the premises referred to in the contract. The decree of the circuit court dismissing the bill is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views expressed herein. Reversed and remanded.

(174 Ill. 485)

SECOND NAT. BANK OF MONMOUTH v. GILBERT.

(Supreme Court of Illinois. Oct. 24, 1898.)

FRAUDULENT CONVEYANCES—EVIDENCE—CHATTEL MORTGAGES—POSSESSION—EXECUTION—SHERIFFS—LIABILITY.

1. The fact that a grantee of a bill of sale of hotel furniture is the father of one of the grantors, and that the manager of the hotel continued in possession after the bill was executed, does not conclusively show that the sale was fraudulent as against creditors.

2. A creditor accepting a mortgage from his debtor as a substitute for a bill of sale previously given to secure the debt, and under which he had possession, is estopped to assert, as against other creditors, that his possession continued under the mortgage, which recites that the mortgagor is possessed of the property.

3. A levy may be made on mortgaged chattels in the mortgagor's possession.

4. The burden is on an officer sued for refusing to levy on chattels in the debtor's possession to show that they were not subject to levy.

Appeal from appellate court, First district.

Action by the Second National Bank of Monmouth, Ill., against James H. Gilbert. From a judgment of the appellate court (70 Ill. App. 251) affirming a judgment for defendant, plaintiff appeals. Reversed.

This is an action on the case, brought by the appellant against the appellee, sheriff of

Cook county, charging that the appellee unlawfully refused to levy a writ of execution issued out of the office of the clerk of the superior court of Cook county in favor of appellant, and charging that the appellee, as such sheriff, made a false return of "No property found" upon such execution. The appellee filed the plea of the general issue. The cause was submitted to the court for trial, by agreement, without a jury, and a finding was made against the appellant and in favor of the appellee, and a judgment for costs was rendered against the appellant. To reverse this judgment an appeal was taken to the appellate court, where the judgment of the circuit court was affirmed. The present appeal is from such judgment of affirmance.

On November 9, 1893, the appellant bank recovered a judgment for \$2,460.85 in the superior court of Cook county against Frederick S. Eames. Execution was issued upon this judgment on November 10, 1893, and on the next day was delivered to the appellee, then sheriff of said county. This execution was returned "No property found, and no part satisfied," on February 8, 1894. The judgment has never been paid. In March or April, 1893, Frederick S. Eames and one William J. Tewksbury were interested, as partners, in the Savoy Hotel, in Chicago. They owned the furniture, fixtures, and other personal property in the hotel, which were worth about \$15,000, and operated the hotel as such through a manager, named Hanna. In October, 1893, shortly before the judgment above mentioned was rendered, Tewksbury and Eames executed a bill of sale of the personal property in the hotel to Henry F. Eames, the father of Frederick S. Eames, and the president of the Commercial National Bank of Chicago. When the execution aforesaid came to the hands of the sheriff, Hanna, manager of the hotel, claimed to be in possession thereof under Henry F. Eames, and, when the sheriff went to the hotel with the execution, Hanna made such claim to the sheriff, and exhibited to him the bill of sale. On December 5, 1893, while the execution was still in the hands of the sheriff, Frederick S. Eames and William J. Tewksbury executed a chattel mortgage to one Earl W. Spencer, as trustee, to secure an indebtedness claimed to exist from Tewksbury and Frederick S. Eames to Henry F. Eames. This chattel mortgage was acknowledged before a justice of the peace in Cook county by Tewksbury and Frederick S. Eames, and entered in his docket on December, 5, 1893, and was filed for record in the recorder's office of Cook county on December 20, 1893. The indebtedness to Henry F. Eames is stated to have been on account of moneys advanced by him to his son and Tewksbury for the purpose of buying furniture, and otherwise fixing up the hotel. The chattel mortgage recites that it is given to secure an indebtedness of \$12,000. It con-

tains the following provision, after describing the furniture and fixtures and other personal property in the hotel: "And the mortgagors herein, for themselves and their heirs, executors, and administrators, do hereby covenant to and with said mortgagee and his successors and assigns that said mortgagors are lawfully possessed of the said goods and chattels as of their own property; that the same are free from all incumbrances." Henry F. Eames obtained this chattel mortgage from his son and Tewksbury upon the recommendation of his attorney, and upon the statement of such attorney that "it would be safer if he took a chattel mortgage, and put it on record, than to keep Hanna in there under the bill of sale." The sheriff demanded of the appellant, the plaintiff in the judgment, an indemnifying bond, and refused to make a levy unless such bond was furnished. On January 9, 1894, an indemnifying bond was left with the sheriff, but the sheriff, not being satisfied with the bond, never made a levy. Prior thereto, to wit, on December 23, 1893, appellant's attorney paid a certain amount of fees to the sheriff, and stated to him that Frederick S. Eames, defendant in the execution, had property at the Savoy Hotel. The appellant (plaintiff below) submitted to the court, to be held as law, the following proposition, numbered 7: "If the defendant in the execution had an equitable interest in sufficient property in Cook county to satisfy the execution at and after the time the bond was delivered to the sheriff or his deputy, it was the duty of the sheriff to levy the same upon such equitable interest." The court refused to hold such proposition as law, but modified the same by adding thereto the following words: "But sheriff need not levy on the personal property which had a prior mortgage lien on it." After so modifying the proposition numbered 7, the court held it as the law in the decision of the case. The appellant also submitted to the court, to be held as the law governing the decision of the case, the following proposition, numbered 8: "Henry F. Eames, by causing to be executed the chattel mortgage dated on the 5th day of December, 1893, was estopped to deny that the property therein was on that date, and before the execution of said mortgage, the property of the mortgagors therein named." The court refused to hold this proposition, as asked, as the law, but modified the same by adding thereto the following words: "But he was not estopped to show that he had a prior mortgage on the same, which was evidenced by the bill of sale." After thus modifying the eighth proposition, the court held it to be the law in the decision of the case. Thereupon the court, of its own motion, held the following proposition, numbered 15, as the law governing the decision of the case, to wit: "The court holds that the bill of sale was, in fact, a mortgage, and that there

was a delivery under the bill of sale to Mr. Hanna for Henry F. Eames, which gave Henry F. Eames a lien prior to the execution in favor of the plaintiff."

Remy & Mann, for appellant. E. R. Bliss, for appellee.

MAGRUDER, J. (after stating the facts). The ground upon which the trial court found for the appellee in this case is stated in proposition No. 15, held by the court of its own motion to be the law in the decision of the case. That proposition, considered in connection with propositions numbered 7 and 8, as modified and held to be the law by the court below, was erroneous. It is not claimed that the bill of sale, which is alleged to have been executed by Tewksbury and Frederick S. Eames to Henry F. Eames in the latter part of October, 1893, was an absolute transfer of the title to the personal property in the hotel. Such bill of sale is conceded to have been merely a security for the indebtedness alleged to have existed in favor of Henry F. Eames from Tewksbury and Frederick S. Eames. Of course, the bill of sale, not having been acknowledged or recorded in accordance with the requirements of the chattel mortgage act, was not valid, as against creditors and third persons, unless the mortgagee, Henry F. Eames, was in possession of the property. It is claimed that Henry F. Eames was in possession through the manager of the hotel, Hanna. The proof shows conclusively that Hanna was manager of the hotel for Tewksbury and Frederick S. Eames before the execution of the bill of sale, and continued to act as manager thereafter. The proof also shows that Hanna made reports to Tewksbury and Frederick S. Eames, as well as to Henry F. Eames, after the execution of the bill of sale, and that he operated the hotel for the grantors in the bill of sale after its execution, as he had done theretofore. The grantee in the bill of sale was the father of Frederick S. Eames, the judgment debtor, and one of the grantors in the bill of sale. When the known and previously recognized agent of an alleged vendor remains in possession of personal property, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. The change in the character of the possession should be indicated by such outward, open, actual, and visible signs as can be seen and known to the public, or persons dealing with the property. *Martin v. Duncan*, 156 Ill. 274, 41 N. E. 43; *Brunswick v. McClay*, 7 Neb. 137; *Doyle v. Stevens*, 4 Mich. 87; *Porter v. Parmley*, 52 N. Y. 185. Where parties to such a transfer are near relations, clearer and more convincing proof is required of the good faith of the transaction than when they are strangers. *Martin v. Duncan*, *supra*. Notwithstanding the fact that the same

manager who had operated the hotel for the grantors in the bill of sale still continued to manage it after the execution of the bill of sale, and notwithstanding the relationship which existed between one of the grantors in the bill of sale and the grantee, the trial court found that there was an actual delivery under the bill of sale to Hanna for Henry F. Eames. We would not be disposed to disturb this finding of fact by the trial court, if the propositions held as law were correct. The apparent want of change in the character of the possession after the execution of the bill of sale, and the near relationship existing between one of the grantors therein and the grantee, are strong circumstances tending to throw suspicion upon the bona fides of the transfer. Still, the force of these circumstances may be overcome, when the proof is sufficient to show good faith and an actual change of possession. It may be assumed, therefore, that the finding of the trial court as to a change of the possession was justified by the evidence. If there was an actual and bona fide change of possession, so that, after the execution of the bill of sale, Henry F. Eames was in the possession of the property in the hotel, then there is presented the case of a mortgagee of personal property, who is in actual possession of the same. Where the possession of personal property is transferred from the mortgagor in a chattel mortgage to the mortgagee therein before the rights of creditors actually intervene, the mortgagee will hold the property, and a levy cannot be made thereon. *Martin v. Duncan*, supra; *Read v. Wilson*, 22 Ill. 376; *Brown v. Riley*, Id. 46; *Frank v. Miner*, 50 Ill. 444. So long as Eames was in possession of the property as mortgagee under the bill of sale, the appellant could not insist upon a levy being made by the sheriff under the execution issued upon its judgment. While, therefore, the bill of sale was in force, and the possession of the grantee therein continued under it, the statement in proposition No. 15, as held by the court, was correct. But the proof shows that on December 5, 1893, while the execution of appellant was yet alive, the grantee in the bill of sale, who was, in fact, a mere mortgagee, accepted from Frederick S. Eames and his partner, Tewksbury, a chattel mortgage upon the property in the hotel. This chattel mortgage was duly acknowledged, and entered upon the docket of the justice of the peace who took the acknowledgment, and was recorded in the recorder's office on December 20, 1893. After this day, to wit, on December 23, 1893, the attorney of the appellant stated to the sheriff that the judgment debtor, Frederick S. Eames, owned property in the hotel subject to levy. We are of the opinion that it was then the duty of the sheriff to levy upon the property subject to the chattel mortgage. Although property embraced in a chattel mortgage cannot be levied upon while the mortgagee is in possession, yet it can be levied

upon where the mortgagor is in possession, and the mortgage given by him is executed in accordance with the statute. Where a mortgagee of chattels is in possession, after condition broken, before the rights of creditors have attached, his title to the chattels becomes absolute at law. *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636. But here the mortgagee, Henry F. Eames, changed his attitude and possession. The mortgage accepted by him, which was executed on December 5, 1893, contained a statement that the mortgagors were in possession of the property, and that they were lawfully possessed thereof "as of their own property." After accepting such a mortgage, Henry F. Eames was estopped from denying the truth of the statements therein contained. It is well settled in this state that, when a chattel mortgage is properly acknowledged and recorded, a third person, who is a creditor of the mortgagor, may levy an attachment or execution upon the property in the possession of the mortgagor. *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902; *Beach v. Derby*, 19 Ill. 617; *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371; *Dunlap v. Epler*, 88 Ill. 82; *Gaar v. Hurd*, 92 Ill. 315; *Simmons v. Jenkins*, 76 Ill. 479; *Spaulding v. Mozler*, 57 Ill. 148.

It follows from what has been said that the modifications which the trial court made of propositions numbered 7 and 8 were erroneous under the circumstances of this case. The modification made of proposition numbered 7 asserts that the sheriff need not levy on personal property which had a prior mortgage on it. This was not a correct statement of the law as to the property in the hotel after the execution of the chattel mortgage on December 5, 1893, and its record on December 20, 1893. The sheriff could have levied and should have levied upon the property in the hotel, when requested to do so on December 23, 1893, because, at that date, Frederick S. Eames owned one-half of the furniture, subject to the chattel mortgage executed to his father. This was true, even if the turning over of the possession of the property by Henry F. Eames to his son and Tewksbury did not have the effect of letting in the lien of appellant's judgment ahead of the chattel mortgage executed upon December 5, 1893. *Blatchford v. Boyden*, 122 Ill. 657, 13 N. E. 801. The modification made by the court of proposition numbered 8, as originally asked, was erroneous, because the execution of the chattel mortgage upon December 5, 1893, superseded the bill of sale, and operated as an abandonment of the possession held thereunder by Henry F. Eames, if there had been any such possession. It makes no difference that the judgment debtor, Frederick S. Eames, did not come into the possession of the property, as owner, until after the mortgage of December 5, 1893, had been executed and recorded. This is true, because he obtained such possession as owner during

the life of the execution. The law is that the lien of a judgment in the hands of a proper officer attaches to all property which the debtor owns, or which he may acquire during the life of the execution. The lien attaches to property acquired by the judgment debtor at any time while the execution is in force. *Blatchford v. Boyden*, supra; 1 *Freem. Ex'ns*, § 197; *Shafner v. Gilmore*, 3 *Watts & S.* 438. A sheriff failing to levy on personal property in the possession of the judgment debtor can only discharge himself from liability by showing that the property was not subject to levy, and the burden of proof is upon the officer. Where he neglects to levy upon personal property in possession of the defendant, he must either show that the property was exempt from execution, or must establish such facts as justify his failure to make the levy. *Bonnell v. Bowman*, 53 *Ill.* 460; *People v. Palmer*, 46 *Ill.* 398; *Dunlap v. Berry*, 4 *Scam.* 327; 1 *Freem. Ex'ns*, §§ 107, 200; 2 *Freem. Ex'ns*, § 252.

There is much discussion in the briefs of counsel upon the questions whether the circumstances justified the sheriff in demanding an indemnifying bond as a condition precedent to making a levy, and whether, if he was justified in calling for such a bond, the bond presented to him was such a sufficient security as the statute requires. *Rev. St. c. 77, § 43*; 2 *Starr & C. Ann. St.* p. 1408. But we do not deem it necessary to discuss, or pass any opinion upon, these questions, as the court below based its finding in favor of the appellee solely upon the theory that, after the mortgage of December 5, 1893, was executed, the previous bill of sale was still in force, and the grantee therein was still in possession of the property as mortgagee. For the reasons above stated, the judgments of the appellate court and of the circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(175 *Ill.* 631)

PEORIA GRAPE-SUGAR CO. v. TURNEY
et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

SALES—WARRANTY—INSTRUCTIONS—PAYMENT—
REVIEW—FINDINGS OF FACT.

1. A finding by the appellate court on the question of fact whether there had been a breach of warranty is conclusive.

2. A finding by the appellate court on the question of fact whether goods delivered were the kind contracted for is conclusive.

3. Whether there has been an unreasonable delay in paying for goods purchased is for the jury.

4. Where a contract for the sale of goods does not express a warranty, none will be implied.

5. Where a charge that there was no warranty of the goods sold is modified by another charge that, if the sale was based on goods previously furnished, they should be equal in quality to those previously furnished, the instructions as to implied warranty are sufficient.

6. Where coal is purchased as "Reed City lump coal," there is no implied warranty as to quality.

Appeal from appellate court, Second district.

Action by Henry D. Turney and others against the Peoria Grape-Sugar Company to recover the purchase price of coal sold to defendant. From a judgment of the appellate court (70 *Ill. App.* 587) affirming a judgment for plaintiffs, the defendant appeals. Affirmed.

Page, Wead & Ross, for appellant. Runnells & Burry, for appellees.

PHILLIPS, J. The appellant purchased coal, under verbal contracts, from appellees, during the months of December, 1893, and January, 1894, which was supplied from the Reed City coal mines. On February 1, 1894, the parties entered into a written contract, by which appellees were to furnish appellant its entire requirement of coal, which was from four to eight cars per day, for one year from date, at a price fixed in the contract. Two kinds of coal were to be furnished, viz. Reed City lump coal, and mixed nut, pea, and slack made from the lump so taken. Payments were to be made for the coal on or before the 20th of the month next following shipment. Coal was supplied under both the verbal and written contracts, which was not paid for. Appellees then brought suit, and recovered judgment.

The defense interposed was made under the general issue and notice of set-off. The main defense was, as stated by appellant's counsel, that the coal delivered was sold under an express warranty as to its steam-producing qualities, of which there was a breach, with resultant damages, which, it is complained, were not allowed. This defense raised a question of fact which was passed on by the jury, affirmed by the appellate court, and is conclusive here.

But it is said that court misconceived the scope of appellant's contention with regard to the grounds relied on for reversal, which, it is said, were "that the coal delivered was not in fact Reed City lump coal, nor mixed nut, pea, and slack made therefrom, as provided in the contract, but was an inferior grade of coal," for which no proper allowance was made. Whether the coal delivered was in fact the kind of coal contracted for was a matter of fact, necessarily passed upon by the two courts that have considered this case, which is conclusive. The facts having been determined against appellant, made it liable to pay for the coal without unreasonable or vexatious delay. Whether there was such delay was properly submitted to the jury as a fact.

Complaint is also made of instructions 1 and 2, which told the jury there was no warranty of the coal to be furnished under the contract of February 1, 1894. The contract itself does not express a warranty of the coal, in which case none is implied. *Benj. Sales* (3d Ed.) § 621; *De Witt v. Berry*, 134 *U. S.* 306, 10 *Sup. Ct.* 536. But the court

did expressly modify those instructions by reference therein to another instruction, which in effect told the jury that, if the sale of February 1st was based on coal that had been furnished prior thereto, then it should be equal in character and grade to that before furnished, and, if it was not, then damages should be allowed, etc. This was all the appellant could fairly ask, and the reference to such modifying instruction was so plain that the jury could not have been misled.

It is also urged the words "Reed City lump coal," in the contract, raised an implied warranty of the quality of the coal, independently of the kind of coal before furnished. Those words designated a certain kind of coal known in commercial trade, and with which appellant was familiar, as it had used it prior thereto. Therefore, it having contracted for that kind of coal, if it received what it had contracted for, there was no implied warranty. The common law is tersely stated in the English "Sale of Goods Act," under rule 14, "that, in the case of a contract for the sale of a specific article under its patent or other trade-name, there is no implied contract as to its fitness for any particular purpose," for the reason, as stated in the authorities, that "an undertaking as to fitness is not implied where the buyer gets what he bargained for." 1 Pars. Cont. (7th Ed.) 586, 587; Gossler v. Refinery, 103 Mass. 331; Iron Co. v. Groves, 68 Pa. St. 149; Mason v. Chappell, 15 Grat. 572; Benj. Sales, rule 18, p. 47, which contains the English "Sale of Goods Act," the same being declaratory of the common law.

The criticism of instruction No. 1, that it ignored the obligation of appellees to furnish "lump coal," is hypercritical. The contract called for Reed City coal of two different kinds,—lump, and mixed nut, pea, and slack made from lump taken by appellant. The instruction necessarily covered both kinds of coal mentioned in the contract, and not one to the exclusion of the other.

The criticism of the second instruction, that it assumed the coal mentioned in the invoice was mined at Reed City, is not sound. It left the fact to be found by the jury that such coal was mined at Reed City. The instruction might have been differently arranged, but that is the necessary purport of the language used.

There are some other objections urged as reasons for the reversal of the judgment, but they are not deemed to be well taken. The judgment is affirmed. Judgment affirmed.

(175 Ill. 267)

PAYSON v. PEOPLE ex rel. PARSONS,
Treasurer, et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

DRAINAGE DISTRICTS — ORGANIZATION — ASSESSMENTS — JURISDICTION — COMPENSATION.

1. On application for judgment on a delinquent special assessment of a drainage district

against land of a nonresident, any power to make the assessment being derived from a proceeding to organize the district under a statute requiring mailing of notices to nonresident owners (Drainage Act, § 3), it may be shown that the owner of the land was a nonresident, and received no notice, and that, therefore, the court had no jurisdiction to include the land in the district, or confirm the assessments.

2. The fact that a nonresident landowner received no notice of proceeding to organize drainage district, as required by Drainage Act § 3, may be shown by the fact that his name did not appear in the affidavit accompanying it, and that the certificate of the clerk as mailing notices showed that he sent notices only to those whose names there appeared.

3. Under Drainage Act, § 5, providing that if the court shall find that the petition for organization of a district has not been signed a majority of the landowners, it shall dismiss the petition, but that, if it shall find that has been so signed, it shall so find, and, if shall appear to it that the drain is necessary, shall so find, and appoint commissioners, such facts must be proved and entered of record give the court jurisdiction to appoint the commissioners.

4. Though the section of the constitution authorizing construction of drains across the land of others is silent on the subject of compensation, it is required in case of drainage district by Const. art. 2, § 13, prohibiting the taking private property for public use without just compensation.

Appeal from Livingston county court; Charles M. Barickman, Judge.

Application by J. B. Parsons, treasurer and ex officio collector of the county of Livingston, and the Oliver and Corn Grove drainage district, for judgment for a delinquent special assessment against lands of Lewis E. Payson. Objections of said Payson were overruled, and judgment entered against the land, from which he appeals. Reversed.

N. J. Pillsbury, for appellant. A. C. Norton, for appellees.

PHILLIPS, J. Notice of application for judgment against delinquent lands and town lots in Livingston county was duly published by appellee, the county collector, and appellant appeared and filed his objections to entering judgment against the E. ¼ of the S. W. ¼ of section 32, township 26, range 8 E., of the third P. M. It appears that a special assessment was levied on the above-described tract of land by the Oliver and Corn Grove drainage district, amounting to \$280, and judgment was sought for that amount, with \$17.27 interest and 71 cents costs, aggregating \$297.98. An attempt was made to organize a drainage district through lands in the petition described, which petition prayed for the construction of a continuous ditch through lands included within said district. This ditch crossed the land of appellant a distance of about 180 rods, taking for the purposes of the ditch about 4½ or 5 acres of land belonging to appellant. Appellant's agent made a contract for the sale of this land, subject to the approval of the appellant. The agent's authority only extended to making provisional contracts, to be passed upon by his principal. The contract of sale of this land was repudiated.

ed by appellant, and the proposed purchaser was notified of that fact within two or three weeks of the date of the contract. That was in June, 1895. Subsequently, it was proposed to organize this drainage district, and one of the landowners who was active in the preliminary steps for the formation of the district, and who made the affidavit required by the statute, giving the names of nonresident landowners in the proposed district, was notified of the ownership of this land by the appellant, who was well known by him to be a resident of the city of Washington, D. C., and yet no notice of the proceedings for the organization of the district was ever given or attempted to be given to appellant. On the levy of the special assessment to pay for this ditch so constructed through appellant's land, the publication of notice that this assessment was delinquent was made, and also notice of sale. Appellant's objections set up the fact of his ownership, and knowledge thereof by the petitioners; the absence of notice to him, as required by the statute; that no notice was given him, or attempted to be given, of the appointment of commissioners to assess benefits, nor when they would apply to the court for the confirmation of their report; that there was no finding by the court of jurisdictional facts necessary to be found before it was authorized to appoint commissioners; and that no damages were allowed or compensation made for lands actually taken for the ditch. These objections were overruled, and judgment was entered against the land for the amount of the special assessment, interest, and costs; and appellant prosecutes this appeal.

The county court, in establishing drainage districts, derives its jurisdiction from the statute alone, and no presumption arises to support its action in any given particular. Every essential fact necessary to such jurisdiction must appear affirmatively of record, as nothing shall be intended or presumed to be within the jurisdiction. *Haywood v. Collins*, 60 Ill. 328; *Firebaugh v. Hall*, 63 Ill. 81; *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, and 24 N. E. 674. In *People v. Seelye*, 146 Ill. 189, 32 N. E. 458, it was said (page 221, 146 Ill., and page 467, 32 N. E.): "If it [the court] has proceeded without jurisdiction, it is equally unimportant how technically correct and precisely certain in point of form the record may appear. Its judgment is void to every intent and for every purpose, and it must be so declared in every court in which it is presented." See, also, *Sheldon v. Newton*, 3 Ohio St. 494; 12 Am. & Eng. Enc. Law, 311; *Hernandez v. Drake*, 81 Ill. 34; *Munroe v. People*, 102 Ill. 406.

To obtain jurisdiction by means of publication, it must affirmatively appear that the statute has been strictly pursued, and its provisions complied with. In *McChesney v. People*, 145 Ill. 614, 34 N. E. 431, the application was for judgment for a delinquent special assessment for local improvements; and it was

held that the court had no jurisdiction to confirm the assessment, because the proof of the mailing, posting, and publication of the notices required by the statute was not made. The case of *McChesney v. People*, 148 Ill. 221, 35 N. E. 739, was an application by the county collector of Cook county for a judgment against the lands for a collection of taxes and special assessment. The appellants appeared in the county court, and objected to the rendition of judgment, on the ground that the court had no jurisdiction to render judgment of confirmation for the want of proper notice. On this application for judgment they were allowed to show that the notices appearing in the record were not legal, because two of the commissioners and a stranger had signed the notices, and not the three commissioners jointly. Section 27 of the act under which the assessment was made in that case required the commissioners to give notice of such assessment and the term of court at which a hearing would be had. The court said (page 225, 148 Ill., and page 741, 35 N. E.): "It is a general rule, and one well understood, that in a proceeding for the collection of taxes, where the owner may be deprived of his property, the requirements of the statute must be strictly followed. * * * The object of this requirement is to afford the owner whose land has been assessed an opportunity to appear and contest the validity and the justness of the assessment; and, unless the notice required by the statute has been given, the court in which the assessment roll has been filed has no jurisdiction to confirm the assessment. The landowner, when notified by the commissioners, as provided by the statute, is bound to appear and make his defense; and, if he fails, the judgment of confirmation will be conclusive on him; but he is under no obligation to pay any attention to a notice given by persons other than the commissioners who have been appointed to make the assessment." In *Schertz v. People*, 105 Ill. 27, it was held that, on an application for judgment for a delinquent special assessment, the record of the entire proceedings, including the judgment of confirmation, was before the court; and, if it appeared that those proceedings were so defective as not to authorize the court to act, then the objections could be made as well on application for judgment as at any other time, on the ground that, when the court acts without jurisdiction, its judgments and orders are void, and can be attacked at any time before any court. To the same effect are *Fortman v. Ruggles*, 58 Ill. 207, and *Senichka v. Lowe*, 74 Ill. 274.

It is insisted that, if appellant has any remedy against the collection of this assessment, he is not now in the proper forum, as this is a collateral proceeding. The appellant, not being named as a party to the proceedings, and receiving no notice thereof from the commencement thereof until after the assessment was made and filed in the county court, is not concluded by the judgment of confirma-

tion or any order of the court in reference to said drainage district. *Robeson v. People* (Ill. Sup.) 43 N. E. 619; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *Clark v. People*, 146 Ill. 348, 35 N. E. 60; *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, and 24 N. E. 674; *Railway Co. v. Brown*, 136 Ill. 322, 26 N. E. 501. In this last case it was held essential to the jurisdiction of the court to enter judgment of confirmation that it obtained jurisdiction of the person of the landowner by proper notice; otherwise, if he did not appear, the judgment of confirmation would not be binding upon him, and he could show the want of jurisdiction upon the application for judgment. To the same effect are the other cases cited.

There being no presumption of jurisdiction, in the county court, of appellant, he not being named as a party or landowner, and it being shown by negation that he received no notice of the proceedings, and that none was attempted to be given, and the assessment depending upon the legality of the organization, no finding of the court of the existence of jurisdiction would be obligatory. It has never been held, where the record itself showed the evidence of jurisdiction upon which the court acted was insufficient, that the finding of the court in favor of its jurisdiction was conclusive. *Goudy v. Hall*, 30 Ill. 109; *Fox v. Turtle*, 55 Ill. 377; *Fortman v. Rugles*, *supra*. The drainage district seeking to levy a tax on appellant's land, and deriving its power to do so from a proceeding to include such land within the drainage district by means of the statute, and the statute requiring notice to be given appellant, and there being no presumption that notice was given, appellant may contest the question as to whether the court had jurisdiction over him to include his lands within the limits of the district, and make it liable for this special assessment. *Schertz v. People*, *supra*; *Kilmer v. People*, 106 Ill. 529; *Cass v. People* (Ill. Sup.) 46 N. E. 729.

It is insisted by appellee that this is a collateral proceeding, and appellant cannot contest the validity of the judgment confirming the assessment except in a direct proceeding in the nature of quo warranto; and *Osborn v. People*, 103 Ill. 224; *Blake v. People*, 109 Ill. 504; *Keigwin v. Commissioners*, 115 Ill. 347, 5 N. E. 575; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 248; *Bodman v. Drainage Dist.*, 132 Ill. 430, 24 N. E. 630; and *People v. Jones*, 137 Ill. 35, 27 N. E. 294,—are cited as sustaining this contention. That the existence of a de facto corporation and the authority of its acting officers can only be questioned by a proceeding by quo warranto, and that all objections which could have been urged at the time of the confirmation of the assessment roll, and which were not then urged, must be considered as waived, and cannot be urged for the first time on application for sale of lands for a delinquent assessment, as held in *Blake v. People*, *supra*, is a well-recognized

principle. One who is not served with notice in any manner, and who does not enter his appearance, and on whom there is no attempt at service, cannot be held to have waived any right. All the cases above cited as sustaining appellee's contention are distinguishable from this case. The statute required that notice should be given the plaintiff before a right existed to levy the special assessment against his land. Only after due notice to him, as required by the statute, can his land be brought into the district, and made subject to the special assessment. To hold that a landowner may be subjected to such an assessment without any notice given or attempted, and without an appearance, would be against every principle of justice and right. The right to levy a tax by which one may be deprived of his property exists by virtue of the statute alone, which must be strictly followed. Appellant's denial of the right to levy this tax is not a denial of the existence of a de facto corporation, but is a denial of the right to subject his land to the payment of any tax levied as a special assessment without notice to him, as the landowner, of the organization of the district; and hence is an attack on the jurisdiction of the court to confirm the assessment, and not a denial of the existence of the corporation.

Section 3 of the drainage act requires that, when a petition to organize a drainage district is filed, the clerk of the county court shall cause three weeks' notice of the presentation and filing of such petition to be given by publication, and by posting notices thereof at the door of the court house of the county, and in at least ten of the most public places within such proposed district; that, if any of the landowners of the district are non-residents of the county or counties in which the proposed district shall lie, the petition shall be accompanied by an affidavit giving the names and places of residence of such non-residents, if known, and, if unknown, stating that upon diligent inquiry their places of residence cannot be ascertained; and that the clerk shall send a copy of the notice aforesaid to each of the said non-residents within three days after the first publication of same. This provision of the statute should be followed in good faith, to the end that the non-resident landowners may have notice of the proceedings instituted against them. In the case at bar the petitioners knew appellant was interested in the land, for they were so notified. They knew he owned the land, and were told he still owned it by his tenant in possession. They knew his residence, but in the affidavit attached to the petition, for some reason unknown, they neglected or refused to insert his name as owner; and hence he had no notice as a matter of course, and, not being named as a party, nor as interested, has a right to question every act taken against his interest. The certificate of the clerk as to mailing notices shows he only sent notices to those whose names were in

the affidavit attached to the petition, and this excludes the idea that notice was sent to appellant. We hold that under the statute, and under the facts as they appear in this record, the court had no jurisdiction of the person of appellant, and he has a right in this proceeding to contest the fact of jurisdiction of the court in including his lands within the district.

Section 5 of the drainage act requires that, on the hearing of any petition, the contestants and petitioners may offer any competent evidence in regard thereto, and it shall be the duty of the court to hear and determine whether or not the said petition contains the signatures of the majority of the owners of lands within the said proposed district, who are of lawful age, and who represent one-third in area of the lands proposed to be included in the district. The statute, after stating what may be prima facie evidence of such fact, provides: "If the court, after hearing any and all competent evidence that may be offered before it for and against the said petition, shall find the same has not been signed by a majority of the land owners, as hereinbefore required, the said petition shall be dismissed at the cost of the petitioners; but if the court shall find that the petition has been signed by land owners constituting such majorities the court shall so find, and such finding shall be conclusive upon the land owners of such district that they have assented to and accepted the provisions of this act; and if it shall further appear to the court that the proposed drain or drains, ditch or ditches, levee or other works, is or are necessary or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes, the court shall so find, and appoint three competent persons as commissioners. * * * If the court shall find against the petitioners, the petition shall be dismissed at the cost of the petitioners." *Hurd's Rev. St. 1889*, p. 540. The facts that must thus appear must be judicially found and entered of record. The right to appoint commissioners is dependent on the facts so found and entered of record. When these facts are judicially found to exist, then, and not until then, is the court authorized to appoint commissioners. *Commissioners v. Griffin*, 134 Ill. 330, 25 N. E. 995. The order and judgment of the court did not find these jurisdictional facts, the same being as follows: "And now, on this day, come the said petitioners, and make proof of the day of publication, posting, and mailing of notices, as required by law. It is therefore considered and ordered by the court that Michael Truhill, W. P. Goemble, and S. S. Hitch be, and they are hereby, appointed commissioners for said drainage district." This was not a sufficient finding to authorize the appointment of commissioners.

No notice was given appellant of the con-

firmation of the report of the commissioners. After the filing of the commissioners' report, a jury was ordered to be impaneled to assess damage and benefits, and no compensation was allowed appellant for land actually taken for the ditch. The contention of appellee is that, in drainage assessments, benefits may be set off against damages for land taken, and that a different rule exists with reference to drainage districts than with reference to condemnation proceedings in which private property is sought to be taken for public highways or railroads. That contention cannot be sustained. In *Chronie v. Pugh*, 136 Ill. 539, 27 N. E. 415, it was said (page 548, 136 Ill., and page 417, 27 N. E.): "If the construction of the statute in question adopted at the trial below were the only one of which it is susceptible, we might feel compelled to declare the statute unconstitutional, in that it provides for taking and appropriating private property by proceedings in invitum without making just compensation. Section 13 of article 2 of the constitution prohibits the taking or damaging of private property for public use without just compensation; and, under this and similar provisions of state constitutions, it has been uniformly held, in this and other states, that the power to authorize the taking of private property for private use, either with or without compensation, is impliedly prohibited. *Nesbitt v. Trumbo*, 39 Ill. 110; *Lewis, Em. Dom.* § 157, and authorities cited in note. It is true, the section of the constitution in relation to drainage authorizes the passage of laws permitting the owners of land to construct drains for agricultural, sanitary, or mining purposes across the lands of others, and is silent on the subject of compensation to the owners of the lands over which such drains are constructed; but we are not inclined to adopt the view that the framers of the constitution intended to authorize the taking of private property, even for the purpose of drainage, without making just compensation. If the construction of drains for the purposes mentioned is to be regarded as a public purpose, then the taking of private property for that purpose comes directly within the prohibition of section 13, art. 2. If, on the other hand, it is to be treated as a taking of private property for a mere private purpose, we are inclined to the view that, by analogy, it must be held to come under the same rule, so far as the duty to make compensation is concerned. If the taking of private property for public use, and to subserve the public welfare, can be authorized only upon making just compensation, we will not readily attribute to the framers of the constitution an intention to authorize the taking of private property for private use by proceedings in invitum, without making compensation to at least an equal extent." The above was a case where land was sought to be taken through which to construct a ditch to drain an adjoining tract.

Corporations existing for drainage purposes are public corporations, and, where land is sought to be taken for the purpose of a ditch, it is for a public purpose, and compensation must be made before land of an individual can be taken for such public use. *Elmore v. Commissioners*, 135 Ill. 269, 25 N. E. 1010; *Chicago & N. W. Ry. Co. v. Galt*, supra; *Chaplin v. Commissioners*, 129 Ill. 651, 22 N. E. 484.

The county court of Livingston county erred in overruling appellant's objections, and its judgment is reversed, and the cause is remanded. Reversed and remanded.

(175 Ill. 553)

LOEWENTHAL v. ELKINS.

(Supreme Court of Illinois. Oct. 24, 1898.)

BURNT RECORDS ACT—QUIETING TITLE—PLEADING—EVIDENCE—DECREE—ADVERSE POSSESSION.

1. A petition, ostensibly filed under the burnt records act, to set aside a title acquired since the fire, and to establish plaintiff's title to the land, is insufficient, where it fails to allege the objections to defendant's title.

2. On a petition to quiet title, under the burnt records act, the court cannot grant relief where there is no evidence of the destruction of the records by fire, or that the original deeds in petitioner's chain of title have been lost by fire without his fault.

3. A finding, on a petition to quiet title under the burnt records act, "that the records of the county of Cook were destroyed by the great fire of October 9, 1871, and the original deeds, which constitute, and are, as hereinafter set forth, the chain of title of this petitioner, having in such fire or otherwise been destroyed or lost, are inaccessible to this petitioner and the defendants herein," is insufficient on which to base a decree, since it is not a finding that the records or any of the deeds in petitioner's chain of title were destroyed by fire.

4. Payment of taxes for seven years and possession for two years immediately preceding the filing of the bill are insufficient to constitute possession of land, within the meaning of the seven-year limitation act (section 1).

Appeal from circuit court, Cook county; Elbride Hanecey, Judge.

Petition by Henry K. Elkins against Berthold Loewenthal. From a decree for petitioner, defendant appeals. Reversed.

Smith, Blair & Smith, for appellant. E. M. Winston, for appellee.

PHILLIPS, J. Appellee filed his petition in the circuit court of Cook county against appellant and others to restore the records of deeds in the chain of title of lots 1, 4, 18, and 19 in block 5 in the First division of the village of Riverside, in said county, and other lots (which records he alleges had been destroyed by fire), and to establish title to said lots in him. Appellant answered the petition as to the above-described lots; disputing the ownership of appellee, and claiming title in himself. Other defendants, to whom deeds of conveyance of said lots, or some part thereof, were alleged to appear of record, were defaulted, and there was a hearing of the issues between appellant and appellee as

to said lots. The court found for appellee, and entered a decree establishing the title in him. The amended petition averred that the Riverside Improvement Company became the owner in fee of the said premises under a continuous chain of title from the United States, and set out a list of conveyances down to the date of the Chicago fire, October 9, 1871, consisting of 28 deeds and 2 plats; that the records of said conveyances were consumed in said fire, and many of the original conveyances were destroyed and lost; that title passed to petitioner by a deed from the Riverside Improvement Company to the Chicago & Great Western Railroad Land Company, a trust deed from the latter company to Henry Seelye, trustee, and a trustee's deed from the latter to petitioner; that he and the said company had been in the continuous and actual possession of said lots from 1869 to the filing of the petition, in 1890; and that petitioner, while so in possession, had paid and discharged all taxes for more than seven years. The title claimed by appellant was by virtue of execution sales and sheriff's deeds under judgments against the Riverside Improvement Company. On this appeal the only parties to the controversy are appellant and appellee, who claim from a common source of title, and from the record it appears that their titles date subsequent to October 9, 1871. The petitioner avers the payment of taxes and assessments, and that about two years before the bringing of this suit he took possession of the lots, and has had open, notorious, and adverse possession. In the answer the appellant demurs also to the petition.

It is apparent this bill, while ostensibly filed under the burnt records act, is in reality filed to set aside the title of appellant acquired since the date above mentioned, and makes no sufficient case to set aside the title of appellant, under that act. *Gage v. McLaughlin*, 101 Ill. 155. Nowhere in this record is there any evidence of the destruction of records by fire, or that the original deeds in petitioner's chain of title have been lost by fire without petitioner's fault; and, in the absence of evidence of this character, the court cannot take judicial notice of the existence of the fire, or the destruction of records or deeds. Such destruction of records and deeds is jurisdictional, and must be alleged; and unless shown by proof, or admitted by the answer or by default,—which is not the case here,—the court is without jurisdiction to grant relief. *Gage v. Gentzel*, 144 Ill. 450, 33 N. E. 536; *Gage v. Thompson*, 161 Ill. 403, 43 N. E. 1062; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777; *Quinn v. Perkins*, 159 Ill. 572, 43 N. E. 759; *Llewellyn v. Dingee*, 165 Ill. 26, 45 N. E. 961; *Gage v. McLaughlin*, supra. The decree finds as facts that the records were destroyed by fire, and that the original deeds set forth in petitioner's chain of title have been lost, by fire or otherwise, without petitioner's fault. The recital of the

decree must be based on evidence to support it, and, in absence of evidence showing that fact, it cannot be sustained on this appeal. *Russell v. Connors*, 140 Ill. 660, 30 N. E. 606; *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756; *Moore v. Tierney*, 100 Ill. 207; *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189; *Goels v. Goels*, 157 Ill. 33, 41 N. E. 756; *Koeler v. Eaton*, 52 Ill. 319; *Kennedy v. Merriam*, 70 Ill. 228; *Daniels v. Heartrunft*, 57 Ill. 222. A finding of the decree is "that the records of the county of Cook were destroyed in the great fire of October 9, 1871, and the original deeds, which constitute, and are, as herein-after set forth; the chain of title of this petitioner, having in such fire or otherwise been destroyed or lost, are inaccessible to this petitioner and the defendants herein." This is not a finding that the records or any of the deeds in the petitioner's chain of title were destroyed by fire, and is not sufficient on which to base the decree. *Gage v. Thompson*, supra. In the absence of evidence, preserved by the certificate of evidence, or in the decree, showing the loss and destruction by fire of the records of the deeds in petitioner's chain of title, and the loss or destruction of the deeds themselves, there is no evidence to support the decree.

It is insisted by appellant that the allegations of the bill and the evidence do not correspond; the allegation being that the petitioner had been in possession of the premises and paid the taxes for more than seven consecutive years, while the evidence was that they had not been occupied for but two years. The court found by the decree that they had been vacant and unoccupied for more than seven years, during which time appellee had paid the taxes legally assessed thereon, having color of title thereto made in good faith. Payment of taxes alone does not constitute possession of land, within the meaning of the first section of the seven-year limitation act. *Johns v. McKibben*, 156 Ill. 71, 40 N. E. 449. The evidence being that up to within about two years of the time of the filing of this bill the lands were vacant and unoccupied, when appellee fenced the same, the allegation of the bill is not sustained by the evidence. The petitioner must make his allegation under one or the other section of the limitation act, and his evidence must sustain the allegation as made. While he may make both allegations, he must sustain one or the other by proof. In this case the allegation of the bill is not sustained by the proof. The judgment must be reversed, and the cause is remanded. Reversed and remanded.

(175 Ill. 376)

NEVITT et al. v. WOODBURN et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL TO SUPREME COURT—FREEHOLD INVOLVED
—CONVERSION.

1. An action against a trustee under a will, to require him to account for certain securities belonging to the trust fund, and to restore thereto the amount of wasted securities, does not involve a freehold, though the trustee held title to land under the foreclosure of a mortgage forming part of the trust fund, and the decree, which found that there had been a breach of trust, and removed him, ordered him to convey the land to his successor in trust; it appearing that he did not claim title to the land, except as trustee.

2. Land required by a will to be reduced to money is regarded as personal property.

3. Where it appeared on a motion to dismiss an appeal that merely personalty was involved in the suit, it will be dismissed, whether the appellees had an interest in the property involved, entitling them to maintain the bill, or not.

Appeal from circuit court, Whiteside county; J. G. Garver, Judge.

Bill by Charles H. Woodburn and others against Edward H. Nevitt and others. From a decree of the circuit court in favor of plaintiffs, defendants appeal. Appeal dismissed.

Jarvis Dinsmoor, for appellant E. H. Nevitt.
John Manahan, for appellees.

MAGRUDER, J. In this case a motion is made to dismiss the appeal for want of jurisdiction in this court. The appeal is taken directly from a decree entered by the circuit court, and it is claimed that no freehold is involved, and that, therefore, the appeal should have been taken to the appellate court. We are of the opinion that the bill filed in the court below was a bill filed against the trustee, and other parties acting for or with the trustee, for an accounting as to trust funds. The bill, being of the character thus indicated, involves no freehold, and the motion to dismiss must be allowed. The facts are somewhat complicated, but enough of them will be stated to explain the conclusion here reached.

On June 19, 1872, one George W. Woodburn died at Sterling, Ill., testate, leaving, him surviving, his widow, Phebe A. Woodburn, and an only child, James H. Woodburn, and two grandsons, George W. Woodburn, Jr., and Charles H. Woodburn; the latter being sons of the said James H. Woodburn. On April 6, 1890, said George W. Woodburn, Jr., died intestate, leaving, him surviving, his two children, May M. Woodburn and Beatrice L. Woodburn, who were respectively of the ages of 10 and 13 years at the time of filing the bill herein, and were great-grandchildren of the testator, George W. Woodburn, Sr. The will of George W. Woodburn, Sr., contained the following provision: "I hereby will, direct, and request, and by this my last will do place in the hands of my executor all my real estate, being the farm upon which I live, and do direct him to sell what may be necessary for the payment of my debts; also, to sell an amount sufficient to raise a fund sufficient to pay of interest to my beloved wife, Phebe Ann Woodburn, \$1,000.00 per year, which amount shall be for her support during her lifetime, and at her death this fund shall go to my legal heirs, in the order below men-

tioned; that is, to my son, James H. Woodburn, if living, for his use during his lifetime, at his death to go to his children, and at their death, if childless, to go to and be divided among the families of my brother William H. Woodburn, John M. Woodburn, and Jane E. Ege." The will also contained a provision, that the son, James H. Woodburn, might be a bidder at the sale to be made of the real estate to be sold for the purpose of raising the fund above mentioned, and that he should have the right to buy the real estate so to be sold by the executor for the purpose of creating the fund, and to secure the same by securities to be made to the executor. By the will, one Peter Ege, a nephew of the testator, was appointed executor, and qualified and took upon himself the duties of the trust. On March 13, 1873, Peter Ege, the executor and trustee, for the purpose of creating the fund provided for in the will sold the farm of the decedent at public auction, and it was struck off to James H. Woodburn for \$15,150. James H. Woodburn sold the homestead and $2\frac{1}{2}$ acres of ground to the widow, Phebe A. Woodburn, for \$2,180, to secure which she executed her notes and a mortgage upon the property so bought by her directly to the executor, Peter Ege. The executor accepted the notes and mortgage of the widow, so secured, for \$2,180, as the payment of so much from James H. Woodburn on his purchase, and as a portion of said principal fund. James H. Woodburn executed to the executor his two notes of \$2,000 each, secured by mortgage upon the north half of the farm sold, and known as the "north mortgage," and also his two notes of \$2,376.50 each, secured by mortgage on the south part of the farm, and known in the record as the "south mortgage." The balance of the purchase money of \$15,150, less said \$2,180, James H. Woodburn paid in cash. A certain sum of \$753 was paid by said James H. Woodburn, and credited upon one of the notes for \$2,000 each, leaving \$3,247 due upon said "north mortgage." Thereupon, Peter Ege, as trustee under the will, set aside the notes of James H. Woodburn, aggregating \$8,000, and the notes of the widow, aggregating \$2,180, being \$10,180 in all, together with the mortgages securing the same, to form the fund provided for by the will; the residue of the proceeds of the sale being applied to the payment of the decedent's debts, and the expenses of administration. Afterwards certain proceedings were had which resulted in the removal of the said Ege as trustee and executor. *Woodburn v. Woodburn*, 23 Ill. App. 289; *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. 58, and 16 N. E. 209; *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385. A certain note for \$1,100, given by one Peter Odenthal, and secured by mortgage, was also turned over by James H. Woodburn to the trustee as a part of the fund. Litigation arose between the widow and Peter Ege and James H. Woodburn, as will be seen by reference to the cases above

referred to. In the course of this litigation the securities were taken by the court out of the hands of Ege, and given to one Sanborn, who was appointed receiver. Afterwards, on April 6, 1883, the circuit court entered an order appointing the appellant Edward H. Nevitt as trustee of the said funds under the will. In 1883 Nevitt and the receiver brought suit to foreclose the "north mortgage" for \$3,247 and interest, and obtained title to the land under the foreclosure; and afterwards, in 1888, Nevitt sold the lands embraced in said mortgage at public auction for \$4,155. Subsequently Nevitt foreclosed the other mortgage above referred to, and, after decree of foreclosure was entered, James H. Woodburn adjusted said decree with Nevitt by giving a new note and mortgage on additional land, securing the same for the amount of principal and interest due on said "south mortgage." Shortly thereafter Nevitt foreclosed said new mortgage against James H. Woodburn, and sold a portion of the land mortgaged at the foreclosure sale for about \$1,500 in cash, and bid in the remainder of the mortgaged premises for \$6,945, the balance of the debt, interest, and costs.

The bill in the case at bar is filed by Charles H. Woodburn, son of James H. Woodburn, in his own right, and also as next friend of the minor children, May M. Woodburn and Beatrice L. Woodburn, against Edward H. Nevitt, James Dinsmoor, Jarvis Dinsmoor, James H. Woodburn, and Phebe A. Woodburn, claiming to be the owners of the principal fund created under the will of George W. Woodburn, deceased, and charging that said fund has been wasted and squandered by the trustee, Edward H. Nevitt, and his attorneys, James Dinsmoor and Jarvis Dinsmoor, and praying that they restore to said principal fund the amount of such depletion, and that an accounting be had of and concerning said trust fund, and for an injunction restraining the trustee and his attorneys from further wasting and squandering the fund. Default was entered against Phebe A. Woodburn. A plea and an answer were filed by Edward H. Nevitt. Answers were also filed by James and Jarvis Dinsmoor and by James H. Woodburn. A cross bill was filed by the said Nevitt, which was answered by Phebe A. Woodburn, and demurred to by Charles H. and James H. Woodburn. The court, on hearing of the demurrer, dismissed the cross bill. The decree of the court upon the original bill found that the appellees, Charles H., May M., and Beatrice L. Woodburn, were the owners of the principal of the trust fund created by the will, and that the same had been depleted and squandered by the defendants to the bill, and that the appellees were entitled to an accounting, and a restoration of the principal fund to its original amount. The cause was referred to a master in chancery, who made report, and therein found a certain amount due. A final decree was rendered

by the court, finding that the trustee, Nevitt, had failed to keep proper books of account; that said trustee had paid to the widow a sum in excess of said sum of \$2,180, which he should have retained and invested as a part of the principal fund; that he had unjustifiably paid to the firm of James & Jarvis Dinsmoor the sum of \$1,693.79, part of said trust fund. In its decree the court charged Nevitt with \$8,000, the principal of the James H. Woodburn notes, with \$166.93 received from Sanborn, the receiver, and with \$2,180 wrongfully paid over by him to the said Phebe A. Woodburn; the whole amounting to the sum of \$10,346.93. The decree allowed Nevitt credits to the amount of \$4,753, and left him indebted to the trust fund in the sum of \$5,593.93. The decree also removed Nevitt from the trusteeship, and required him to turn over to his successor the land representing the portion of the trust fund originally secured by the "south mortgage." By the decree it was ordered that complainants recover of Edward H. Nevitt \$5,593.93, and of James and Jarvis Dinsmoor \$1,693.79, and the sum of \$2,180 from said widow, etc.

It is evident from the above recital of the facts, and of the findings of the decree rendered by the court below, that no freehold is involved in this case. A freehold is involved, within the meaning of the statute, in cases wherein the necessary result of the judgment or the decree is that one party gains and the other loses a freehold estate, or where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves the decision of that issue. *Goodkind v. Bartlett*, 136 Ill. 18, 26 N. E. 387; *Sanford v. Kane*, 127 Ill. 591, 20 N. E. 810; *Malaer v. Hudgens*, 180 Ill. 225, 22 N. E. 855; *Ryan v. Sanford*, 133 Ill. 291, 24 N. E. 428. The title to land is in no way put in issue by the pleadings here. The primary object in the present suit is not the recovery of a freehold estate, nor is the decree one by which one of the parties gains and the other loses a freehold estate. *Zinc Co. v. City of LaSalle*, 117 Ill. 411, 2 N. E. 406, and 8 N. E. 81; *Railroad Co. v. Watson*, 105 Ill. 217. The trustee, Nevitt, and his attorneys had in their possession certain securities belonging to the trust fund, which they are alleged to have wasted and squandered. They are called upon to account for the amount so wasted and squandered, and to restore it to the trust fund. It is true that at a foreclosure sale against James H. Woodburn the trustee bid in certain property, and holds the title thereto. This property, however, he merely holds in trust; and as it is a substitute for the note and mortgage held by the trustee, which was foreclosed, the land so held by the trustee is regarded in equity as personalty or money in his hands.

Nevitt does not claim to be the owner of the land which he thus bid in at the foreclosure sale, but admits that he holds it in trust, and as a part of the trust fund named in the will. To be sure, he is removed from his trusteeship, and a new trustee is appointed by the decree; and he is ordered to convey the land, the title to which is in him, to his successor in trust. The decree, however, which thus orders him to convey the title, is not such an adjudication upon the title as deprives him of the title, and gives it to another person. The requirement that he convey the title held by him is the result, not of an adjudication upon the title itself, but is the result of the finding that he had not faithfully performed the duties of the trust. The order to convey the title is merely a part of the finding that there has been a breach of trust. It cannot be said that Nevitt loses a freehold estate, in any sense, by the decree ordering him to turn over the land to his successor.

Some question is made as to the ownership by the appellees of the principal of the trust fund. It is claimed on the part of the appellants that the appellees have no such interest in the principal of said trust fund as authorizes them to file this bill. In disposing of the present motion to dismiss, we do not deem it necessary to consider the will, as above quoted, with a view of determining the nature of the interests, if any, which the parties hereto have in said fund. The will provides that the farm shall be sold in order to raise a fund, which shall be for the support of the widow during her lifetime, etc. Where a will directs the executor or trustee to sell real estate for the purpose of creating a fund to be invested for the use of life tenants, the will is to be regarded as a devise of money or personalty, and not of land. *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467. A devise of real estate, to be converted into money and distributed among devisees, is admitted to be a devise of money, and not of land. Land required by law to be reduced to money is regarded as personal property. *Baker v. Copenbarger*, 15 Ill. 103; *Jennings v. Smith*, 29 Ill. 116. The principal fund here in controversy must therefore be regarded as personalty. Hence the question whether or not the present appellees are the owners of the fund makes no difference in the determination of the motion to dismiss, as the property is personal property, so that a freehold cannot be involved. A freehold has been defined to be "an estate in real property of inheritance, or for life, or the term by which it is held." *Gage v. Scales*, 100 Ill. 218; *Ducker v. Dry-Goods Co.*, 145 Ill. 653, 34 N. E. 562. Accordingly an order will be entered dismissing the appeal. Appeal dismissed.

(174 Ill. 439)

CHICAGO & N. P. R. CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—PAVING—ORDINANCES—VALIDITY—AMENDMENT.

1. An ordinance providing for the paving of a street to conform to the established grade of the street, "as shown by an ordinance fixing the grade of said street now on file in the office of the city clerk," is a sufficient description of the grade, under 1 Starr & C. Ann. St. (2d Ed.) p. 751, art. 9, § 19, providing that, whenever a local improvement is to be made, the ordinance shall specify the nature and description thereof "by reference to maps, plats, plans, profiles, or specifications thereof on file in the office of the proper clerk."

2. An ordinance provided for the paving of a street to conform to the established grade, "as shown by an ordinance fixing the grade of said street now on file in the office of the city clerk." At the time of the passage of the former ordinance, there was no ordinance fixing such grade. *Held*, that the defect could not be cured by an ordinance afterwards passed.

3. Acts of a city council fixing the grade of streets, being legislative in their character, must be in the form of ordinances, and not of mere resolutions or orders.

4. An order passed by a city council, by which it was "ordered that where a grade is established on streets" running in one direction, at intersections of streets running in another direction, the grade so established shall hold as to cross streets, which is not styled, "Be it ordained by the city council," as required for ordinances by City and Village Act, pt. 1, art. 5, § 2, and which was not passed by a majority of the members, nor the yeas or nays taken, and entered upon the journal, as required for ordinances by article 3, § 13, and which was not presented to the mayor for approval, as required for ordinances by article 3, § 18, is a mere resolution, and not sufficient to establish the grade of such cross streets.

5. City ordinances fixing the grade of streets cannot be enlarged so as to apply to other streets, by mere resolutions, but must be amended by an act of equal dignity with the ones sought to be amended.

Appeal from Cook county court; W. T. Hodson, Judge.

Application by the city of Chicago for the confirmation of a special assessment, to which objections were urged by the Chicago & Northern Pacific Railroad Company. From a judgment overruling the objections and confirming the assessment, the railroad company appeals. Reversed.

On March 15, 1897, the city of Chicago passed an ordinance providing for the curbing, filling, and paving of West Taylor street, in that city, from the west curb line of California avenue to the east curb line of Kedzie avenue, and that the cost of said improvement should be paid by special assessment. The usual proceedings were taken for the levying of the special assessment to pay for said improvement, and objections were urged by the appellant company to the legality of these proceedings. These objections were overruled by the county court, and the assessment was confirmed after verdict by a jury. The present appeal is prosecuted from such judgment of confirmation. West Taylor street runs east and west, and is intersected by

California avenue, Francisco street, Sacramento avenue, Albany avenue, and Kedzie avenue, which all run north and south; California avenue being the easternmost of such intersecting avenues, and Kedzie avenue being the westernmost thereof, and the three others above named being between California avenue on the east and Kedzie avenue on the west.

K. K. Knapp and Mark Breeden, Jr., for appellant. Charles S. Thornton, Corp. Counsel, John A. May, and Stuart G. Shepard, for appellee.

MAGRUDER, J. (after stating the facts). Section 1 of the ordinance providing for the improvement, by curbing, filling, and paving, of West Taylor street, between California avenue on the east and Kedzie avenue on the west, contains the following provision: "Said pavement to be laid to conform to the established grade of said West Taylor street between said points, as shown by an ordinance fixing the grade of said street now on file in the office of the city clerk." The provision above quoted is the only provision in said ordinance which in any way refers to or describes the grade of the portion of West Taylor street to be paved. It will be observed that the reference is to "an ordinance fixing the grade of said street, now on file in the office of the city clerk." Section 19 of article 9 of part 1 of the city and village act provides that, whenever a local improvement is to be made wholly or in part by special assessment, the city council in cities "shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement, either by setting forth the same in the ordinance itself, or by reference to maps, plats, plans, profiles or specifications thereof on file in the office of the proper clerk or both." 1 Starr & C. Ann. St. (2d Ed.) p. 751. The statute nowhere authorizes a reference to an ordinance as indicating the nature, character, locality, or description of the improvement. It specifically requires that the ordinance providing for the improvement shall either make such specification in the ordinance itself, or shall refer to maps, plats, plans, profiles, or specifications thereof on file in the office of the proper clerk, etc. In *City of Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169, we said that the grade of the street must be made to appear, in order to show what amount of excavation and filling respectively are required to be made in the construction of the improvement, and that "a reference to an ordinance, monument, instrument, or other fixed thing that locates and witnesses that grade will suffice." *Washington Ice Co. v. City of Chicago*, 147 Ill. 327, 35 N. E. 378; *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146. In the recent case of *Chicago & N. P. R. Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006,

where the ordinance for an improvement provided that the pavement was "to be laid to conform to the established grade of Ashland avenue, as shown by an ordinance establishing the grade of said street now on file in the office of the city clerk," reference was made to the case of *City of Carlinville v. McClure*, supra, and the statement made in the latter case, that a reference to an ordinance would suffice, was indorsed and approved of. These decisions, which thus justify a reference to an ordinance, in order to determine the grade of a street, proceed upon the theory that the ordinance referred to shall be as definite and certain in its description of the grade, as though reference was made to a map, plat, plan, profile, or specification. Upon the authority of the two cases of *City of Carlinville v. McClure* and *Chicago & N. P. R. Co. v. City of Chicago*, supra, the ordinance here must be regarded as sufficient upon the face of it in its description of the grade of the street.

Upon the trial, however, of the case, the appellant proved that no ordinance was ever passed by the city council of the city of Chicago fixing the grade of West Taylor street along the line of the proposed improvement. Whether it devolved upon the appellee, the city of Chicago, to prove, in the first place, the existence of the ordinance establishing the grade, as referred to in the ordinance providing for the improvement, or whether it was the duty of the appellant to show the absence of such ordinance, it is not necessary here to inquire. It is sufficient to say that the proof showing such absence was made by the appellant. To rebut this proof, appellee introduced in evidence an ordinance, passed by the city of Chicago on June 21, 1897, and approved June 24, 1897, by the mayor. This ordinance provided that the grade of West Taylor street, between Kedzie and California avenues, in Chicago, should be on certain lines; and it recited in its body that it was intended thereby to remove any ambiguity that might exist in the ordinance passed by the city council in January, 1897, being the same ordinance providing for the improvement, and heretofore designated as having been passed on March 15, 1897. The introduction of the ordinance of June 21, 1897, was objected to by the appellant, upon the ground that it was passed subsequently to the passage of the ordinance of January or March, 1897, providing for the improvement. This objection was valid, and should have been sustained. The ordinance providing for the improvement referred to the established grade of West Taylor street as shown by an ordinance fixing such grade then on file in the office of the city clerk; that is to say, on file in the office of the city clerk in January or March, 1897, when the ordinance providing for the pavement of the portion of West Taylor street above indicated was passed. The common council has no power to cure a defect in the original ordi-

nance by creating after its passage a street grade which did not exist at the time of its passage.

Counsel for the city also introduced in evidence three ordinances, the first of which fixed the grades of Kedzie avenue, Albany avenue, Sacramento avenue, and Francisco street at their intersections with West Taylor street, the second of which fixed the grade of certain streets east of California avenue and at their intersections with West Taylor street, and the third of which fixed the grade of California avenue at the intersection of certain streets north and south of West Taylor street. No one of the ordinances thus introduced fixed the grade of California avenue at its intersection with West Taylor street; and no one of said ordinances purported to fix the grade of West Taylor street at any point. In connection with the three ordinances above mentioned, the appellee introduced in evidence an order, passed by the city council on March 23, 1896, subsequently to the passage of the three ordinances last above named, by the terms of which it was "ordered, that where grade is established on streets running north and south, or at intersection of streets running east and west, or where grade is established on a street running east and west at intersection of streets running north and south, grade so established shall hold as to cross streets." The appellant objected to the introduction of the three ordinances last above named, and of the order introduced in connection with them. The objection was overruled, and exception was taken. We think that the objection should have been sustained.

The reference in the ordinance providing for the improvement is to "an ordinance fixing the grade of said street now on file in the office of the city clerk." The reference here is to an ordinance fixing the grade of West Taylor street. None of the ordinances introduced fixed the grade of West Taylor street. The ordinances introduced were three in number, and fixed the grades of other streets crossing West Taylor street or parallel with it. The reference also is to an ordinance, and not to an order. There is an essential difference between an ordinance passed by the common council, and an order of the common council, as will be hereafter shown. In *City of Carlinville v. McClure*, supra, the reference in the ordinance for the improvement as to the grade of the street was to a profile of the street on file in the office of the city clerk; and it was there held that the reference was sufficient, because the profile on file in the clerk's office so aided the ordinance as that the ordinance, when read in the light afforded by the profile, indicated the location of the grade of the street. The instrument, to which the reference is made, in order to ascertain the grade, whether it be an ordinance, or a profile, or a map, or a plan, or a plat, should be sufficient to locate the grade of the street. Unless the

grade of the street is accurately located, no intelligent and correct estimate of the cost of the improvement can be made. It is impracticable to pave the street stably without prior grading. *Horr & B. Mun. Ord. § 226*. In the case at bar, the contractor, seeking to ascertain the grade of West Taylor street between the avenues already mentioned, would not find in the city clerk's office any ordinance establishing such grade; and he could not be required to look among the ordinances of the city to find ordinances establishing grades of other streets than the one which his contract required him to pave; nor could he be required to search among the council proceedings to find some general order applicable to the grade of streets crossing, or parallel with, the street which he was required by his contract to pave.

The proof in the case showed that the order of March 23, 1896, was not styled in accordance with section 2 of article 5 of part 1 of the city and village act. Section 2 requires that the style of the ordinance in cities shall be, "Be it ordained by the city council of ——" The proof also shows that the order of March 23, 1896, was not passed by a majority of the members of the city council, as required by section 13 of article 3 of part 1 of the city and village act; also, that the yeas and nays were not taken upon its passage, as required by said section 13; also, that the yeas and nays were not duly entered upon the journal of the proceedings of the city council, as required by said section 13; also, that the same was not presented to the mayor for his approval, as required by section 18 of said article 3. *Barr v. Village of Auburn*, 89 Ill. 361; *Hackman v. Village of Staunton*, 42 Ill. App. 409; *Schofield v. Village of Hudson*, 56 Ill. App. 191. It is thus clearly shown that the order in question lacked the requirements which the statute makes necessary in order to constitute a valid ordinance. The order in question was nothing more than a mere resolution, and in no sense an ordinance. It is not claimed that the three ordinances, introduced for the purpose of showing the grades of streets intersecting with West Taylor street and parallel with it, would be competent, as showing the grade of West Taylor street between the points indicated, without the order of March 23, 1896, accompanying them and considered in connection with them. That order attempted to enlarge and amend the three ordinances referred to. But an ordinance cannot be amended, repealed, or suspended by a resolution. The act which amends, modifies, or repeals a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation, which are to have continuing force and

effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. It is true that, where the charter of a municipality is silent as to the mode in which the city council shall perform an act, the decision of the council may be evidenced by either a resolution, or an ordinance. But where the charter requires an act to be done by ordinance, or where such a requirement is implied, as it is here, by necessary inference, a resolution is not sufficient, but an ordinance is necessary. 17 Am. & Eng. Enc. Law, pp. 235, 236; *Horr & B. Mun. Ord. § 210*; 1 Dill. Mun. Corp. (4th Ed.) § 30, and notes; *City of San Antonio v. Micklejohn*, 89 Tex. 79, 33 S. W. 735. As an ordinance is required to establish a fixed rule for the conduct of the affairs of the city, it would seem that the grade of a street should be established by an ordinance; and such is the general practice in this and other states. *City of Bloomington v. Pollock*, supra; *City of Carlville v. McClure*, supra; *Washington Ice Co. v. City of Chicago*, supra; *Chicago & N. P. R. Co. v. City of Chicago*, supra; *State v. City of Bayonne*, 35 N. J. Law, 335; 1 Dill. Mun. Corp. (4th Ed.) § 307, and note; *Horr & B. Mun. Ord. § 226*; *Nazworthy v. City of Sullivan*, 55 Ill. App. 48; *Village of Crotty v. People*, 3 Ill. App. 465.

Paragraph 7 of section 1 of article 5 of part 1 of the city and village act enumerates, among the powers of city councils in cities, the power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets," etc. Paragraph 96 of said section 1 enumerates, among the powers of city councils of cities, the power "to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities," etc. Immediately following said paragraph 96 is section 2, which specifies what shall be the style of an ordinance in cities. By the paragraphs and sections thus referred to, it is made clear that the common council is required to pass such ordinances, rules, and regulations as are necessary to carry into effect the powers granted to the city, and that among these powers is that of grading the streets. Acts of the city which have for their object the carrying into effect of the charter powers thus granted are legislative in their character; and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of ordinances, and not of mere resolutions. 17 Am. & Eng. Enc. Law, p. 236, and cases referred to in notes. A resolution is a much less formal act than an ordinance. "Ordinances, rules, and regulations," as used in paragraph 96, above referred to, are identical in meaning. *Hunt v. City of Lambertville*, 45 N. J. Law, 282; *Kepner v. Com.*, 40 Pa. St. 124. It follows that the order of March 23, 1896, did not have the effect of establishing the grade of West Taylor street, because, viewed as an original

act of the city council, it was not an ordinance, and, viewed as an attempted enlargement of previous ordinances, it was not of equal dignity with the legislative acts which it attempted to qualify. City of Quincy v. Chicago, B. & Q. R. Co., 92 Ill. 21, is not inconsistent with the doctrine here announced; as in that case there was a conveyance of the street absolutely to the railway company, under the resolution mentioned in the case, and the city had recognized for over 20 years the resolution passed by it, which granted the right to the railroad company to lay its tracks in certain streets. There the resolution was held to be binding, because of the deed made under it, and the long possession held under it. No such state of facts, however, exists in the case at bar.

Our conclusion is that the county court erred in not sustaining the objections made by the appellant company to the introduction of the ordinance of June 21, 1897, and of the three ordinances, introduced in connection with, and precedent in time to, the order of March 23, 1896, and of the order itself. For the error in not sustaining the objections above indicated, the judgment entered by the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views here expressed. Reversed and remanded.

(174 Ill. 585)

GREENE v. BOARD OF TRADE OF THE CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

EXCHANGES—EXPULSION OF MEMBERS—BY-LAWS—VALIDITY—CONTRACTS OF CUSTOMERS.

1. Rule 4, § 15, of the Chicago Board of Trade, providing that when any member commits any grave offense, or act of dishonesty involving the association, the board of directors shall appoint a committee from their number to make a preliminary investigation as to whether charges should be preferred to the Board, is not unreasonable and against public policy.

2. Where a committee of the board of directors of the Chicago Board of Trade makes a preliminary investigation of charges against a member of the Board of Trade, to determine whether a trial of such charges shall be had, the member is not entitled to notice of such preliminary investigation.

3. The fact that charges against a member of the Chicago Board of Trade are preferred by a member of the board of directors which is to try the member upon such charge is no ground for enjoining such trial.

4. A rule of the Chicago Board of Trade that a member being tried before the board of directors for violation of the by-laws of the Board shall not be allowed to be represented by professional counsel is not unreasonable or against public policy.

5. The fact that a member of the Chicago Board of Trade by virtue of his membership has made contracts between customers does not prevent the Board from expelling such member for violation of its rules, as such contracts can be enforced by the customers in their own names.

6. Customers dealing with a member of the Chicago Board of Trade are conclusively pre-

sumed to have dealt with him with reference to the rules of the Board, which provide that members can be expelled for misconduct.

Appeal from appellate court, First district.

Bill for injunction by Harry M. Greene against the Board of Trade of the City of Chicago. Judgment for defendant was affirmed in the appellate court (63 Ill. App. 446), and plaintiff appeals. Affirmed.

Monroe & Thornton, for appellant. Green, Robbins & Honoré, for appellee.

PHILLIPS, J. Appellant filed his bill against appellee to enjoin it from trying him for a violation of its by-laws. The bill avers that the appellee is a public corporation owning property of the value of \$1,500,000, and is carried on for the pecuniary profit of its members; that appellant is a member in good standing, and is innocent of the charges made against him; that the 18 directors are the judges who must pass on the charges against appellant; that a committee of 3 of these directors was appointed, under a by-law, to investigate charges against appellant, and without his knowledge, and without notice to him, examined sworn witnesses, whose testimony was reported, and preferred charges against him for a violation of the rules of the Board. The bill then alleges there is no warrant in the by-laws for such committee proceeding in the way it did; that, if such course was to be pursued, he had a right to notice of such examination, and to be present and defend himself, and should be allowed the assistance of counsel; that a by-law deprived him of that right, and that such by-law was illegal and void; that appellant has pending contracts with clients and customers for the future delivery and purchase of grain amounting to \$75,000, upon which he received \$20,000 margins, and paid out to others \$10,000, and, if expelled, he cannot fulfill his contracts; that he was summoned to appear and stand trial on three days' notice, when he was sick and unable to attend, and, if expelled, the injury to him will be irreparable. The bill prayed for an injunction restraining the Board of Trade from trying or attempting to try him for dealing in differences on fluctuations in the market price of commodities without a bona fide purchase or sale of property for actual delivery, or from trying him for making or reporting false and fictitious purchases and sales, and from disciplining, suspending, or expelling him. Appellee filed an answer, which admits that it is a corporation. Avers that it is not organized for pecuniary profit, but is a voluntary association, and states its object substantially as alleged in the bill. Avers it was authorized by its charter to make rules, regulations, and by-laws for its government, and to admit to membership or expel therefrom such persons as it may see fit, in the manner prescribed by its rules, regulations, and by-laws, by which it is shown that the board of directors of appellee

consists of 18 members, 1 of whom is its president, and 2 are its vice presidents; that when any member shall violate any of the rules, regulations, or by-laws of the association, or when any member shall be guilty of making or reporting false or fictitious purchases or sales, he shall be censured, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed; that a majority of a quorum sitting at a regular or adjourned meeting of the board of directors shall be necessary to censure or suspend, and an affirmative vote of at least 12 members of the board of directors shall be necessary to expel; that all charges shall be in writing, and be signed by one or more members of the association, by business firms, one or more of whose members shall be members of the association, or by the chairman of the committee of the association; that it is made the duty of the board of directors to refer all charges made against a member, or any public report concerning an act of a member, charging him with an offense against its by-laws, to a committee of their own number, for a preliminary or informal investigation, who must inquire into the truth or falsity of such complaint or report, and after investigation, if they shall deem any member guilty of such offense, they shall so report to the board of directors, with specific charges; that, upon such a report being made, the member implicated is notified to appear before the board of directors for trial; that the rule does not prescribe what means the committee appointed to investigate shall take to determine the truth of the accusations against a member. Avers that these rules were in force at the time appellant became a member, and that he assented to the same. Denies all conspiracy or prejudging of the case. Admits the preferring of charges by the committee after they heard evidence, and the purposed trial. Admits the rule as set forth in the bill, that the right to professional counsel is denied. Affidavits were filed by appellee and appellant. The temporary injunction granted at the time of filing the bill was dissolved, and the bill dismissed, on a hearing upon bill, answer, and affidavits. The complainant excepted, and prosecuted an appeal to the appellate court for the First district, where the decree was affirmed, and this appeal is taken.

The appellant insists that the rule denying to him the right to have professional counsel is unreasonable and void; that the appointment of a committee to investigate and determine whether charges shall be preferred against him, from the members of the board of directors, who are to constitute the body to try him, would make his judges his prosecutors, who had prejudged his case, and therefore the rule is unreasonable, illegal, and void; that the procedure by the committee in hearing and reporting the evidence against him without notice and without his

being present was a violation of the rules of the board, and was an illegal and oppressive procedure. The Board of Trade of the City of Chicago maintains an exchange hall, upon the floors of which, between certain prescribed hours of each business day, the business of its members in buying and selling grain and provisions is transacted. The greater part of the products of the territory tributary to Chicago is dealt with on its floors, and to a great extent the prices of grain and provisions throughout the civilized world are there fixed and determined. It is a corporation organized under an act of the general assembly of this state, and has the power to enact rules and by-laws for its own government and the government of its members. When such rules are enacted by such an association or corporation, they must be conformed to by it in all matters relating to its members, with reference to their actions, and in disciplining them. One becoming a member of such a corporation or association, and subscribing to the by-laws, agrees to submit to its rules and regulations. *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Assurance Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Coles v. Insurance Co.*, 18 Iowa, 425. The by-laws to which such member agrees to submit are such as are authorized by the nature of the corporation and the laws of the country, and hence must not be contrary to the policy of the law, nor unreasonable. *Sayre v. Association*, 1 Duv. 143; 1 *Thomp. Corp.* §§ 1014, 1015; *People v. Throop*, 12 Wend. 183. The offense charged against appellant is one that is clearly in violation of the by-laws, and, although it is averred that the defendant is not guilty of the charge, that cannot affect the right of procedure. By section 15 of rule 4 of appellee it is provided that where any grave offense, or act of dishonesty involving the good name or dignity of the association, or any act of dishonesty, by complaint or public report concerning a member, shall come to the knowledge of the board of directors, they shall cause a preliminary investigation to be made by a committee, to determine whether charges shall be preferred. The appellant insists that such appointment of the committee, and its hearing testimony and investigating, without notice to him, are unreasonable, unjust, and a violation of his rights. The object and purpose of this rule were evidently to avoid the annoyance and harassment to members which would arise from hearing every charge that might be made against a member based on mere rumor, or by operators on the wrong side of the market who might be dealing through the member as their agent or commission man. A mere inquiry to determine whether mere complaints or rumors shall be investigated and tried before the board of directors on charges preferred against a member is in no sense a trial. Neither is it an unreasonable by-law, in contravention of public policy. It is not requisite that notice be

given of such inquiry. When charges are preferred against a member to be tried before the board of directors, the by-laws then require that he shall have notice before being placed on trial. No right given him under the by-laws of the corporation, to which he has assented, is infringed. The fact that the charges are preferred by a member of the board of directors which is to try the accused would not be cause for interference by a court of equity to prevent a trial. To assume in advance that such a board would not give a member a fair trial is to deny to such a body the reputation for justice and fair dealing which commercial and mercantile associations have always enjoyed. It is to assume that men will not deal fairly with one of themselves. Such presumption cannot be entertained. If the fact that charges were preferred by a member of a board of directors would prevent a hearing by them on charges, it would also apply in case the power of trial was lodged in the body of the members, as it frequently is. If the board of 18 directors would be disqualified from trying a member because one or two had prejudged his case, and a court of equity would on that ground interfere by injunction to prevent a trial, then one or two members of the board who might have prejudged the case favorably to the member to be tried could prevent a trial by announcing the fact that they had prejudged the case.

It is urged that a court of equity should interfere and enjoin a trial, under the rules of appellate, because one of its rules prevents appellant from being represented by professional counsel. That provision of the by-law is, "In investigations before the board of directors, or any committee of the association, no party shall be allowed to be represented by professional counsel." When it is considered that, as a rule, the body of the board of directors is composed of men not conversant with forms of procedure and technical rules of law, but who are organized into a corporation or association for business purposes, and the governing body before whom trials are to be had is circumscribed by no technical rules of law, and that the purpose is to investigate whether there has been a violation of the rules of that body,—rules with which they as well as the accused are familiar,—it will be seen the employment of professional counsel would not be calculated to expedite business or advance the interest of the accused, because the judges are unacquainted with technical rules of law. With such a body to try the accused under its own rules, subscribed to by the accused, the exclusion of professional counsel does not violate our sense of right, and is not against public policy or unreasonable. The manner of investigation to determine whether charges shall be preferred, the manner of trial, the body before whom the trial is to take place, and the exclusion of professional counsel, are all provided for by the by-laws, and

are methods of discipline. They infringe no rule of law, and are not unreasonable. They provide a tribunal and procedure voluntarily chosen to determine questions arising between the association and its members, according to rules to which the members assented on being admitted. As heretofore said, where such by-laws infringe no public policy or rule of law, and are not unreasonable, courts will never interfere to control their enforcement, but such corporations or associations will be left to enforce their rules and regulations in the manner they have adopted for their own government and methods of discipline. *Fisher v. Board*, 80 Ill. 85; *Baxter v. Board*, 83 Ill. 146; *Sturges v. Board*, 86 Ill. 441; *People v. Board*, 80 Ill. 134; *Pitcher v. Board*, 121 Ill. 412, 13 N. E. 187; *Ryan v. Cudahy*, 157 Ill. 108, 41 N. E. 760; *Board v. Nelson*, 162 Ill. 431, 44 N. E. 743.

It is insisted the Board of Trade, by holding out to the public that a broker is a member, encourages and invites the public to buy produce on its exchange through that member, and, when the public have acted on such invitation, by the expulsion of such member the Board would prevent the carrying out of contracts which customers of the expelled member have made in good faith, and such customers would be remediless. Contracts contemplating actual delivery can be enforced against the other parties thereto in the name of such customer, although the name of the principal with whom he has dealt is not disclosed by the broker at the time of making the contract. Such contracts could have been provided for by counter sales or purchases on the floor of the exchange within an hour. The existence of such contracts affords no ground for interference to prevent a trial under the rules of the Board of Trade. If it could be held it did, then a member could always have outstanding contracts, and effectually prevent being tried for a violation of the rules of the Board of Trade. Aside from this, customers of a member of the Board of Trade, dealing with him as such member, must be conclusively presumed to have dealt with him with reference to the rules of the Board, which provide that their broker could be suspended or expelled for misconduct. *Bailey v. Bensley*, 87 Ill. 556. To allow an injunction in cases of this character would result in transferring offenses against the rules of clubs, societies, churches, corporations, and associations of this character to courts of chancery for trial, where it was alleged the membership was of pecuniary value, and that the complaining member could not have a fair trial under the rules of the organization to which he belonged.

It was not error to dissolve the injunction and dismiss the bill. The judgment of the appellate court for the First district, affirming the decree of the superior court of Cook county, is affirmed. Judgment affirmed.

(174 Ill. 571)

BEATTIE v. NATIONAL BANK OF ILLINOIS.

(Supreme Court of Illinois. Oct. 24, 1898.)

BILLS AND NOTES—PAYMENT OF DRAFTS—FORGED INSTRUMENTS—IDENTITY OF NAMES.

1. A holder of a draft under a forged indorsement of the payee cannot compel the drawee to pay the same, since such holder, although he may have received the draft in good faith and for value, acquired no title thereto.

2. Where the name of the real payee and the name of a fraudulent possessor of a draft differ only as to a middle letter, whether or not there is forgery must be determined as in a case where the name of the real payee and the assumed payee are the same, since the law does not regard the middle initial as a part of a person's name.

3. Where a person, who is not the real payee, but has the same name as the real payee, indorses a draft, with the knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement is a forgery.

Appeal from appellate court, First district.

Action by C. Stuart Beattie against the National Bank of Illinois. From a judgment of the appellate court (69 Ill. App. 632) affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

This suit was originally begun before a justice of the peace, and taken by appeal to the circuit court of Cook county. In the circuit court the cause was submitted by agreement to be tried by the court without a jury. The finding of the court was against the appellant here, who was the plaintiff below, and in favor of the appellee here, who was the defendant below. Judgment was rendered upon the finding, which was for an amount less than \$1,000. An appeal was taken to the appellate court. The appellate court has affirmed the judgment of the circuit court, and granted a certificate of importance. There is no controversy as to the facts. The case was tried upon a stipulation as to the facts, which were substantially as follows: On September 15, 1891, one George P. Bent, of No. 223 Canal street, Chicago, sent for collection to the First National Bank of Council Bluffs, Iowa, a note for \$133.50, made by a man by the name of Max Bournicus. On September 28, 1891, the First National Bank of Council Bluffs collected the note, and on the same day made its draft for \$133.25 on the National Bank of Chicago, Illinois, to the order of George A. Bent, Chicago. The draft was made payable to the order of George A. Bent, instead of George P. Bent, by mistake. It was mailed to George A. Bent, Chicago, Ill. George P. Bent was intended to be made the payee in the draft. George A. Bent never had any business transactions with appellee, the drawee, or with the First National Bank of Council Bluffs, the drawer of the draft. The latter bank was never indebted to George A. Bent. A man named George A. Bent received the draft from the post office, and indorsed upon it his own name, George A. Bent, and sold it to the appellant. The facts tend to show that the

appellant purchased the draft in good faith, relying upon one Beach, a broker, whom he knew, although he was not acquainted with George A. Bent, the supposed payee in the draft. After purchasing the draft the appellant deposited it for his own account in the Bank of Commerce in Chicago, which cleared through the Union National Bank of Chicago. The draft was paid by the appellee bank through the Union National Bank. The appellee returned the draft to the National Bank of Council Bluffs, and it was there discovered that George A. Bent had received the draft intended for George P. Bent. Affidavits setting up the facts and the mistake which had occurred were made and attached to the draft, and the draft, with the affidavits so attached, was returned to the appellee. The appellee returned the draft to the Union National Bank, which redeemed it, under the rules of the clearing house. The Union National Bank presented it to the Bank of Commerce, and the latter bank took it up, and required the appellant to make the same good. The appellant took the draft to the appellee bank, and, ascertaining that the appellee had funds in its hands belonging to the First National Bank of Council Bluffs, the drawer of the draft, demanded payment, but payment was refused by appellee on the alleged ground that the indorsement of the payee was a forgery. Six propositions were submitted by the appellant (the plaintiff below) to the trial court to be held as law in the decision of the case. Two of these were marked "Held," two were marked "Refused," and two were modified, and marked "Held" after being thus modified. The trial court, of its own motion, made in writing, and held affirmatively, a proposition holding that no right of action existed against the appellee, the National Bank of Illinois, and declined to hold whether or not the First National Bank of Council Bluffs was liable. Proper exceptions were taken to the action of the court.

Harry Vincent, for appellant. Arnold Heap, for appellee.

MAGRUDER, J. (after stating the facts). The question presented by this record is within a very narrow compass. It is whether a party holding a draft under a forged indorsement of the payee therein, or what amounts to a forged indorsement, can compel the drawee to pay him the draft. It is established clearly by the evidence that the George A. Bent who took the draft from the post office, and indorsed his name upon the back of it, was not the real payee, to whom the drawer of the draft intended to make it payable. It is true that the real and intended payee and real owner of the draft was named George P. Bent; but the fact that the name of the real owner and the name of the fraudulent possessor of the draft differ, so far as the middle letter of the name is concerned, does not make the case other than a case where

the name of the real payee and the name of the assumed payee are the same. This is so because the law does not regard the middle initial letter as a part of a person's name, but only recognizes one Christian name of a party. *Thompson v. Lee*, 21 Ill. 241; *Erskine v. Davis*, 25 Ill. 251; *Miller v. People*, 39 Ill. 457; *Bletch v. Johnson*, 40 Ill. 116; *Humphrey v. Phillips*, 57 Ill. 132. Where a bill is payable to the order of a person, and another person of the name of the payee gets hold of it, and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. *Cochran v. Atchison*, 27 Kan. 728. If the indorsement so made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement cannot be regarded otherwise than as a forgery. In *Barfield v. State*, 29 Ga. 127, it was held that where there were two persons of the same name, and one of them signed that name to certain notes with the intention that the notes might be used in trade as the notes of the other, it was a forgery. *Blackstone* (4 Comm. 247) defines forgery to be the fraudulent making or alteration of a writing to the prejudice of another man's right. "One may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should have signed. Thus, if a bill of exchange is payable to A. B. or order, and it comes to the hand of a person named A. B., who is not the payee, and who fraudulently indorses it for the purpose of obtaining the money, this is a forgery." *U. S. v. Long*, 30 Fed. 678. Where an indorsement is made for the purpose of being fraudulently used as the indorsement of another person, it is falsely made. The falsity of the act consists in the intent that the indorsement shall pass and be received as that of some other party, and in such case the charge of forgery can be maintained, although the signature is of a name which might lawfully be used by the person who put it on the draft or bill of exchange. *Com. v. Foster*, 114 Mass. 311. In *People v. Peacock*, 6 Cow. 73, where certain coal was consigned to George Peacock, of New York, and arrived there, and was claimed by another of the same name, who resided in the same city, but was not the true consignee, and he, knowing this, obtained an advance of money on indorsing the permit for the delivery of the coal with his own proper name, it was held that this was forgery. Nothing is better settled than that a forged indorsement does not pass title to commercial paper negotiable only by indorsement, and does not justify the payment of such paper. Here, whether the indorsement of the payee's name was technically a forgery, or was merely a spurious and false indorsement, in either case it was inoperative to change the title to the instrument. *Graves v. Bank*,

17 N. Y. 205. In *Graves v. Bank*, supra, it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive it; that it is no defense against such a payee that the drawee, in the regular course of business, with nothing to excite suspicion, paid the bill to a holder in good faith and for value, under an indorsement of a person bearing the same name as the payee. There it was said by the court: "The defendants, on whom the draft was drawn, paid it upon the indorsement of another Charles F. Graves, residing at or near Lasalle, who wrongfully took it from the post office at Mendota. Such a payment, although made in good faith, did not divest or impair the title of the true owner, who had not seen or indorsed the paper." In *Mead v. Young*, 4 Term R. 28, the action was brought by the indorser of a bill of exchange against the acceptor, the bill having been drawn by one Christian on the defendant in London, payable to Henry Davis or order; and having been put into the foreign mail, inclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn. The defendant accepted the bill, and it was discounted by the plaintiff. It was held that it was competent for the defendant to prove that the person who indorsed to the plaintiff was not the real payee, though he was of the same name, and though there was no addition to the name of the payee on the bill; and it was also held that if a bill of exchange payable to A. or order got into the hands of another person of the same name with the payee, and such person, knowing that he was not the real person in whose favor it was drawn, indorsed it, he was guilty of a forgery. In that case *Ashhurst, J.*, said: "In order to derive a legal title to a bill of exchange, it is necessary to prove the handwriting of the payee; and therefore, though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title." In the same case *Bullard, J.*, said: "I am of opinion that it is incumbent on the plaintiff who sues on a bill of exchange to prove the indorsement of a person to whom it is really payable. * * * Now, here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable, and no indorsement by any other person will give any title whatever."

In the case at bar, when the appellant presented the draft for payment to the appellee the latter had a right to know that the appellant held the draft under a genuine indorsement. When the appellant presented the draft for payment, it had been ascertained that the indorsement was forged, or at all events spurious and false, and was therefore void. No title passed by it, and, if the appellee had made payment to the appellant,

appellee could have been compelled again to pay the draft to the true owner thereof. Daniel, in his work on Negotiable Instruments, says: "The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for, if there is a forged indorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again."

* * * The payor should also satisfy himself of the identity of the holder; for he cannot defend himself against the real payee by showing that he paid the amount of the bill or note to another person of the same name, in good faith, and in the usual course of business." 2 Daniel, Neg. Inst. (4th Ed.) § 1225. So, also, Randolph, in his work on Commercial Paper, says: "Where a bank holds a note or bill for collection under a forged indorsement, and collects and pays it over to its principal, it will still be liable to the real owner for the amount collected." * * * So, if a bill is indorsed by another person in the payee's name, and paid to the holder under such indorsement, the payee may recover such payment." 3 Rand. Com. Paper, § 1469.

It follows from the authorities thus referred to that the appellant, having no title to the draft, was not entitled to recover the amount thereof from the appellee. If, without knowledge of the real character of the indorsement of the draft by the supposed payee named therein, the appellee had paid the amount of the draft to the appellant, it could have recovered such amount back from the appellant. This results from the fact that "the indorser contracts that the bill or note is in every respect genuine, and neither forged, fictitious, nor altered." 1 Daniel, Neg. Inst. (4th Ed.) § 672. Tiedeman, in his work on Commercial Paper, says: "Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective, and since no title passes on a forged indorsement, it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements." Section 259. Randolph, in his work on Commercial Paper, says: "Since the indorser warrants the genuineness of prior indorsements, payment made by the drawee to an indorser holding under a forged indorsement may be recovered from such holder." Section 1469. It was held in *Chambers v. Bank*, 78 Pa. St. 205, that the holder of a draft which is indorsed and passed by him guarantees the prior indorsements. In *Cochran v. Atchison*, supra, where a bill was payable to W. W. Owens and one W. W. Owen obtained possession of it and wrongfully indorsed it, it was held that a subsequent indorser could not relieve himself from liability to his immediate indorsee on the ground that the lat-

ter was guilty of negligence in taking the paper without the name of the actual payee indorsed thereon, upon the grounds that the indorser guarantees the genuineness of the signature of the payee, and that the difference in pronunciation between "Owens" and "Owen" was so slight as not to amount to a variance. The court held generally in that case that an indorser warrants the genuineness of indorsements on a bill of exchange. If, therefore, it be true that, upon payment of the amount of the draft to appellant by appellee, a recovery could be had by appellee from the appellant of the amount so paid, upon the ground that appellant by his indorsement had guaranteed the genuineness of the previous indorsement by George A. Bent, it would be useless to hold that a right of recovery exists in favor of the appellant against the appellee. To require the appellee to pay an amount which it could hereafter recover back again would be an idle ceremony.

Counsel for appellant claims that he has a right of action for negligence against the First National Bank of Council Bluffs, Iowa, because of the alleged carelessness of that bank, which was the drawer of the draft, in not mailing it properly to the payee named therein. In other words, it is said that, instead of addressing the letter inclosing the draft to George A. Bent, of Chicago, it should have addressed it to George P. Bent, of 223 South Canal street, Chicago. We do not deem it necessary to decide whether or not an action will lie in favor of the appellant against the Iowa bank. This action is against the appellee bank, and it is sufficient to say that, so far as this record shows, the appellee was guilty of no negligence. The judgment of the appellate court, affirming the judgment of the circuit court, is affirmed. Judgment affirmed.

(175 Ill. 204)

SWAN et al. v. GILBERT, Sheriff.

(Supreme Court of Illinois. Oct. 24, 1898.)

WITNESSES—COMPETENCY—EXECUTION—JUDGMENT—PARTNERSHIP—INDIVIDUAL CREDITORS.

1. In a contest between firm and individual creditors, a member of the firm is competent to testify as to whether the firm is insolvent.

2. A sheriff holding an execution against an individual member of a firm must levy on firm property subject to other executions against the firm, though the records of the case show that the judgment on which such execution was issued was rendered on a note executed by the firm.

3. An officer acting as agent in collecting a chattel mortgage on firm property executed by the firm should apply the property in payment of the mortgage in preference to the payment of an execution against an individual member of the firm, which was placed in his hands before the mortgage was executed.

Appeal from appellate court, First district.

Action by Charles F. Swan and another against James H. Gilbert. From a judgment of the appellate court (67 Ill. App. 236) af-

firming a judgment for defendant, plaintiffs appeal. Affirmed.

This was an action on the case, brought by appellants against James H. Gilbert, sheriff of Cook county, for a false return upon an execution. The facts are practically undisputed. W. A. Cave and F. G. Mathison were co-partners, doing business at different places in the city of Chicago. One store, at No. 9206 Commercial avenue, known as the "Bee Hive," was conducted under the name of W. A. Cave & Co. (Mathison being his partner); and the other, at No. 245 Ninety-Second street, known as "The Fair," was conducted under the name of F. G. Mathison & Co., the same members composing each firm. About June 5, 1892, a judgment note for the sum of \$1,000 was given to appellants, who were then engaged in the banking business, which note was signed by the firm name of W. A. Cave & Co., the signature being attached thereto by W. A. Cave. On August 6, 1892, two chattel mortgages were executed by the firms of W. A. Cave & Co. and F. G. Mathison & Co. to Marshall Field & Co., on the two stocks of goods mentioned, to secure an indebtedness of over \$8,000. On the 8th day of August, two additional chattel mortgages were executed by these firms on these stocks of goods,—one to the Calumet National Bank, to secure an indebtedness of \$3,000; and one to Ella Orb, to secure an indebtedness of \$825. All of these mortgages were placed in the hands of the deputy sheriff in different order of time, and possession of the two stocks of goods was taken by him, together with \$72 of money found in the cash drawer at one of the stores. It is not disputed that these chattel mortgages were given to secure firm indebtedness. Subsequently, judgment was confessed on the note for \$1,000 held by appellants, signed by W. A. Cave & Co.; but judgment was rendered only against W. A. Cave, and execution issued against him. This execution came into the hands of the deputy sheriff after he had taken possession of the stocks of goods under the chattel mortgages. On August 22d, and subsequent to the issuing of the execution against Cave, the firm executed two other chattel mortgages on these stocks of goods to J. V. Farwell & Co., to secure an indebtedness of about \$5,500; and these were also placed in the hands of the same deputy sheriff for foreclosure. The property was sold under the chattel mortgages on August 24th, and the proceeds applied on the chattel mortgages, except that of Farwell & Co., after which there remained in the hands of Jones, the deputy sheriff, who was acting as agent of the mortgagees, the sum of \$2,240. Appellants, together with one Edward L. Hasenstein, who had a judgment and execution similar in all respects to that of appellants, claimed that this amount should be applied on their executions, instead of on the Farwell mortgages. They insisted that,

notwithstanding their judgments and executions were against W. A. Cave, they were for a partnership indebtedness, and they referred the deputy sheriff to the files in the case as evidence of that fact. He, however, applied the \$2,240 upon the Farwell mortgages instead, upon the theory that the indebtedness was partnership indebtedness, and that the indebtedness of appellants was against one individual member of the firm. Upon the trial of this cause in the circuit court of Cook county, a jury being waived, the issues were found for the defendant, James H. Gilbert, sheriff of Cook county. On such trial, propositions of law were submitted asking the court to hold that, notwithstanding the judgment and execution were against W. A. Cave individually, satisfaction should have been had of the same in preference to the Farwell mortgages; that such mortgages were not a lien upon the \$2,240, balance of the proceeds arising from the sale of said stock of goods; that it was the duty of the sheriff to have enforced such execution in preference to the Farwell mortgages; that the defendant sheriff was guilty of a false return on the execution, in returning it not satisfied. Such propositions were refused by the trial court. On appeal to the appellate court for the First district, the judgment of the circuit court was affirmed, and this appeal is prosecuted to this court.

A. B. St. John and S. A. French, for appellants. Flower, Smith & Musgrave, for appellee.

PHILLIPS, J. (after stating the facts). In determining the rights of the parties on the question presented in this record, we shall proceed upon the theory, not disputed, that all the property conveyed by the chattel mortgages, and sought to be reached by the executions, was partnership property; further, that no question is raised as to the validity of the chattel mortgages executed before the confession of judgment, and under which mortgages the deputy sheriff, as agent of the mortgagees, was in possession of the two stocks of goods at the time of the delivery to the sheriff of this execution. After the satisfaction of the prior three chattel mortgages, there remained in the hands of the deputy sheriff \$2,240. The only question to be determined is whether this should have been applied on the execution of appellants against W. A. Cave, then in the hands of the sheriff, or should have been applied, as it was, upon the chattel mortgages of J. V. Farwell & Co., executed by the insolvent firm, after appellants' execution was delivered to the sheriff. It appears the firms of W. A. Cave & Co. and F. G. Mathison & Co. were insolvent, and their partnership property was not sufficient to satisfy partnership indebtedness. The evidence of one of the members of the firm shows this fact, and the appellate court has so found. Appellants object to such fact having been proved in the

manner it was; but we see no reason why a member of a mercantile firm may not testify, on a direct question put to him, whether or not his firm was solvent or insolvent. After the payment of firm indebtedness, therefore, nothing would have remained in this instance to be distributed to the two partners; and therefore they had no interest, individually, in the firm property, over and above such partnership indebtedness. It is true, a partner's interest in firm property may be sold under an execution against him individually, and such partnership interest will pass by execution to the purchaser; but such interest, when so acquired by the execution creditor, passes subject to the rights of partnership creditors and to the rights of other partners. Such purchaser would be compelled to settle with the other partners precisely as would the defendant in the execution had not his interest been sold. In this case the sheriff had in his hands \$2,240, proceeds arising from the sale of firm property, and \$72 additional of firm money. He had in his hands two executions against the members of this firm individually, and also two chattel mortgages given by them as a firm. There can be no question but it was his duty to apply the firm money on the firm indebtedness.

Appellants insist that their execution against W. A. Cave was in fact for firm indebtedness, and that they referred the sheriff to the note in the files in the case wherein their judgment had been rendered, as evidence of this fact. It was not error, however, for the sheriff to be governed by the writ delivered to him, which was against W. A. Cave alone. The partnership being insolvent, Cave's individual interest was worthless. Therefore, there was nothing of value to levy on, and the plaintiffs could not have been injured by the failure to levy. In the case of *Chandler v. Lincoln*, 52 Ill. 74, it was said (page 77): "A partner's interest in the firm property may be sold under an execution, and that interest, whatever it may be, will pass by such a sale to the purchaser. But he takes it precisely as it was held by the defendant in the execution. If, on a settlement of the partnership affairs, defendant in execution is entitled to nothing, the purchaser would obtain nothing by his purchase. Such a purchaser would be compelled to settle with the other partner precisely as would the defendant in execution had his interest not been sold." In *Rainey v. Nance*, 54 Ill. 29, this court said (page 35): "Where the separate property of either partner proves insufficient for the payment of his individual debts, and there is a surplus of the joint property after payment of the firm debts, such separate creditors may resort to the share of the partner thus indebted to them in such surplus. In this case, then, the firm property must be applied in the discharge of the firm indebtedness before it can be applied to pay the debts of the individual members of the firm." The case of *Richard v.*

Allen, 117 Pa. St. 199, 11 Atl. 552, was one where a constable levied executions against the individual members of the firm upon the firm property. Before the sale, the sheriff levied an execution upon the firm property issued on a judgment against the firm. It was held that the sale under the constable's writ only passed the interest of the individuals of the firm, and the sale under the sheriff's writ passed the firm property, and the vendees under the constable's sale would only be entitled to relief after the satisfaction of the execution levied by the sheriff. In *Murfree on Sheriffs* (section 545) it is said: "It sometimes happens that sheriffs fall into error in the execution of final process against an individual member of a partnership. The rule is that he cannot levy upon any specific article of partnership property, and segregate that as the property of the defendant partner, but must levy upon the partner's interest in the whole stock. The only interest he has in the property is in the surplus after the partnership debts are paid and the accounts between the partners have been adjusted." In *Bates on Partnership* (sections 1111 and 1112) it is said: "The buyer at an execution sale cannot acquire a better title than the debtor partner had, and therefore does not acquire an absolute title to the chattels sold, nor priority over partnership creditors; but his title is subject to the partnership debts and equities between partners, and he cannot be a partner by reason of the *delectus personarum*. He becomes a claimant, in common with the co-partners, for a share of the surplus. It follows that in case the partnership is insolvent, or the debtor's and co-partners' equities absorb the debtor's share, the buyer of the interest gets nothing; hence the sheriff is not liable if he allows the effects to be applied to the payment of the partnership creditor, nor even if he release the levy in case of insolvency, but, as he does so at his own risk, it is a very unsafe practice." In *Clements v. Jessup*, 36 N. J. Eq. 569, which was a controversy between *Clements*, a creditor of the firm holding a chattel mortgage executed by both partners for a firm debt, and *Jessup*, a purchaser at a sale under a judgment against one of the individual members of the firm, but which judgment was prior to the chattel mortgage in point of time, the court said: "The interest of a partner in partnership property is only his share on a division of the surplus after the payment of partnership debts, and partnership property must be applied first to the payment of firm debts. A purchaser directly from a partner of his interest in the firm property acquires no title in partnership property, except the vendor's share in the surplus after an accounting and adjustment of the partnership affairs. A sheriff having process of execution or attachment against one partner may seize and sell the latter's interest in partnership property, but a sale under such process will convey only the interest of the partner in partnership

property after the firm debts are paid and the affairs of the partnership are settled up." And as it appeared in that case that, in the end, the property would be required to pay the debts of the firm, the creditor of the individual member, although prior in point of time, was held to take nothing. *Bank v. Wilkins*, 9 Me. 28, was an action of case against the sheriff for default in releasing certain personal property attached by him under an execution in favor of the plaintiff. It was held that the mere insolvency of a co-partnership is sufficient to defeat an attachment made by a creditor of one member of the firm, although the partnership creditors have commenced no action for the recovery of their debts; that where an officer had attached partnership effects in a suit against one of the partners, and afterwards, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger, he was not responsible to the first attaching creditor in an action for not having seized the goods in execution.

From a review of the foregoing decisions it seems to have been considered a circumstance of no importance whether the creditors of the firm, where it was insolvent, had recovered judgment, and were enforcing the collection of their demands, or had ever commenced actions for the purpose, or, if they had, in what stage these actions were at the time of the decisions; and in several of them the claim of a creditor of one or more individual members of the firm was resisted and disallowed because it did not appear whether the firm was solvent or not. In the case of *Lyndon v. Gorham*, 1 Gall. 367, Fed. Cas. No. 8,640, it was said: "If, upon the whole, it appears that the judgment debtor had only a nominal interest, I don't think that a greater interest can be conveyed under an execution, and, if the partnership be insolvent, that any interest can be conveyed." In *Rice v. Austin*, 17 Mass. 197, it appeared that the defendant, as sheriff, had attached certain timber which he contended was the property of one Lindsay, and not of the plaintiff, but, if not wholly Lindsay's, still he contended that it belonged to the plaintiff and Lindsay, as co-partners. The court said: "It does not follow, necessarily, that a creditor of Lindsay might lawfully take partnership property. That must depend upon the solvency of the company, and upon the question whether any surplus remained for the separate partners after the payment of his debts to the company and the debts of the company to the world." The case of *Wilson v. Strobach*, 59 Ala. 488, was a motion against the sheriff for judgment for failure to make certain money on an execution in his hands. The execution was against one member of the firm, and the complaint was made that the firm property was not levied on. The court said: "The interest of a partner may be sold to pay his individual indebtedness. It is well established in this state that the separate creditor of one partner

may take, on execution, that partner's interest in the tangible property of the partnership; but the purchaser at the sheriff's sale cannot take into his exclusive possession the property which still remains subject to the debts of the partnership. The levy upon a partner's interest in an insolvent partnership may be released. A sheriff who has levied on the interest of one partner on a suit of his separate or individual creditor may release the levy when the partnership is insolvent, and the sale of the partner's interest would have been unproductive of anything to satisfy the execution. On motion against the sheriff, he may prove the insolvency of the partnership. On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership."

From these authorities, and on principle, it appears that an officer having executions against an insolvent partnership, and also against individual members of the firm, is required to make application of the proceeds of firm property to the payment of the executions against the firm, even though such executions are junior to those against the individual members of the firm. The officer, acting as agent of a mortgagee having a chattel mortgage for collection against a firm, may, when an execution against an individual member of the firm comes to his hands, apply the same principle without being liable for a false return. It is apparent, therefore, that Cave, the defendant in the execution, had no property subject to the lien of this execution, for the only interest an individual has in firm property is the surplus after the partnership debts are paid and the accounts between the partners have been adjusted. The propositions of law asked by appellants, and refused by the court, involving the questions of law discussed in this opinion, were properly refused by the trial court. The judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(174 Ill. 358)

CHICAGO TRUST & SAVINGS BANK v. KINNARE.

(Supreme Court of Illinois. Oct. 24, 1898.)

PROMISSORY NOTE — LIABILITY OF CONTINUING PARTNERS — NOTICE.

1. Where, after a member silently withdrew from a trading firm, and the other members continued the business without changing the firm name, or giving notice of his withdrawal, he discounted at a bank, which had dealt with him in similar transactions before, a note payable to the order of the firm, and which he executed and indorsed in the firm name, representing to the indorsee that he was still a member, and wrongfully applied the funds thus secured to his personal use, without the knowledge or consent of his former co-partners or the indorsee, who took it in good faith, all the members are liable thereon.

2. Where one without authority executed a note in the name of a firm from which he had withdrawn, neither the fact that it was a judg-

ment note nor that he also signed the note in his own name tends to give notice that the transaction was not in the interest of the firm.

Appeal from appellate court, First district.

Action by the Chicago Trust & Savings Bank against Frank T. Kinnare, administrator. From a judgment of the appellate court (67 Ill. App. 186) affirming a judgment for defendant, plaintiff appeals. Reversed.

Cratty Bros. and Jarvis & Cleveland, for appellant. Barnum, Humphrey & Barnum, for appellee.

PHILLIPS, J. On the 1st day of September, 1887, William H. Ward, J. C. Goldthwaite and C. F. Remick entered into co-partnership under the firm name of Ward, Goldthwaite & Co., and engaged in the business of selling goods at wholesale in the city of Chicago. Said firm was organized to continue for three years from date. On the 2d day of January, 1889, Solomon Herzog was admitted as a partner in the existing firm of Ward, Goldthwaite & Co., and the partnership was to continue four years from January 1, 1889, unless sooner dissolved by mutual consent or operation of law. On the 10th of June, 1889, Herzog sold out his interest to his partner Remick, with the consent of Ward and Goldthwaite. Goldthwaite on the same day ceased to be a member of the firm, but the business was continued under the firm name of Ward, Goldthwaite & Co., and Goldthwaite was employed as bookkeeper, and sometimes acted as salesman. Before the change in the firm by the retirement of Goldthwaite, letters and billheads of the firm of Ward, Goldthwaite & Co., giving the individual names of the firm as William H. Ward, J. C. Goldthwaite, and C. F. Remick, were used, and continued to be used until long after the transaction involved in this case. A sign was placed on the buildings, showing the name of the firm to be Ward, Goldthwaite & Co., and, as appears from the evidence in this case, this was done for the benefit and advantage to the business of the name of J. C. Goldthwaite, and in order to preserve the good will of the firm under its original name. This is shown by the members of the firm. On the 23d of August, 1889, J. C. Goldthwaite, representing himself to be a member of the firm of Ward, Goldthwaite & Co., executed and delivered to the Chicago Trust & Savings Bank a promissory note made payable "to the order of ourselves," for \$2,500, with interest at the rate of 8 per cent. per annum after due, which note was signed by Ward, Goldthwaite & Co. and by James C. Goldthwaite. This note was indorsed by Ward, Goldthwaite & Co. and James O. Goldthwaite, and made payable to the appellant. The note was signed in the presence of D. H. Tolman, president of the appellant bank, and a check for the amount of the note, less the discount, was made out, payable to Ward, Goldthwaite

& Co., and delivered to J. C. Goldthwaite. It is stipulated that the check for the note signed in the name of Ward, Goldthwaite & Co. on August 23, 1889, was delivered to J. C. Goldthwaite, made payable to Ward, Goldthwaite & Co., and said Goldthwaite took said check, and indorsed it in the name of Ward, Goldthwaite & Co., and drew the funds, and wrongfully applied them to his own personal use, without the knowledge or consent of either Ward or Remick, or Tolman, the president of the bank. It does not appear that Ward, Goldthwaite & Co., or Ward or Remick, ever had any dealings with the bank except that done by Goldthwaite in transactions similar to this. The circuit court of Cook county found for defendant on a trial before the court without a jury, and on appeal to the appellate court for the First district that judgment was affirmed, and plaintiff prosecutes this appeal.

This suit is brought on the note above mentioned, and it is set up in defense that the signature thereto of Ward, Goldthwaite & Co. was forged by Goldthwaite, and it is denied that he had any authority to execute the note. The note was a judgment note. Under ordinary commercial partnerships each partner has the right to buy and sell goods belonging to the firm, and may vouch the partnership paper, or borrow money for partnership purposes, and draw, negotiate, accept, and indorse bills of exchange or promissory notes or checks, and do any act incident or appropriate to the business according to its common course and usage. No matter what private arrangement there may be among the individual members limiting the duties and responsibilities of each as between themselves, under the law their power is, as to third parties without notice, as before stated. While dissolution of a partnership terminates any liability of its members for indebtedness subsequently incurred to one having notice of such dissolution, the general rule is, if notice of the dissolution is not given, and business is subsequently transacted in the name of the firm, those preserving and composing the firm will be liable to persons to whom they thus become indebted, although not partners as between themselves. Where they hold themselves out to the community, by acts or declarations, as partners, they would become liable as such, even had no partnership ever existed. *Ellis' Adm'rs v. Bronson*, 40 Ill. 455; *Fisher v. Bowles*, 20 Ill. 396. It is a matter of no consequence whether a partner is acting fairly with his co-partners in a particular transaction or not. If the act is within the apparent scope of his authority, and professedly for the firm, his acts and representations are binding upon the firm in favor of the indebtedness of a third party. In holding him out to the world as a partner in a particular business, they authorize the world to deal with him as possessing all the powers of a partner. Pahl-

man v. Taylor, 75 Ill. 629. In this case a partnership had actually existed in which J. C. Goldthwaite was a member of the firm of Ward, Goldthwaite & Co. For their own convenience and for their own interests they used stationery indicating, and advertised to the world by their sign, that the business was conducted in the same manner after the retirement of Goldthwaite as before, and held him out to the world as a partner, giving no notice of dissolution, or of any change in the firm. Parties dealing with a partner in good faith, without any notice, must have their rights determined in the same manner, and be governed by the same rules, as if they were in fact dealing with the full knowledge and consent of all the members of the firm. *Baring v. Crafts*, 9 Metc. (Mass.) 380; *Trueman v. Loder*, 11 Adol. & E. 589; *Stimson v. Whitney*, 130 Mass. 591; *Turnpike Co. v. Gulick*, 16 N. J. Law, 161. The real members of the firm having held out to the world by advertising and by their sign, and in the manner of doing business, that Goldthwaite was a partner, they are estopped from denying the existence of a co-partnership with him as a member to one who has dealt with him as a member of the firm. *Baylor Co. v. Craig* (Tex. Sup.) 6 S. W. 305; *Grissler v. Powers*, 81 N. Y. 57; *Spears v. Toland*, 1 A. K. Marsh. 203. No notice of dissolution had ever been given, and by the actual holding out to the world that Goldthwaite was a partner, Ward, Goldthwaite & Co., with all its members, are estopped from denying the validity of Goldthwaite's acts, unless there is something in the transaction itself that notifies and acknowledges that it was not for and on account of the partnership. In this case there is nothing in the transaction to give any notice that it was not for and in the interest of the partnership. When Goldthwaite was held out to the world as a partner for the purpose of securing credit, and representations were made in writing as to who were the members of the firm, and as to their own financial ability to sign the firm name to the note, which was also signed by Goldthwaite, the fact that he himself signed the note did not tend to give notice that the transaction was not in the interest of the firm. While the note was also signed by Goldthwaite individually, that in no way tended to give notice that it was not for the use and benefit of the firm. *Lyth v. Ault*, 7 Exch. 669. He was held out to the world as one having authority to do all that he did, and the note was discounted, and the check payable to the firm delivered to him. It was apparent the president of the bank was acting in good faith, and upon the apparent authority of the firm; and by acting as they did, and using his name for their own benefit, employing him in the business, they assumed the responsibility for his acts, and,

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so far as the act was within the apparent authority conferred on him by them, they are bound thereby. The fact that this was a judgment note, and that one partner would not have the right to authorize a judgment against the other members, is not a fact that is calculated to give notice, for the common observation and experience of every business man is that banks and others will use a form of blank notes in various transactions which are not changed simply because one member of the firm signs the firm name thereto.

The holding of the trial court on the first and second propositions of law was substantially in accord with what is here said, but, notwithstanding the holding of the court on the first and second propositions, the court found for the defendant, and this proposition was refused: "The court holds, as a matter of law, that if the evidence shows that Ward and Remick, at the date of making the note, held out to the world that Goldthwaite was a partner in the firm, under the firm name of Ward, Goldthwaite & Co., and that Tolman and the plaintiff had no knowledge of any dissolution of said firm, and if the evidence further shows that the note of August, 1889, was discounted in the name of Ward, Goldthwaite & Co., and a check given to Goldthwaite, payable to the firm, and that Goldthwaite, without the knowledge of Ward and Remick, and without the knowledge of the said Tolman and the bank, indorsed the name of the firm upon the back of such check, and then, without the knowledge of Ward and Remick, and without the knowledge of Tolman or the bank, wrongfully converted the funds to his own use; and if the evidence further shows that the note in suit was a renewal of said note of August, 1889,—then the plaintiff is entitled to recover from the defendants the amount of the note, with interest thereon, precisely as if said Goldthwaite had been actually a member of said firm." Under the facts appearing in the record, this proposition stated a correct principle, and should have been held as asked. Had it been held as asked, the finding would necessarily have been for the plaintiff, as it came by the note fairly, and without the knowledge of fraud. This case is distinguishable from the case of *Charles v. Remick*, 156 Ill. 327, 40 N. E. 970. as many of the facts shown in this case were not presented on the trial of that. The written statement made by Goldthwaite as to the assets of the firm at the time the note was discounted, and the books showing the same, were not in evidence in that case. That case is not conclusive of the questions presented on this record. The judgments of the circuit court of Cook county and of the appellate court for the First district are each reversed, and the cause is remanded. Reversed and remanded.

(175 Ill. 119)

IMPERIAL HOTEL CO. et al. v. H. B. CLAFLIN CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

RECORD ON APPEAL — PRESUMPTIONS — PARTIES — INTEREST.

1. Where a bill of exceptions contains 70 invoices, appearing in connection with the testimony of the witness who identified and described them, and which appear to have been admitted by the court, but not separately certified as being the identical invoices offered in evidence, and the judge certified that the bill of exceptions contained all the evidence offered, it sufficiently appears that they are the identical invoices in evidence.

2. Where the record shows that a document was offered in evidence which is not set out in the bill of exceptions, but the judge certifies that the bill contains all the evidence, there is no presumption as to whether it was received in evidence, or was stricken from the record; and the appellate court is hence not bound to presume that there was sufficient evidence to sustain the judgment of the lower court.

3. Where one assumes the debt of another without the knowledge of the creditor, the two cannot be sued jointly on the debt; and this though the issue of joint liability is not raised by the plea.

4. Where there was no ascertainment of a balance of an account between the parties, and the delay of payment was not unreasonable and vexatious, in the absence of agreement to pay interest no interest can be collected on the account.

5. Appearing and defending the suit is not such unreasonable and vexatious delay as justifies recovery of interest on an unliquidated account.

Error to appellate court, First district.

Action by the H. B. Clafin Company against the Imperial Hotel Company and A. C. Mills & Co. There was a judgment for plaintiff, affirmed in the appellate court, and defendants bring error. Reversed.

Edward S. Elliott and Defrees, Brace & Ritter, for plaintiffs in error. James A. Fullenwider, for defendant in error.

PHILLIPS, J. This is a writ of error brought to reverse the judgment of the appellate court for the First district, affirming a judgment of the superior court of Cook county rendered against plaintiffs in error, as joint debtors, for \$26,487.35, in favor of the defendant in error. The ground of reversal urged in the appellate court was that the superior court erred in holding that the plaintiffs in error were joint debtors and jointly liable, and in allowing interest on the accounts sued on. In the trial court there was no plea denying the joint liability, but it was insisted the evidence showed there was no joint liability. The appellate court refused to consider the evidence because of the insufficiency of the bill of exceptions, and incorporated the following finding in the judgment of affirmance: "The court finds that the bill of exceptions contained in the record is imperfect and incomplete, in that the seventy bills or invoices, numbered from 1 to 70, inclusive, contained in said bill of exceptions, are not sufficiently identified thereby as being

the same bills or invoices offered in evidence, in that said bill of exceptions shows that the charter of A. C. Mills & Co., one of the defendants, was offered in evidence, and said charter is not set out in said bill of exceptions. Thereupon the court is bound to presume that there was sufficient evidence to sustain the judgment of the superior court; and thereupon the court declines to consider any and all the errors assigned." Plaintiffs in error have assigned for error these findings of the appellate court, and now insist in this court that the cause should be remanded to the appellate court, with directions to that court to consider the cause on its merits. The bills numbered 1 to 70, both inclusive, of the H. B. Clafin Company, made out against the Imperial Hotel Company of Chicago, were not separately certified to as being the identical bills offered in evidence. They appear in the bill of exceptions in connection with the testimony of the witness who identified and described them, and by the bill of exceptions appear to have been admitted in evidence by the court. At the close of all the evidence and proceedings the certificate of the judge to the bill of exceptions contained these words: "Which was all the evidence offered in this case by either party." The trial court certifying that the bill of exceptions contained all the evidence offered by either party, and there being incorporated in that bill of exceptions, over this certificate of the trial court, these 70 bills, it sufficiently appears that they are the identical ones offered in evidence. It appears from the record that the charter of the defendant A. C. Mills & Co., a corporation, was given in evidence, but it is omitted from the bill of exceptions. Whether that charter remained in evidence on the trial in the case, or was stricken from the record, is not to be presumed. It is not incorporated in the bill of exceptions, but the certificate to the bill of exceptions is that it contained all the evidence; and it is unnecessary to make any presumption with reference to the charter, as to whether it was read in evidence or not. No prejudice against the plaintiffs in error, or benefit to the defendant in error, or prejudice to it, results from its omission from the bill of exceptions, as all the evidence in the record, as appears by the bill of exceptions, is incorporated therein. We might well remand this case to the appellate court, with directions to that court to consider the cause on the merits; but as but two questions are presented, and they questions of law, we will enter judgment on this record in this court.

It appears that in December, 1892, the Imperial Hotel Company, one of the plaintiffs in error, was engaged in furnishing the Windermere Hotel, in the city of Chicago, and purchased furniture, etc., from the defendant in error. These purchases were continued until April 20, 1893, and the articles so purchased were delivered by the defendant in error to the Imperial Hotel Company. On

May 6, 1893, A. C. Mills & Co., a corporation, one of the plaintiffs in error, was incorporated, and about May 22d of the same year took possession of the Windermere Hotel and its furniture therein, and entered into a contract with the Imperial Hotel Company, by which it was to pay the H. B. Clafin Company indebtedness. The latter company was not a party to this contract, and had no knowledge or notice of the same at the time it was made. The H. B. Clafin Company brought this suit to recover against both the Imperial Hotel Company and A. C. Mills & Co. as joint defendants, and filed a declaration containing only the common counts. Each of the defendants filed pleas of general issue, verified by affidavit of merit. The judgment rendered against both defendants for the full amount of plaintiff's demand, including interest, cannot be sustained. The evidence shows a contract existed between the H. B. Clafin Company and the Imperial Hotel Company, and a cause of action existed in favor of the H. B. Clafin Company against the latter company. By the assumption of this indebtedness by A. C. Mills & Co., a corporation, for a valuable consideration, as shown by the contract, a relation was created in favor of the H. B. Clafin Company that would have authorized it to recover against A. C. Mills & Co. No liability existed in favor of the H. B. Clafin Company against both these defendants as joint debtors. In an action *ex contractu* against several, it must appear that their contract was joint, and that fact must be averred by the pleadings and shown by the proof on the trial, otherwise no recovery can be had; and this is the rule where the evidence shows the contract is several, although none of the parties have put their joint liability in issue by a plea in abatement or plea in bar verified by affidavit. *Supreme Lodge v. Zuhlke*, 129 Ill. 298, 21 N. E. 789.

It was error, also, to include interest on the plaintiff's claim; it being an unliquidated account, and no express or implied contract to pay interest appearing from the evidence. By the statute, interest may be recovered on money due, on settlement of accounts, from the date of liquidating accounts between the parties and ascertaining the balance, or for money withheld by an unreasonable and vexatious delay of payment. It is not shown that there was a settlement of accounts between these parties, and an ascertainment of a balance, nor does it appear that the delay of payment was unreasonable and vexatious. The mere fact of appearing and defending a suit is not sufficient, because that is a right which cannot be construed into unreasonable or vexatious delay of payment. *Hitt v. Allen*, 18 Ill. 592; *Aldrich v. Dunham*, 16 Ill. 403; *Sammis v. Clark*, 13 Ill. 544. To create an unreasonable and vexatious delay in payment, within the meaning of the statute, there must be something more than mere delay of payment. To authorize a recovery for interest, the debtor must in some way throw

obstacles in the way of collection, by some circumvention, contrivance, or management of his own, which induces the court to withhold proceedings against him longer than it would otherwise have done. The judgments of the appellate court for the First district and of the superior court of Cook county are each reversed, and the causes remanded to the superior court of Cook county. Reversed and remanded.

(175 Ill. 344)

HAWKES v. TAYLOR.

(Supreme Court of Illinois. Oct. 24, 1898.)

SALE—INTEREST IN MINE—CONTRACT FOR PAYMENT.

Defendant, who, in consideration of a conveyance of an eighth interest in a mining claim, paid \$5,000 to plaintiff, and agreed to convey to her within a year land worth \$10,000, or else give her half of the first \$10,000 profit of his share, after taking out \$10,000 for himself, provided, if such profits did not amount to so much within five years, plaintiff was to have only half thereof above the \$10,000, and who, soon after execution of the contract, with plaintiff and the other owners of the mine formed a corporation, to which they conveyed their interests, taking stock therefor, did not impliedly agree to work his interest at his own expense to procure profits to be divided with plaintiff.

Appeal from appellate court, First district.

Action by Louise R. Hawkes against Joel V. Taylor. Judgment for defendant was affirmed by the appellate court (70 Ill. App. 255), and plaintiff again appeals. Affirmed.

This was a suit brought by Louise R. Hawkes against Joel V. Taylor on the following contract: "This agreement, made this 26th day of May, A. D. 1885, between Joel V. Taylor, party of the first part, of Cook county, Illinois, and Louise R. Hawkes, of the same place, witnesseth: Whereas, the said party of the second part has this day sold and conveyed to the party of the first part all her right, title, and interest in and to the following described mining property, situated in Ruby mining district, in the county of Gunnison, state of Colorado, to wit: An undivided one-eighth of the Ruby Chief mining claim; an undivided one-eighth of the Sunset lode mining claim; an undivided one-eighth of the Arab lode mining claim; an undivided one-eighth of the Peggy lode mining claim; an undivided one-eighth of the Gem lode mining claim; an undivided one-eighth of the Old Sheik lode mining claim: Now, therefore, this agreement witnesseth that the party of the first part is to pay, as a consideration for the conveyance of the property above described, as follows: First. Five thousand dollars (\$5,000) cash, which sum has already been paid over to the party of the second part. Second. The party of the first part is to have the option, within one year, to convey to the party of the second part real estate of the cash value of \$10,000; the value of such real estate, in case the parties cannot agree,

to be determined by arbitration; each party to select one arbitrator, and, in case they can not agree, they are to select a third; and the decision of two of such arbitrators shall be conclusive on the parties thereto; and, in case said conveyance shall be made, it shall be in full payment for the said property conveyed to the party of the first part. Third. In case said party of the first part shall not elect to make such conveyance of land as is above provided for, then the party of the first part shall be entitled to receive out of the net profits of the property so conveyed by the party of the second part the sum of \$10,000, and, after having received the sum of \$10,000 aforesaid, he shall pay to the party of the second part one-half of the net profits of said property, until the net profits, after first deducting the sum of \$10,000, shall equal \$40,000, the payments to be made in installments of \$1,000 each, and to begin as soon as the net profits amount to the sum of \$1,000 after the party of the first part shall have received the sum of \$10,000 from such net profits; and the party of the second part is thereafter to receive each alternate \$1,000 of the net profits, until she has received from such net profits, in all, the sum of \$20,000; provided, however, that in case the net profits above described do not amount to the sum of \$50,000 within five years from the date of this agreement, then the party of the second part shall be entitled to only one-half of the net profits, over and above the sum of \$10,000 to be first deducted, that have accrued within five years from the date hereof; such sum, however, in no event to exceed the sum of \$20,000. This agreement shall be binding on the heirs, executors, administrators, and assigns of the respective parties. Joel V. Taylor, Louise R. Hawkes." The declaration averred that defendant did not convey the real estate, and paid no profits, and that soon after the purchase of said interest he sold the same to other parties, thereby putting it out of his power to work the said mines. Various pleas were filed, setting up, in substance, that defendant only owned an undivided one-eighth of the mine, the residue being owned by plaintiff and her associates; that a corporation was formed at their request to take the property, in which defendant held a minority of the stock; that he always stood ready to contribute his share to work the mines, but the others refused to contribute their share, etc. The court took the case from the jury by an instruction, and gave judgment for defendant, which was affirmed by the appellate court.

D. J. Haynes, R. M. Wing, and C. C. Carnahan, for appellant. George W. Wilbur and Newton A. Partridge, for appellee.

PHILLIPS, J. (after stating the facts). The legal position of plaintiff is that, when the defendant conveyed his interest to the

corporation, he at once became legally liable to pay the \$20,000 mentioned in the contract. The contract of sale was made May 26, 1885; and, soon after, negotiations were opened between the individual owners in regard to the formation of a corporation, and the transfer of their respective interests to it. This was accomplished in September, 1885. Stock was issued to each, respectively, in proportion to such interest. The plaintiff transferred her interest in the mine to the corporation, received her share of stock, and, together with her husband and the defendant, was elected a director of the company thus formed. The corporation worked the mine for over a year, but at considerable loss. The defendant and others personally advanced money to the corporation to aid in the development and working of the mine, but the board of directors finally ordered the work to stop when the money on hand was exhausted. The plaintiff offered to show the mine was not properly worked, which the court refused to allow. The defendant paid \$5,000 cash on the contract, and was to have the option, within one year, to convey to the plaintiff \$10,000 worth of real estate, the value of which was to be determined as provided by the contract. In case he did not so elect to convey the property, then, after defendant should have received \$10,000 out of the net profits, he was to pay to plaintiff one-half the net profits of said one-eighth interest, until she should have received \$20,000, or, in case the net profits of such interest within five years did not enable him to pay such sum, then she was to receive one-half the net profits over said \$10,000. Construing this contract in the light of the language used, the amount the defendant paid in cash, the speculative nature of the enterprise, and the early formation of the corporation, in which plaintiff became interested as a stockholder and officer, it is evident the parties did not contemplate or use language to require the defendant to proceed at his own expense to work said mine in order to procure such profits. The act of the plaintiff in joining the defendant, her husband, and others in the formation of a corporation soon after the execution of the contract, for the purpose of uniting all interests, shows very clearly she had no such view of the contract. Besides, the nature and amount of the undivided interest that she conveyed, together with the speculative character of the enterprise, and the well-known uncertainty of results, all contribute to exclude, rather than to raise, the implication that the defendant agreed to work said undivided interest in said mine at his own expense in order to secure such profits. It is not claimed that by the express provisions of the writing the contract required the defendant to work the interest at his own expense. No implication can arise from the contract itself, as the natural and reasonable result of the lan-

guage used with reference to the subject-matter to which it relates, that would authorize or require such a construction of this contract. Bouvier defines "implied contracts" as being such as reason and justice dictate, and which the law presumes that every man undertakes to perform. There is in this agreement, by its terms and language, an entire absence of such elements as would constitute an implied contract, or require the appellee to work that interest at his own expense. The judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(175 Ill. 318)

NORTH CHICAGO ST. RY. CO. v. HONSINGER.

(Supreme Court of Illinois. Oct. 24, 1898.)

DAMAGES—INSTRUCTIONS—HARMLESS ERROR.

1. In an action for damages the court instructed the jury that in determining their amount they should consider all the facts and circumstances in evidence before them. *Held* not erroneous, as assuming that there were damages, where such fact was admitted by the defendant.

2. It was objected to a hypothetical question that it did not give the entire history of the case, whereupon counsel supplied the alleged omission. *Held*, any error was harmless.

Appeal from appellate court, First district.

Action by Eunice Honsinger against the North Chicago Street-Railway Company. From a judgment of the appellate court (70 Ill. App. 101) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for a personal injury, brought by appellee against the appellant company. The declaration charges that the appellee was a passenger upon the defendant's street railway, and while she was in the exercise of ordinary care for her own safety the defendant so carelessly managed and handled the car upon which she was riding that it was suddenly jerked and stopped, so that appellee was thrown from her seat, and received the injuries complained of. The plea of the general issue was filed. The trial, which was before the court and a jury, resulted in verdict and judgment in favor of the appellee, the plaintiff below. This judgment has been affirmed by the appellate court, and the present appeal is prosecuted from such judgment of affirmance.

Egbert Jamieson and John A. Rose, for appellant. Dent & Whitman, for appellee.

MAGRUDER, J. (after stating the facts). Only two grounds for the reversal of the judgment below are brought to our attention by counsel for appellant in their brief. The first of these objections is that the trial court erred in giving the second instruction which was given for the appellee. That instruction begins as follows: "In determining the amount of damages, the jury should take

into consideration all the facts and circumstances in evidence before them," etc. It is said that this instruction is erroneous, because it assumes that damages were sustained, and merely leaves it to the jury to determine the amount of the damages. Small v. Brainard, 44 Ill. 355. The objection might have force, if there was any controversy about the commission of the injury by the appellant, or about the liability of the appellant. It appears, however, that counsel for appellant in the trial in the court below admitted a technical liability on the part of the appellant. The record shows that the following statement was made by the counsel for appellant to the court upon the trial: "Well, I suppose we may as well admit a technical liability." In the brief filed by counsel for appellant in this court it is admitted that "the plaintiff was thrown against the dashboard of the car and received injuries." Counsel further say in their brief: "Upon the trial the defendant admitted a technical liability, but no damages." The first instruction given in behalf of the plaintiff below is as follows: "The jury are instructed that the liability of the company is not disputed, but the amount of damages, if any, is questioned." No complaint is made of the first instruction. Inasmuch as the liability of the appellant was admitted, the only question for the jury to consider was the amount of damages. It would have been different if the question of the liability had been disputed. Where an instruction requires the jury to consider the question of assessment of damages before they have previously passed upon the issues in the case, such instruction may be regarded as erroneous, as assuming that there are damages. Felsenthal v. Block, 8 Ill. App. 425. But such error does not exist here, in view of the admission already referred to. The instruction directing the jury to ascertain the amount of damages leaves them free to bring in a nominal amount, if they choose. The second instruction, read in connection with the first, presents to the jury the precise character of their duty under the circumstances of this case.

The second objection relates to the admission of testimony. A physician, when testifying as a witness, was asked an hypothetical question. Counsel for appellant objected to this question upon the alleged ground that it was incomplete, and did not give the entire history of the case. It appears from the evidence that the appellee, some 11 years previous to the accident, had suffered a miscarriage, and, as a result, the cervix of the womb had become lacerated; and it was a question, which was submitted to the jury, and which has been determined, so far as we are concerned, by the judgment of the appellate court affirming the judgment of the circuit court, whether or not the injuries shown in evidence were simply the result of the old complaint, or were the direct and immediate result of the shock sustained from the sud-

den stoppage of the car. The objection to the hypothetical question is that it omitted any reference to the laceration of the cervix previously existing, and only referred to the injury caused by the sudden jerking and stoppage of the car. When, however, counsel for appellant made this objection to the question, counsel for appellee thereupon amended and changed the question so as to refer to the matter omitted from it when it was first asked. When the question was thus changed and modified so as to answer the objection made to it, no further objection was made. The alleged defect in the question having been thus cured, we do not consider that any such error was committed as would justify a reversal of the judgment. All the questions of fact are settled by the judgments of the lower courts. The judgment of the appellate court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

(174 Ill. 506)

LUNDY et al. v. MASON.

(Supreme Court of Illinois. Oct. 24, 1898.)

DEED—DELIVERY—ACCEPTANCE—RES JUDICATA—GIFT.

1. Intending to make a gift effective at his death, a father made a deed to his son, without the latter's knowledge, and retained possession. He then concluded to make the gift by devise, but was unable to make a will. During the father's life, the son obtained possession of the deed without his knowledge. *Held* no delivery.

2. A father gave his son possession of lands, and exacted rent therefor, and then made a deed thereof to him, without his knowledge, and retained possession, intending it to take effect as a gift at his death. *Held* not a valid settlement of the lands on the son.

3. Grantee's obtaining possession of a deed without grantor's knowledge or consent does not dispense with a delivery.

4. There was no valid acceptance of a deed by the grantee during the grantor's lifetime where he, without grantor's knowledge, obtained possession of a sealed package containing it, and gave it to another, who abstracted the deed, and gave it to him.

5. A decree refusing to cancel the deed of a deceased person at the instance of his heirs for want of possession in them, and because they have an adequate legal remedy, being not on the merits, is no bar to a recovery from the grantee of their distributive share of the lands conveyed.

Error to Livingston county court; Alfred Sample, Judge.

Bill by Samuel P. Lundy and others against Lizzie Lee Mason. There was a judgment for defendant, and plaintiffs bring error. Reversed.

Reeves & Boys, for plaintiffs in error. George Torrance and R. S. McIluff, for defendant in error.

WILKIN, J. This is a suit in ejectment, begun in the circuit court of Livingston county by Samuel P. Lundy and others, the children and grandchildren and heirs at law of Henry Lundy, deceased, against Elias J. Lundy, another son and heir, to recover pos-

session of a 90-acre tract of land owned by Henry Lundy in his lifetime, and of which it is claimed he died intestate, still owning it. The declaration avers that the plaintiffs and defendant are owners in fee as tenants in common, but that the defendant, against the will of plaintiffs, holds the whole of said lands, and the rents and profits therefrom, and has excluded plaintiffs from the possession thereof. Before plea was filed, the defendant Elias died testate, leaving his wife his sole devisee. She afterwards married J. H. Mason. The declaration was amended, and the name of Lizzie Lee Mason substituted as defendant. She filed a plea of not guilty, and a special plea that the plaintiffs had failed to make demand for possession. To the latter plea a demurrer was sustained. Upon a hearing had before the court without a jury, judgment was rendered for defendant, on the ground that she was the owner of the land in fee by virtue of a deed from Henry Lundy to her husband, Elias J. Lundy. From that judgment plaintiffs bring the cause here on writ of error.

The principal questions in the case are two: First, was there a delivery and acceptance of the deed from Henry Lundy to Elias J. Lundy conveying the lands involved in this suit? and, second, is the decree in a prior cause in chancery (No. 2,217), and its affirmance in this court, a bar to this ejectment suit?

Relative to the first inquiry, it appears from the evidence that Henry Lundy, in his lifetime, made a deed to his son Elias J. Lundy, without the latter's knowledge, purporting to convey the land in controversy, and placed it in a sealed envelope in a drawer where the grantor usually kept such papers. At the time of making this deed he made several others, his purpose being to divide up his estate, which consisted of several hundred acres of land, among his several children and grandchildren. The deeds were not delivered, it being his expressed intention to keep the grantees ignorant of what he was doing, and have the deeds take effect upon his death. This he afterwards learned would not have the legal effect he desired, and he expressed his intention to make a will. Elias was at this time in possession of the land in controversy, paying \$2.50 per acre rent therefor, and his father was living with him. Before the father succeeded in making the will, he was, in May, 1895, stricken with paralysis, and remained very ill until he died, August 9th following. Immediately after taking sick, he asked a neighbor, C. R. Manley, to prepare a will, but his condition was such that Manley was unable to get from him a definite understanding as to what disposition of his property was desired. It appears that several attempts were afterwards made to get a definite statement, but without success. Elias was present on one occasion. He had understood that he was to have the land here in question, and was expressing

anxiety over the fact that he had nothing to show his title thereto. He remarked that there was a sealed envelope at home, but that he was not aware of its contents, and upon the suggestion of Manley he brought the envelope, and Manley opened it. Among others, the deed in controversy was found. Elias then instructed Manley to keep the deed, which he did, until Henry Lundy's death, when it was delivered to Elias, who soon after placed it on record. It is also claimed that in the drawer where the deed was kept were also some papers belonging to Elias. From this statement of facts, can it be said that the act of Henry Lundy in making and acknowledging the deed, and placing it in the drawer, without the grantee knowing of its existence, constituted a delivery of the instrument? Clearly not. The grantor was aware the deed was inoperative without delivery in his lifetime, as he stated to one of the witnesses testifying in the case; and, as is clearly shown, he abandoned the making of deeds to accomplish his purpose. He at no time parted with his control over the instrument. So long as the purpose of a grantor to make a voluntary conveyance is in fieri, the grantor may, with or without cause, at any time recede from such purpose. *Rountree v. Smith*, 152 Ill. 493, 38 N. E. 680; *Byars v. Spencer*, 101 Ill. 429; *Stinson v. Anderson*, 96 Ill. 373. The finding of the court in this case is that "the father delivered the possession of the ninety acres to the son, Elias, in the spring of 1881, with the purpose and intention of making a settlement of the same on him, and that the deeds to said ninety acres were placed in a drawer of a stand where Elias kept his papers, with the view and intention that Elias should find the same at his [the father's] death; that Elias paid the taxes on said land during the time," etc. The facts, we think, do not show that a settlement was made, as found by the court, but rather that Elias was merely paying rent as a tenant. But, even granting that the evidence supports the finding, it would amount to nothing more than an attempt to make a testamentary disposition of the lands by deed, which clearly could not be done. *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007. It is necessary that delivery be made during the grantor's life to pass the title. *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041; *Benson v. Hall*, 150 Ill. 60, 36 N. E. 947. If it be said the grantee had possession of the deed, it must be admitted such possession was without the knowledge or consent of the grantor. In any view of the facts, to hold the instrument a valid deed would be to give effect to it contrary to the grantor's intention. There was clearly no delivery of the deed, and, furthermore, there was no acceptance of it, as such, during the lifetime of the grantor.

Reference is made in the argument and the evidence to another tract of land, known as the "North Eighty," but what is here said

has no reference to that tract of land, it not being involved in this suit.

The contention that the decree in chancery cause No. 2,217 is a bar to this suit is, we think, untenable. That was a proceeding by parties who are appellants here to cancel the deed in question in this suit as a cloud upon their title as tenants in common and heirs of Henry Lundy. The decree below dismissed the bill. This court, upon appeal, held that such a bill could not be maintained under the statute and decisions of this court, because the complainants were not in possession; and it was expressly stated that complainants' remedy was at law, in ejectment. The merits of the cause were not discussed. The decree below dismissing the bill was affirmed on the sole ground that the circuit court was without jurisdiction. The dismissal of the bill in that case presents no defense to this suit at law. *Richards v. Railway Co.*, 124 Ill. 521, 16 N. E. 909. The judgment of the circuit court finding the issues for the defendant is reversed, and the cause remanded to the circuit court for further proceedings. Reversed and remanded.

(174 Ill. 595)

EVANS v. GERRY.

(Supreme Court of Illinois. Oct. 24, 1898.)

VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—DEEDS—DESCRIPTION—FRAUD—EVIDENCE—ADMISSIBILITY.

1. A contract to convey described the lots as in block 75 of a certain city, but the deed tendered by the vendor correctly described the lot as in block 75 of an addition to the city. The only block 75 in the city was in the addition, and the vendee had personally examined the property, and was not misled by the erroneous description. *Held*, that the variance did not avoid the contract.

2. Where a contract to convey describes a lot as in a certain city, and the deed tendered by the vendor describes it as in an addition to the city, parol evidence is admissible to explain the latent ambiguity.

3. A contract provided that a merchantable abstract of title should be furnished within 10 days, and a deed delivered within 3 days after the title was perfected. *Held*, that it was intended that abstracts should be furnished in 10 days, title perfected within a reasonable time, and the deed delivered within 3 days thereafter.

4. A description of land as "the southeast forty of the northeast quarter" does not contain a latent ambiguity.

5. Parol evidence is admissible to show that a deed describing land as the "southeast forty" of a certain quarter section means the southeast 40 acres.

6. Since the question of the validity of a title to real property is a question of law, the opinions of title examiners are not admissible to show that the title is defective.

7. A vendee did not abandon his rights under a contract to convey by stating to the vendor, after she had refused to convey, that, if he had acquired the property, he would have made certain improvements, to which she had said she held the property at a certain price, and he had replied that it was useless to talk further regarding it.

8. A vendor's expression of opinion as to the value of his land is not a representation of value made to the vendee.

Appeal from circuit court, Lake county; Clark W. Upton, Judge.

Suit by Robert G. Evans against Julia M. Gerry. There was a decree for defendant, from which plaintiff appeals. Reversed.

This was a bill in chancery filed by appellant for the specific performance of a contract providing for the mutual exchange of certain properties in the city of Highland Park between appellant and appellee. The contract over which the controversy arises is as follows: "Contract for conveyance made this first day of March, A. D. 1895, between Julia M. Gerry, party of the first part, and Robert G. Evans, party of the second part, both of the city of Highland Park, Lake county, Illinois: First party agrees to convey, by warranty deed, to second party, lots one (1) and two (2), except westerly thirty feet thereof, and lot three (3), all in block three (3) in the city of Highland Park, Lake county, Illinois, as per recorded plat made by the Highland Park Building Company, free from all liens and incumbrances whatsoever, except a mortgage on which a balance of \$3,500 remains unpaid, and will mature November, 1895. And in consideration of such conveyance second party agrees to convey, by warranty deed, to first party, free from incumbrances of every kind, lot nineteen (19) in block seventy-five (75) in the city of Highland Park, Lake county, Illinois, as per said recorded plat. Second party, as a further consideration, agrees to pay first party the sum of \$1,000 on the first day of May, 1895, and the further sum of \$990 on the delivery of said deed, and the further sum of \$10 on the signing hereof, the receipt of which latter sum this day is hereby acknowledged by first party. Each party to furnish the other a complete and merchantable abstract of title for said respective lots, brought down to date, same to be furnished within ten days of this date, and said deeds to be delivered within three days after said respective titles are found to be good. Witness our hands and seals the day and year first above written. Julia M. Gerry. [Seal.] R. G. Evans. [Seal.]" The parties to this contract were residents of the city of Highland Park, where they had lived many years; and they had made personal investigation of the respective properties, and apparently came to a full understanding as expressed in this contract. Appellant paid the earnest money of \$10, and, soon after the execution of the contract, abstracts of title were furnished by each of the parties to the other. The abstract of title of appellee's property was found to be satisfactory to appellant, and no objection was raised to it. Appellant's abstract was by appellee placed in the hands of an attorney for examination, and on March 14, 1895, he rendered an opinion finding a number of objections,—some material,

and some of minor importance,—subject to which he found appellant had a good, merchantable title. Appellant immediately went to work to cure such defects in his title as were noted by the attorney, and as appeared to be material. About this time, however, appellee offered to return to appellant his abstract and the \$10 earnest money; informing him that she did not intend to carry out her contract, as his title was not good. From the record and from her evidence it appears the true reason was she had become dissatisfied with the contract, and believed the property she was receiving from appellant was not worth as much as he had represented, and as she had first believed. It is apparent this was the prime cause which actuated her to refuse to carry out the contract. The principal reason assigned by appellee for declining to accept the abstract of title of appellant's property was that while the contract provides for a conveyance to her of "lot 19 in block 75 in the city of Highland Park, Lake county, Illinois, as per said recorded plat," the correct description of the property, and that named in the deed which was afterwards tendered to her, is "lot 19, block 75, in Hawkins' addition to said city of Highland Park." It is not controverted that the property of appellant, of which appellee made a personal investigation, and the house, buildings, etc., thereon, was as last described. It is also undisputed that there is but one block numbered 75 in the city of Highland Park, and that block is in Hawkins' addition. Originally there were but 73 blocks subdivided and platted, and they were consecutively numbered from 1 to 73, inclusive. Subsequently Frank P. Hawkins made a subdivision of the adjacent property, consisting of 3 blocks, which he numbered 74, 75, and 76. The appellant's property is lot 19 in block 75. On this lot were located a new brick dwelling house and other improvements, which appellee went through and carefully examined the day before the contract was entered into. On the 25th day of March appellant made a tender of a deed to appellee conveying the property last above described, and the balance of the money specified in the contract to be paid by him, both of which appellee refused to accept or to carry out the contract. No objection was made by her at that time as to the variance between the description of the property in the deed and that in the contract. Upon this refusal on her part, appellant filed this bill for specific performance, and upon the trial, to establish his right thereto, offered the contract, and introduced proof of chain of conveyance from the United States to himself, and proof of the payment of taxes, for the purpose of establishing a good, merchantable title. Appellee, for the first time upon the trial, objected to the variance in the description of the property, and also insisted the contract had been waived or abandoned by appellant having negotiated with appellee for the pur-

chase of part of the property after she had refused to comply with the contract. Upon the hearing in the circuit court of Lake county a decree was entered dismissing appellant's bill for want of equity, and from that decree this appeal is prosecuted to this court.

D. L. Zook and Cook & Upton, for appellant. Whitney & Upton, for appellee.

PHILLIPS, J. (after stating the facts). It is contended by appellant that the facts presented by this record, and the law applicable thereto, are sufficient to authorize a decree in his favor, and that the decree in the circuit court dismissing his bill should be reversed. Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties under the circumstances of the case. Inflexible rules cannot be laid down for the exercise of the power of a court of equity to grant specific performance of a contract. While it is true it is never to be demanded as a matter of absolute right, and the granting or denial of the relief sought rests in the sound judicial discretion of the court, yet where all the necessary elements, conditions, and incidents are present, relief by way of specific performance should be granted as a matter of right, and not as a mere matter of favor. *Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414; *Hayes v. Nourse*, 114 N. Y. 595, 22 N. E. 40; *Jones v. Newhall*, 115 Mass. 244; *Chambers v. Livermore*, 15 Mich. 381; *Pom. Eq. Jur. § 1404*; 22 Am. & Eng. Enc. Law, 911, 912. By the contract executed voluntarily by the parties to this suit, appellant is, under the rule above stated, entitled to a decree for specific performance, unless appellee has shown some valid and sufficient reason why such contract on her part should not be performed.

It is first urged the description of the premises owned by appellant, of which a deed was tendered to appellee, and afterwards brought into court, varies from the description in the contract. This is true; but is it a material legal variance, to an extent that should permit the avoidance of this contract? The evidence clearly shows there is but one block numbered 75 in the city of Highland Park. It is further shown there is no unvacated block bearing the number 75. It is also shown the parties had in mind at the time of the execution of the contract the identical property to which a deed has been tendered by appellant; that appellee made a personal examination of such property, and is by such change of description in no wise being injured, defrauded, or deceived. Thus, there is no difficulty in determining from all the evidence what particular property the contract refers to. It was not error to admit parol evidence to explain the latent ambiguity existing between the two descriptions. In *Lyman v. Gedney*, 114 Ill. 388, 29 N. E.

282, which was a bill for specific performance, and in which a misdescription had occurred in the contract, this court said (114 Ill. 410, 29 N. E. 287): "Without affirming or denying what may be the law in a case where rectification and specific performance rest entirely on parol evidence, there can be no question but that latent ambiguities may be explained by parol evidence, and that such evidence may also be resorted to for the purpose of identifying the premises, and applying the calls of the deed in suits for rectification and specific performance, and in other actions and proceedings affecting title,"—citing *Cossit v. Hobbs*, 56 Ill. 231, and *McLennan v. Johnston*, 60 Ill. 306. The same rule as to the admission of parol evidence to explain a latent ambiguity was followed by this court in *Canal Co. v. Kinzie*, 93 Ill. 415. In *Hurley v. Brown*, 98 Mass. 545, which was a bill for specific performance, the legal effect of the contract was to convey "a house and lot of land situated on Amity street, Lynn, Massachusetts," and the question was raised whether such description was void for uncertainty. The court held that parol evidence was admissible to show the proper description of the property intended by the contract to be conveyed. There can be no doubt in this case the parties contracted with reference to the particular property described in appellant's deed, and the contract was not void by reason of any wrong description.

It is also contended by appellee that a construction of that part of the contract which provides, "each party to furnish the other a complete and merchantable abstract of title for said respective lots, brought down to date, same to be furnished within ten days of this date, and said deeds to be delivered within three days after said respective titles are found to be good," would mean such title should be found to be good, from the abstract, within the time stipulated in the contract. In other words, it is contended the title must be absolutely good within three days, and, if any question should arise regarding it, the court, on bill for specific performance, should not find the title to appellant's lot good, and decree specific performance, on account of the time under the contract having expired by limitation. This position is not tenable. Courts know, and recognize as part of the general transaction pertaining to the sale and exchange of real estate, that an abstract of title shows nothing more than an abbreviated transcript of the records pertaining to such property, be the same perfect or faulty. A fair construction of this contract is that abstracts were to be furnished within ten days, and, if by the abstracts the titles were not found to be good, they should be perfected within a reasonable time, and the deeds exchanged within three days after such titles were found to be good. It is not necessary that the vendor possess a perfect title at the time the contract is entered into. It is sufficient that he makes the contract in

good faith, and will be able to convey by the time a decree of specific performance is rendered. 22 Am. & Eng. Enc. Law, 960, and cases cited. In many cases where abstracts are furnished and submitted to an attorney or examiner of titles, many defects, either of greater or minor importance, are pointed out, which it often takes a number of weeks to rectify, by quitclaim deeds, affidavits, or otherwise; and it must be presumed, in a contract such as the one entered into in this case, opportunity was to be given to both parties to make good their respective titles within a reasonable time. In this case, it appears, appellant, immediately he ascertained the objections of appellee's attorney to his title, took steps to remedy it as far as was possible. A trust deed dated in 1875 appeared not satisfied of record. On March 21st he obtained a release deed to satisfy this. The attorney for appellee who examined the abstract also noted the property to have been conveyed by the United States to John McCready, and subsequently conveyed by John McCready; but, to rectify this, appellant produced the original deed, showing the conveyance to have been by McCready, the former grantee. Another deed described the property as "the southeast forty of the northeast quarter," etc. There was no latent ambiguity in this expression, its common acceptance and meaning being well understood. Extrinsic evidence was admitted to show that about the date of this deed (1847) it was a common form of expression to say "a forty" or "an eighty," etc., to indicate a 40 acres or an 80 acres, and therefore an abstract which read "a southeast forty" would readily be construed to mean the southeast 40 acres. There was no error in permitting the fact to be thus established, nor do we regard it a defect. Other supposed defects suggested by the examiner of the abstract are not argued by appellee, and therefore need not be noted by this court.

A number of attorneys and examiners of real-estate titles were offered by appellee to show the title to appellant's property was defective. This was improper. The sufficiency of any title to real-estate property is a question of law, and not of fact to be proven by the opinions of witnesses. Where, on a bill for specific performance, the defendant alleges defective title to plaintiff's property, it is a question for the trial court, upon a hearing, to determine from the terms of the contract, and also as a question of law, whether such title is sufficient.

It is urged also by appellee that there was a waiver and abandonment of this contract by appellant. Late in March, 1895, appellee refused to comply with her contract. On May 8th, appellant addressed her a line, requesting the privilege of talking with her on business matters, and on May 9th wrote her, stating that he wished to see her about the purchase of a lot, etc. About that time he had a short personal interview with her, and

in the course of the conversation he spoke about a great many pieces of real estate, and prices, and said that if he had bought the particular property, as he supposed he had, he would put an alley through it, whereupon appellee replied that she held this property (being the property mentioned in the contract) at \$100 per foot. Appellant thereupon said that it was useless to talk further regarding it, and went away. There is no sufficient evidence in the record of an abandonment or waiver of the contract. Where an abandonment or waiver is relied upon, it must be shown to have been the clear intention of the parties to abandon the contract previously entered into. *Mix v. White*, 36 Ill. 484. Courts will indulge no presumptions in favor of a waiver of a contract, where specific performance is attempted to be enforced, nor will it infer waiver or abandonment upon slight proof. 22 Am. & Eng. Enc. Law, 1062. A parol waiver or discharge of a written contract must be clear and explicit, and be proved beyond a doubt. *Huffman v. Hummer*, 18 N. J. Eq. 83.

Appellee, in her evidence in the trial court, dwelt upon the fact that appellant's property is not worth as much as he represented it to be, and that she relied upon his representations. This would not be a good defense. Mere matters of opinion, or expression of an opinion, by the owner of property as to its value, standing alone, will not be held to be a misrepresentation. *Brady v. Cole*, 164 Ill. 116, 45 N. E. 438.

Taking the record as a whole, it appears the contract for the exchange of these properties was fairly entered into between these parties, and was free and clear from any taint of fraud; that appellant has complied with all the terms and conditions imposed by this contract upon him in respect to the furnishing of a merchantable abstract of title to his property, and in other respects mentioned in the contract. There appears no sufficient legal reason why he should have been denied the relief asked for in his bill for specific performance in this case. The decree of the circuit court of Lake county dismissing appellant's bill is reversed, and the cause remanded to that court, with directions to enter a decree granting to appellant the relief asked for in his bill, in conformity with the views herein expressed. Reversed and remanded.

(176 Ill. 34)

J. I. CASE PLOW WORKS v. EDWARDS.
(Supreme Court of Illinois. Oct. 24, 1898.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—ACCOUNTING—EMPLOYEES' SALARIES—COUNSEL FEES—CUSTOMS DUTIES.

1. Where some of an insolvent's goods were inventoried from tags on boxes and packages without examining the contents, and others as "knocked down" without setting up the articles, and some parts were inventoried separately when they had already been listed with the complete articles, and afterwards some box-

es were found empty, and the knocked-down articles in some instances incomplete, the assignee should not be charged with the discrepancy between such incorrect inventory and the sales list; the assignee testifying, uncontradicted by any competent evidence, that he had sold and accounted for everything which came to his hands.

2. Where an auction sale by an assignee was apparently fair and well advertised, the fact that some articles brought less than their inventory price does not amount to fraud.

3. Where the assignee of an insolvent firm found their business in such confusion that services of its employés, who were the only persons acquainted with the business, became necessary, and they would not work for less than formerly, which the assignee was obliged to pay, he could not be charged as having paid them excessive salaries.

4. Where there was no evidence to support a contention that counsel fees of an assignee's attorneys were excessive, and the assignee testified that they were reasonable, a credit for the whole amount was properly allowed.

5. An assignee is not chargeable with customs duties paid to release imported merchandise owned by the insolvent from bond, so as to make it available as assets, even if it afterwards sold at less than cost.

Appeal from appellate court, Second district; Coloston D. Myers, Judge.

In the matter of the assignment of Kirkwood, Miller & Co., a judicial settlement of the account of Isaac C. Edwards, assignee, was modified by the appellate court (71 Ill. App. 655), and the *J. I. Case Plow Works* appeals. Affirmed.

On December 31, 1892, Kirkwood, Miller & Co. made a general assignment for the benefit of their creditors, to Isaac C. Edwards, the appellee. They were conducting the general business of selling farming implements, wagons, buggies, and bicycles, having two establishments,—the main one at Peoria, Ill., and a branch at Cedar Rapids, Iowa. The assignee took possession of the stock in Peoria immediately, but, before he could secure possession of the stock at Cedar Rapids, the city marshal of that city had levied on it under four attachments, aggregating over \$20,000. The assignee, at the instance of some of the largest creditors of the insolvents, employed Mills & Keeler, attorneys at Cedar Rapids, to contest the attachments for him. Some time in February the attachments were all released, and the stock turned over to the assignee, who, after selling the best of it at private sale in Cedar Rapids, shipped the remainder to Peoria. While the stock was still in Cedar Rapids, he was sued in replevin for part of the goods by two firms, who claimed that some of the goods in his hands were their goods shipped to the insolvents, to be sold on commission. The assignee afterwards turned the goods over to them, but there was an unsettled claim of Sechler & Co. for goods belonging to them, which they contended the assignee had sold and refused to account for. The assignee finally compromised the suit. In these replevin suits, Mills & Keeler represented the claimants, both, however, being different parties from those who levied the original at-

tachment writs. After accepting the trust, the assignee had an inventory made of the stock on hand, both at Peoria and at Cedar Rapids. For this purpose he had to employ persons familiar with the business, as he himself was totally unfamiliar with it. A large number of petitions were filed in the county court by parties alleging that they had goods in the storerooms of Kirkwood, Miller & Co., which had been shipped to the firm to sell on commission, and asking that their goods be turned over to them. These were all pressed for trial, and it was not until the following April that they were all disposed of. Upon the hearing, the court ordered goods to be turned over to the petitioners valued in the inventory at more than \$12,000. After selling at private sale for several months, the assignee procured an order of the county court authorizing him to sell at auction. On May 26, 1893, he held the final auction sale, disposing of all the balance of the stock on hand. In September he filed his report, to which objections by a number of the creditors, including appellant, were sustained; and he filed an amended report November 3, 1893, and a supplemental report April 12, 1894. Both reports were contested, and evidence was heard at intervals for upward of a year. In December, 1895, the county court entered an order charging the assignee, in addition to the amount shown by his report, with items aggregating \$9,349.70. From this order appellant appealed to the appellate court, alleging numerous errors, insisting that the appellee had not been charged with certain items at all, and had not been charged sufficiently on others, and objecting to certain credits which had been allowed. Appellee assigned cross errors, and the appellate court struck out most of the items charged against the assignee by the county court. From this decision, appellant has again appealed, and the assignee has assigned cross errors here.

Jack & Tichenor, for appellant. McCulloch & McCulloch and George B. Foster, for appellee.

CARTER, O. J. (after stating the facts). The appellant, in support of its alleged several errors, charges the assignee with fraud and mismanagement. We have read the voluminous evidence carefully, and do not find the charges sustained. Errors of judgment, and mistakes, have doubtless occurred, and it may be that other persons might have managed the affairs of the insolvents to better advantage, for the assignee had never had any experience in business of the kind carried on by the insolvents; but we find no sufficient evidence in the record to sustain this charge against him. The original inventory of stock on hand footed up over \$60,000, part of which, however, was afterwards turned over, by order of the court, to other parties. This stock was stored on three floors and in the basement of a large three-

story building, and in several other basements and sheds. It had accumulated for several years, and a large portion of it was in bad order. A large number of articles were stored "knocked down,"—that is, in parts, not set up complete,—and the different parts were stored in various places, and on different floors, some in different buildings. In taking the inventory, the different articles were not all handled, and no effort was made to ascertain whether all the articles that were knocked down, and inventoried as complete, were really complete in all their parts. In some lines, notably the harness department, the inventory was taken from tags on the outside of boxes and packages, without examining the contents. Appellee contends that in all these cases the inventory was incorrect; and when they put together the knocked-down articles and opened the boxes, preparatory to a sale, many pieces were found to be missing, and some of the boxes which had been inventoried were empty. Some of the parts were inventoried separately when they had already been counted in the complete vehicle or article. The assignee was compelled, by the circumstances, to employ the servants of his assignors, as they were the only persons familiar with the stock and the books and accounts. The books had not been balanced for a long time, and were over \$30,000 out of balance. The assignors had paid large salaries to some of their employés, and they would not work for the assignee for any less.

Appellant seeks to charge appellee with what he calls a shortage in his accounts of the articles sold. This shortage was obtained by taking the list of articles in the inventory, and comparing it with those sold, as reported by the assignee. As has already been seen, the inventory was not reliable; and any statement based on such a calculation would have been an incorrect one, especially as it seems that part of the statement was not made from definite data, but was estimated and drawn from other sources than the inventory and the sales list. We think the appellate court was right in disallowing all charges against the assignee based on the alleged discrepancy between the inventory and the sales list. The assignee declared on oath that he had sold all the goods that came to his hands, and had accounted for them as either sold or on hand, and his statement is uncontradicted by competent evidence.

Appellant alleges that certain auction sales were fraudulently made, especially the final or closing-out sale, and insists that appellee should be charged with the difference between what the sales actually realized and the inventory appraisement. The closing-out sale seems to have been perfectly fair, and thoroughly advertised, and there is no evidence to the contrary. We find no sufficient evidence to impeach any of the auction sales. Mere inadequacy of

price, where it is not gross, is not sufficient.

It is claimed that appellee employed too many persons in his service, and paid them unreasonable salaries. The county court charged him with part of the salary paid Henning and part of that paid Stewart. The appellate court held these proper credits for the assignee. We concur in this view. While the salaries of some of the men were high, still, in view of the nature of the business and their knowledge of it, their services were necessary for appellee to have. We think, also, it was proper to allow Stewart's salary up to the time of making the supplemental report.

Complaint is made that the amount paid Mills & Keeler for professional services was excessive, and that the charge should not be allowed for the further reason that, as attorneys, they represented interests antagonistic to the assignee. This contention is not sustained. As to the value of their services, appellant offered no evidence, and the appellee testified that it was a reasonable amount. The county court disallowed part of it, and the appellate court restored the whole amount of fees as a credit. The credit was proper under the evidence.

Complaint is also made of the commission allowed the auctioneer. No evidence was offered by appellant on the subject, and neither the county court nor the appellate court has reduced the amount paid on that ground. It is conceded, however, by appellee, that the auctioneer has been overpaid, and this overpayment should be charged to appellee.

It is further contended that the appellee is chargeable with the amount of duty he paid on the wheels he took out of bond. There were nearly 200 bicycles in bond at the custom house in Peoria, which had been shipped to the insolvents by Bonnick & Co., of England, and which had been partly paid for. There is no merit in this contention. The wheels could not be made available by the assignee without paying the duty on them. There was no error in allowing this credit. That the wheels did not realize all they cost, as contended by the appellant, was unfortunate; but we cannot say that the assignee, in the exercise of his best judgment in the matter, acted in such a way as to make him chargeable with the resultant loss, if any there was.

As to the separate items of interest charged against the assignee by the county court, that is not before us on this appeal. The principles upon which a trustee should be charged with profits or interest arising from the lending or use by him of the trust funds for his personal gain are well settled, and have been frequently stated by this court. *Ogden v. Larrabee*, 57 Ill. 389; *Asay v. Allen*, 124 Ill. 391, 16 N. E. 865; *Lehman v. Rothbarth*, 159 Ill. 270, 42 N. E. 777. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 264)

PAIN et al. v. KINNEY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEALS—FINAL DECREES—DISMISSAL AS TO A PARTY—EXCEPTION—CASES OF HARDSHIP.

An order of court dismissing a bill in equity as to one party is not a final order, and cannot be appealed from until there has been a final disposition of the case as to all other parties, in the absence of a showing that a peculiar hardship will result from a refusal to allow an appeal.

Appeal from appellate court, First district.

Bill in equity by Charles E. Pain and others against William C. Kinney and others for specific performance. From a judgment of the appellate court (73 Ill. App. 115) dismissing complainants' appeal from an order of the trial court, complainants appeal. Affirmed.

Parker & Pain, for appellants. Knight & Brown, for appellees.

CARTER, J. This is an appeal from a judgment of the appellate court dismissing an appeal to that court from an order of the circuit court of Cook county in a chancery cause for specific performance. The appeal was dismissed by the appellate court on the ground that the order or decree appealed from was not a final decree, and that is the only question involved in the appeal to this court. Appellee Julianna Chambers was the owner in fee of certain lots which had been leased to one Brady for 99 years. Brady and one Skinner had contracted with the Farson & Libbey Company to furnish millwork and materials, which, though not specified in the contract, were to be and were used in constructing a building on the said lots. After furnishing a portion of the materials, Skinner made an assignment for the benefit of his creditors, and the Farson & Libbey Company refused to furnish any more. Thereupon a written agreement was entered into, which also included the work of the other contractors, whereby the company was to furnish the balance of the material, and receive promissory notes for the amount of \$3,000, to be secured by a deed of trust on the lots, including the fee-simple title thereto in Julianna Chambers. The deed of trust was to be recorded, and the notes placed in escrow, before the company should deliver the material. It does not appear that Julianna Chambers signed this contract, but it seems she undertook to comply with it so far as she was to perform it. She, with appellee Patrick Chambers, her husband, and Brady, executed the deed of trust to secure the notes, which notes were given by Brady. These notes were payable at the office of William C. Kinney, who was the trustee in the deed of trust, and were delivered to him in escrow, as provided by the contract, and the deed of trust was duly filed for record. The bill charged that the company performed the contract on its part, but that Kinney, acting with the consent and ad-

vice of Julianna Chambers, refused to deliver to it the notes, and the prayer is for specific performance,—that Julianna Chambers and Kinney be required to deliver said notes.

Answers and replications were filed and the cause was referred to the master. He reported the evidence and his conclusions to the court, recommending a decree as prayed in the bill. All of the appellees excepted to the report, and the court made the following order: "This cause coming on to be heard upon the exceptions of the defendants, Julianna Chambers, Patrick Chambers, and William C. Kinney, to the report of the master, and to his rulings upon the motion of said defendants to exclude the testimony of the complainant, and to dismiss the bill of complaint filed in said cause for want of equity, which said motion was duly filed by said defendants with the master in chancery to whom said cause was heretofore referred, after argument of counsel, and upon due deliberation by the court, the report of the master overruling said motion is hereby set aside, and the court finds that the said master should have sustained the said motion as to the defendants Julianna Chambers and Patrick Chambers, and should have overruled the said motion as to the said defendant William C. Kinney; and the court does hereby sustain said exceptions and motion as to the said defendants Julianna Chambers and Patrick Chambers, and overrule the said exceptions and motion as to the said defendant William C. Kinney." The court further ordered that the cause be re-referred to the master to take testimony on behalf of Kinney, and report the same with his conclusions. The appellants appealed to the appellate court, as before stated.

The decree appealed from was not a final decree, and the appeal was rightly dismissed. In *Thompson v. Follansbee*, 55 Ill. 427, this court said: "If the bill is dismissed as to one or more parties, the complainant cannot prosecute a writ of error until there has been a final disposition of the case as to all other parties. A cause cannot be reviewed as to one party at one time and as to another party at another time." *Bucklen v. City of Chicago*, 166 Ill. 451, 46 N. E. 1073; *Dreyer v. Goldy*, 171 Ill. 434, 49 N. E. 560. Appellants concede the rule, but insist that this case comes within exceptions to it which have been established; that is, that such appeals will be entertained in cases where to deny them would result in a denial of justice, or in great hardship. *Crouch v. Bank*, 156 Ill. 342, 40 N. E. 974. We are unable to see how any hardship would result to appellants from the dismissal of their appeal by the appellate court. It seems that Julianna Chambers complied with the contract, executed the deed of trust, and it was recorded. The notes were executed by Brady, and not by her, and were delivered in escrow to Kinney, as agreed. The case is retained as to him; and, if it should appear later that for any reason it should be retained as to the other appellees,

the order dismissing them may be brought up with the final decree. The judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 48)

SINGER & TALCOTT STONE CO. v. HUTCHINSON et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

CORPORATIONS—EXPIRATION OF CHARTER—SUBSEQUENT ACTIONS—RIGHT TO WRIT OF ERROR.

Rev. St. c. 32, § 10, provides that certain corporations whose charters may have expired shall continue in their corporate capacity during the term of two years, for the sole purpose of collecting the debts due, and selling and conveying their property. Section 11 provides that the corporate name may be used for such purpose, and that they shall be capable of prosecuting and defending all suits at law or in equity. Section 12 provides that "the dissolution for any cause whatever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution." *Held*, that a corporation sued for a debt incurred previous to the expiration of its charter may sue out a writ of error more than two years after its charter has expired, notwithstanding the suing out of a writ of error is the beginning of a new suit; since section 12 gives such creditors the right to sue without any limitation as to time except the general statute of limitations; and since Prac. Act, §§ 67, 91, provide that "a party" to an action may prosecute a writ of error.

Error to appellate court, First district.

Action by Dillon B. Hutchinson and others against the Singer & Talcott Stone Company. From a judgment of the appellate court (72 Ill. App. 306) dismissing a writ of error brought by defendant, defendant brings error. Reversed.

Ira W. & C. O. Buell and A. B. Jenks, for plaintiff in error. T. A. Moran and Barnum, Humphrey & Barnum, for defendants in error.

PHILLIPS, J. The plaintiff in error was incorporated April 20, 1872. Its charter expired April 20, 1892. The defendants in error brought suit against it January 21, 1893, and obtained judgment at the July term, 1895. The case was taken by appeal to the appellate court (61 Ill. App. 308), where it was reversed, and the cause remanded, on the merits. At the June term, 1897, of the circuit court, the cause was again tried, and again defendants in error obtained judgment, from which orders for appeal were taken by plaintiff in error, but not perfected. On September 8, 1897, plaintiff in error sued out a writ of error to remove the record to the appellate court, in which court defendants in error filed a plea of nul tiel corporation, to which a demurrer was interposed, overruled, and the writ of error dismissed, on the ground that the suing out of a writ of error was the commencement of a new suit, which, owing to the expiration of its charter, and of the two years thereafter provided by section 10 of chapter 32

of the Revised Statutes for the closing up of its business, that court held it could not bring. The plaintiff in error then prosecuted this writ of error, and, on filing the record in this court, a plea of nul tiel corporation was again interposed, which was stricken from the files, and thereafter a motion was made to reinstate it. The legality of that plea as a defense, on the above facts of record, is presented for our consideration.

The plaintiff in error contends that, it having been sued, and judgment having been rendered against it, as a corporation, the defendants in error are now estopped from setting up the defense stated in the plea; while the position of defendants in error is that the two years given plaintiff in error by the statute for the purpose of bringing suit, etc., to close up its business, beyond the limitation of its charter, having expired, this new suit by writ of error cannot be maintained,—in other words, that its corporate capacity to sue had ceased April 20, 1894. It is the established law of this state, as evidenced by a long line of decisions, that the suing out of a writ of error is the beginning of a new suit. *Ripley v. Morris*, 2 Gilm. 881; *Bank v. Jenkins*, 107 Ill. 291. The law is that the corporate capacity of a corporation to sue ceases on dissolution, except as such capacity is continued by statute, or its name is used in an equitable proceeding for the purpose of distributing its assets as a trust fund. *Association v. Fassett*, 102 Ill. 315.

The charter, or corporate existence, of this corporation, having expired April 20, 1892, section 10 of chapter 32 on "Corporations," provides that it and like corporations "shall continue their corporate capacity during the term of two years, for the sole purpose, only, of collecting the debts due to said corporation and selling and conveying the property and effects thereof." Section 11 provides that the corporate name may be used for such purpose, and that they shall be capable of prosecuting and defending all suits at law or equity, arising, as evidently intended, out of the execution of such sole purpose of collecting debts and selling and conveying the property and estate thereof. Section 12 is as follows: "The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution." Much stress is placed upon these sections in this case. It is evident that sections 10 and 11 were enacted for the benefit of the corporation, but fixing a limitation on the time of its continued existence for the sole purposes expressed, while section 12 was enacted for the benefit of those whose rights had accrued against the corporation previous to its dissolution, without any limitation as to time other than the general statute of limitations applicable to the remedy itself sought to be applied, or as to subject-matter other than that the remedy

must be limited to liabilities incurred previous to its dissolution. While the corporate capacity of this corporation was continued for two years after the expiration of its charter, or until April 10, 1894, in order to bring suits for the purpose aforesaid, its corporate capacity to be sued, as a party defendant, for liabilities which accrued before its dissolution, was continued without limitation as to time, and therefore the general statute of limitations only would apply. Hence an action at law would lie against said corporation at any time within such general statute of limitations for a liability created before its dissolution, if brought before equity had obtained jurisdiction. These sections, therefore, continued its life, for the respective periods stated, as an entity, so that it could sue or be sued as a party to the action; and therefore its rights, as such party, are conserved the same as the rights of other parties to actions, not only by the constitution, but by sections 67 and 91 of the practice act, which provide that a party to an action may prosecute a writ of error, or, as expressed in section 91, "any party to such cause shall be permitted to remove the same to the supreme court by appeal or writ of error." Clearly, this corporation was a party to the cause, and came within the provisions of this law. It is conceded the corporation would have had the right to appeal from the judgment, because, as stated, the appeal would have been a continuation of the same suit. But the constitution and the statute grant the right to remove the record to "any party to such cause," by writ of error as well as by appeal. For this purpose the entity of this corporation, as a party to the cause, continued after the judgment was rendered as well as before. A writ of error is a writ of right, both by the common law and our statute, as to any one who is a party to the record, or who is shown by the record to be prejudiced by the judgment. *McIntyre v. Sholty*, 189 Ill. 171, 29 N. E. 43. This corporation was kept alive for the purpose of being made such a party to the original action, and, being so alive for such purpose, is preserved by the practice act, with authority to prosecute an appeal or a writ of error.

This holding is in harmony with the prior decisions of this court that a writ of error is a new suit. In the *Fassett Case*, supra, the corporation had been dissolved by decree, and a receiver appointed, who would necessarily, therefore, have had to represent the corporation in any suits it might bring. The defense there set up was that the corporation was extinct by decree of court, which if true, as the court states, the writ of error should have been dismissed. The appellate court for the First district erred in dismissing the writ of error. The judgment of that court will be reversed, and the cause remanded to that court, with directions to consider the errors assigned. Reversed and remanded.

(174 Ill. 514)

GEER et al. v. GOUDY.

(Supreme Court of Illinois. Oct. 24, 1898.)

WITNESS—HUSBAND AND WIFE—PAROL GIFT OF LAND—PART PERFORMANCE—EVIDENCE—SUFFICIENCY—STATUTE OF FRAUDS.

1. A wife cannot testify to communications made by her husband during coverture, even after the marriage relation is severed.

2. Plaintiff claimed premises through her husband, who, it was alleged, acquired title by parol gift from his father, deceased, who put him in possession, and promised to convey the same to him. Several witnesses testified that they had heard deceased say he was going to buy a lot for his son, and that he was building, or had built, a house for him. Other witnesses testified that he said, while he and the son were discussing the building of the house, which was being erected under the son's superintendence, on which their opinions differed, "It is your own house. I suppose you can do as you please;" and "Do what you please. It is your own house, and you have got to pay for it;" and "This is the kind of work you get for the big price you pay for this house." All the contracts for the house were made in the son's name, and paid for by him with checks drawn on his private account, which consisted of checks drawn on the father's account by his authority, and deposited to the son's credit. When the lot was purchased the deed was made originally to the son, but it was changed, and the property conveyed to deceased by deed in handwriting of the son. About the time the erection of the house was commenced, deceased executed a party-wall agreement, as owner, with the adjoining owner, and, about the time the son took possession, executed a trust deed thereof, which contained covenants as to ownership, title, and possession. He also paid the taxes for the two years partially occupied in building the house, and in his will made no mention of a gift to his son. *Held*, that the evidence of a parol promise to convey was not sufficiently clear, certain, and unambiguous to warrant a finding that such a promise was made.

3. The evidence was insufficient to show such expenditures of money or such making of valuable improvements on the premises as to constitute a part performance of the oral promise to convey which would take the case out of the statute of frauds.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by Carolyn W. Goudy against Clara G. Geer and another. From a decree in favor of complainant, defendants appeal. Reversed.

This is a bill filed in the court below by Carolyn W. Goudy, sole devisee under the will of her deceased husband, William J. Goudy, who is alleged by her to have acquired the title to the premises hereinafter referred to by gift from his father, William C. Goudy, against Clara G. Geer and Ira J. Geer, her husband, for the purpose of compelling the execution by Clara G. Geer of a quitclaim deed conveying to Carolyn W. Goudy an undivided one-half interest in certain premises situated on the northwest corner of Astor and Goethe streets, in Chicago; the said Clara G. Geer holding the title to such undivided one-half interest as one of the devisees of William C. Goudy, deceased, who at his death left by his will the residue of his estate to said Clara G. Geer, considered and

treated as his daughter, and to his son, William J. Goudy, in equal shares. Ira J. Geer, the husband of Clara G. Geer, having upon his petition been made a party defendant as executor of the will, answered the original bill, denying the material allegations thereof, and also filed a cross bill, which was answered by the said Carolyn W. Goudy. Clara G. Geer filed a separate answer to the original bill, denying that there was any gift of the premises by William C. Goudy to William J. Goudy, or any promise made by William C. Goudy to convey the premises to the said William J. Goudy. The answers in the case set up and rely upon the statute of frauds. Replications were filed to the answers. An amendment was filed to the original bill, and the answers of Clara G. Geer and of Ira J. Geer, individually and as executor, were ordered to stand as answers to the bill as amended. The cause came on for hearing before the chancellor upon evidence taken before a master, and upon proofs presented in open court; and the court made a decree directing that the appellants, Clara G. Geer and Ira J. Geer, execute and acknowledge a quitclaim deed conveying the premises in question to the appellee, Carolyn W. Goudy, subject to the incumbrance hereinafter mentioned, for \$15,000. In its decree the court dismissed the cross bill of Ira J. Geer, as executor, for want of equity. The present appeal is prosecuted from the decree so entered by the circuit court.

The facts as shown by the pleadings and evidence are substantially as follows:

William C. Goudy, who in his lifetime was a practicing lawyer in the city of Chicago, died testate on April 27, 1893, leaving him surviving, his widow, Helen Judd Goudy, and William J. Goudy, his son and only child. He and his wife, some years before the birth of their son, took into their family, to live with them, Clara G. Carr, or Clara G. Phillips, a grandniece of Mrs. Goudy, who was always treated by them as a daughter, although not formally adopted, and was always called Clara G. Goudy. She was so taken into the family when she was quite a child, and never knew that she was not the daughter of William C. Goudy and his wife until after she was grown. In June, 1887, Clara G. Goudy married Ira J. Geer, one of the appellants herein. In December, 1887, William J. Goudy, being about 24 years of age, married Carolyn Walker, the present appellee, and now named Carolyn Goudy. On June 10, 1889, William C. Goudy purchased from John W. Root the premises in question for \$13,520, of which \$6,415.73 was paid in cash, and the balance, amounting with interest to \$7,231.90, was paid in December of the same year in discharge of a mortgage which he had assumed. A warranty deed, dated June 10, 1889, was executed by John W. Root and wife to William C. Goudy. In the summer of 1890 the erection of a dwelling house and stable upon the said premises was commenced un-

der the superintendence and direction of the son, William J. Goudy. The dwelling house and stable were finished about the month of May, 1891, at a cost of \$53,684.07. The bill of the appellee, as originally filed, and as amended, alleges that the premises in question were purchased by William C. Goudy, a man of ample means, for the purpose of providing his only child with a home for himself and family, and that immediately after the purchase thereof he gave the same to the said William J. Goudy, and put him in possession thereof as owner, promising thereafter to make a deed thereof to William J. Goudy to evidence such ownership; that William J. Goudy went into possession thereof as owner, and proceeded to erect a dwelling house and stable thereon; that he gave his own personal time and attention to erecting the same; that all contracts for the erection of the building were made by William J. Goudy in his own name, and all payments therefor were made by him with his own money; and that all of such facts were well known to William C. Goudy. When the house and stable were finished, in May, 1891, William J. Goudy, with his wife and child, moved into the same, and occupied the same until his death on May 26, 1894. While the house and stable were being erected on the lot at the corner of Astor and Goethe streets purchased from Root, and called in the record the "Root Lot," William C. Goudy was building another house on Goethe street, on the opposite side of the street, and to the east of the Root lot, as a home for himself and his wife, where the appellants, Clara G. Geer and Ira J. Geer, her husband, lived with him and his wife until his death.

William C. Goudy, in his will, dated July 22, 1891, after leaving certain legacies to his niece and his sister and a brother, made the following provisions: "I devise and bequeath to my wife, Helen Judd Goudy, the homestead No. 240 Goethe street, Chicago, * * * the dwelling house and stable thereon, together with all the furniture, pictures, and ornaments, carriages, horses, harness, etc., in and on said premises, to use for and during her lifetime. If she desires to lease the homestead, she may do so, and have the net rent as her own. If she chooses to sell any of the furniture, carriages, horses, or stable furniture, she may sell, and purchase others with the proceeds, or keep the money received therefor as her own. In addition to the foregoing provision, I direct my executors to pay to my said wife \$500.00 in each and every month, making in the aggregate \$6,000.00 per year. This amount is to be paid from my estate, whether the income amounts to enough or not. If the income is insufficient, then principal is to be used; and, if money is not on hand, then it is to be raised by the sale or mortgage of property. Subject to the foregoing provisions, I devise and bequeath all of the rest and residue of my estate, real and personal, money, stocks, evidences of indebtedness, and securities, to my

son, William Judd Goudy, and my daughter, Clara Goudy Geer, each to be entitled to one-half, as nearly as it is practicable to divide the same. In case of the death of my son in my lifetime, and I make no further provision by will, then his share is to go to his child or children; and, in a like contingency as to my daughter, then her share is to go to her child or children. But in such an event it is my wish that \$25,000.00 in money or property be deducted from the share going to my son, his child or children, and given to his wife, Carolyn; and from the share going to my daughter's child or children a like deduction be made, and given to her husband, Ira J. Geer." The will makes the son, William J. Goudy, and the son-in-law, Ira J. Geer, executors, and confers upon the said executors certain powers, in the following words: "I give to them, or the survivor, in case of the death, resignation, or inability of the other to act, full power to manage the estate, to collect debts, to sell and convey real or personal property, to bring suits, to compromise disputed matters, to invest and reinvest money, and in general to exercise a discretion in the management of the estate, subject to the provisions of this will in favor of my wife." In June, 1887, William C. Goudy conveyed to the appellant Clara G. Geer, under the name of Clara G. Goudy, certain premises in Argyle, a suburb of Chicago, for an expressed consideration of \$9,000. This conveyance was made to her just before her marriage to Ira J. Geer. In the same month William C. Goudy conveyed to his son, William J. Goudy, certain other premises in Argyle for an expressed consideration of \$9,000, which was done a few months before the marriage of said William J. Goudy to the appellee. Before his marriage in December, 1887, William J. Goudy had become the junior member of the law firm of Goudy, Green & Goudy, of which his father, William C. Goudy, was the senior member, and continued to be a member of that firm until about 1892. His income from the firm was not more than \$3,000 per annum, and from the rents of certain properties he received about \$1,100 per annum in addition. When William J. Goudy died on May 28, 1894, he left, him surviving, the appellee, Carolyn W. Goudy, as his widow, and Helen Goudy as his daughter and only child. He left a will giving, devising, and bequeathing all his property, real and personal, to his wife, the appellee herein. After the death of William J. Goudy, the appellee continued to occupy the premises at the corner of Astor and Goethe streets, here in controversy, for about a year, and then rented the same, together with the furniture in the house, for about \$4,000 per annum. It was rented at the last-named figure when the present bill was filed. All the improved property left by William C. Goudy, except two houses, was heavily incumbered. The rest of his estate consisted mostly of vacant land in and about Chicago. It is conceded

that the houses in Argyle conveyed to the appellant Clara G. Geer and to William J. Goudy, deceased, in 1887, were gifts to them from William C. Goudy.

Such other facts as are necessary to be set forth in order to understand the questions involved are stated in the opinion of the court.

Smith, Blair & Smith, for appellant Clara G. Geer. Custer, Goddard & Griffin, for appellant Ira J. Geer. Green, Robbins & Honoré, for appellee.

MAGRUDER, J. (after stating the facts). The bill filed in this case seeks to enforce the specific performance of an oral promise to convey land alleged to have been made by a father to his son. The appellee asserts that William C. Goudy purchased the lot at the corner of Astor and Goethe streets, in Chicago, for his son, and gave it to the latter, and put him in possession thereof, and promised to convey the same to him. It is admitted that no conveyance was actually made by William C. Goudy to his son, and that William C. Goudy died holding the legal title to the property. The appellants in their answers have pleaded the statute of frauds. Wherever there is a parol contract for the conveyance of land, or an oral promise by a father to his son to convey land, such a performance of the contract or promise must be shown as will take the contract or promise out of the statute of frauds. That statute establishes a wholesome and salutary rule, by requiring written evidence of contracts for the sale of land; and, in its practical operation, the rule conduces rather to the prevention of wrongs than to the infliction of injuries. In special instances it may seem hard and inequitable, but in its general application it prevents fraud and perjury. The courts have no right to construe it so as to destroy its meaning. *Wood v. Thornly*, 58 Ill. 464. Here both the father and the son are dead. The present bill is not filed by the son against the father to enforce an oral promise, but it is filed by the widow and devisee of the son, not for the purpose of obtaining a conveyance from the father's executor, but for the purpose of obtaining a conveyance from a devisee under the father's will. When a court of equity is called upon to decree the specific performance of a parol agreement, or an oral promise to convey land, alleged to have been made between father and son after both are dead, the court must be well satisfied of the existence and character of the agreement or promise, and of the substantial justice of the claim to the exercise of its powers. In order to take a case out of the operation of the statute of frauds, a parol contract or oral promise to convey land should be clear and certain in its terms, and should be established by testimony of an undoubted character, which is clear, definite, and unequivocal. Equity will not enforce the promise of a gift of land by the father to the son, unless the

promise has not only been acted upon by taking possession of the land, but also by the expenditure of money and the making of valuable and permanent improvements, with the knowledge and consent of the promisor. *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792; *Wood v. Thornly*, 58 Ill. 464.

In the present case the allegation of the bill is not that William C. Goudy made an oral contract with his son to convey the premises in question to him, but that he promised to convey the premises to him. It is not only true that, in order to enforce in equity a parol contract to sell land, it must appear that the vendee has taken possession under the contract, and made lasting and valuable improvements, and paid the purchase money, but it is also true that a promise made by a father to a child, to convey a tract of land if the child will take possession thereof and improve the same, will not be enforced, unless such promise is followed by the expenditure of labor and money, and the making of lasting and valuable improvements, as well as by the taking of possession. Otherwise such a promise cannot be regarded as resting upon such a valuable consideration as will justify a court of equity in upholding and enforcing it. All the authorities agree that such a promise must be established by proof which is clear, definite, and unequivocal. Mere declarations made by the promisor or donor to third persons do not constitute such clear, definite, and unequivocal testimony. *Worth v. Worth*, 84 Ill. 442; *Langston v. Bates*, Id. 524. It cannot be said in this case that there is any clear and satisfactory evidence of a promise made by William C. Goudy to his son to convey to him the premises in question. Mrs. Helen Judd Goudy, the widow of William C. Goudy, was placed upon the stand in the court below, and permitted to testify as to certain declarations made by her husband to her in his lifetime. This testimony was incompetent. Neither the husband nor the wife can testify to communications and conversations occurring between them during coverture. Such was the rule at common law, and such is the rule in this state, as laid down by this court in the construction of the statute in relation to evidence. This inability of the husband or wife to testify continues, as to the communications and conversations between them, after the marriage relation is severed, whether such severance be by divorce or by death. *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756. The testimony of Mrs. Goudy being out of the way, there remains nothing but proof by outside parties of remarks made upon this subject by William C. Goudy. Several witnesses swear that they heard Mr. Goudy say that he was going to buy a lot for his son, and that he was building a house for his son, or that he had built a house for his son. One or two witnesses say that he spoke of the house as his son's house. None of these

witnesses heard anything said by William C. Goudy in the presence of his son with reference to the ownership of said house. Where such a promise is alleged to have been made by a father to a son, the witnesses must have heard it when it was made, or must have heard the parties repeat it in each other's presence. A contract is not to be inferred merely from the declarations of one of the parties, because, if such were the rule, a contract might be enforced against one party and not against the other. *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553; *Edwards v. Morgan*, 100 Pa. St. 330; *Ackerman v. Fisher*, 57 Pa. St. 459.

In addition to the testimony of witnesses as to declarations of the character already stated which were made by William C. Goudy in the absence of his son, two witnesses were produced to testify to remarks alleged to have been made by William C. Goudy in the presence of his son. While the house upon the premises in question was in the course of erection, Mr. Goudy occasionally stopped to examine the work. This, however, was only during the earlier period of the construction. A superintendent, representing the architect of the building, says that upon one occasion he heard a discussion between William C. Goudy and his son concerning the grade to be established, and concerning some proposed connection of the house with the building on the north, and that there seemed to be some difference of opinion between them, which led the father to remark: "It is your own house. I suppose you can do as you please." Another witness, who was a foreman, and had charge of the masonry work, testified to a discussion between the father and son, in which they differed with each other, and says that he heard the father say, in a tone of dissatisfaction: "Do what you please. It is your own house, and you have got to pay for it;" and again: "This is the kind of work you get for the big price you pay for this house." We do not regard such evidence as this as conclusive proof of a promise or agreement on the part of the father to convey the house to the son. The nature of the relation which exists between a parent and child requires a contract between them to be proved by a different kind of evidence from that which is sufficient as between strangers. In *Poorman v. Kilgore*, 26 Pa. St. 365, the supreme court of Pennsylvania said: "It is so usual and natural for parents to help their children by giving them the use of a farm or house, and then call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books or utensils or rooms or houses by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to their children as against each other, and in subjection to their own para-

mount right." The fact that a father puts his son in possession of land, with the expectation of giving it to him some day, is not conclusive evidence of a gift of the land. *Cox v. Cox*, Id. 375. It is the presumption in all such cases that the use and possession are permissive. The ownership is that of the parent, who simply permits or suffers the use and possession by the child. *Railroad Co. v. Knowles*, 117 Pa. St. 77, 11 Atl. 250. In *Harrison v. Harrison*, 38 W. Va. 556, 15 S. E. 87, it was said: "Neither are loose declarations of the father, calling the land the son's property, without explanation, sufficient evidence of a gift. A contract between father and child, from the nature of the relation, requires to be proved by a kind of evidence very different from that which might be sufficient between strangers. The evidence in such case of a parol gift from father to child should be direct, positive, express, and unambiguous, and its terms clearly defined." In addition to this, where a gift is intended, such a gift must be complete; and where the alleged gift is of a legal estate, capable of legal conveyance, which is not made, the gift is revocable. *Wadhams v. Gay*, 73 Ill. 415; *Allen v. Webb*, 64 Ill. 342; *Gosse v. Jones*, 73 Ill. 508; *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589; *Hugus v. Walker*, 12 Pa. St. 173. In the latter case of *Hugus v. Walker* it was held that loose declarations of a father to his neighbors, calling land in the possession of his son his son's property, without any explanation how such land came to be his son's, were not sufficient evidence of a gift. "A mere intention, though expressed as to a future deed of a man's property, creates no legal obligation upon him to carry out that intention, and until the intended gift is made he may change his mind respecting it." *Thorn. Gifts*, § 375. In *McCartney v. Ridgway*, 160 Ill. 129, 43 N. E. 826, we said (page 156, 160 Ill., and page 835, 43 N. E.): "To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee, or in a trustee for the donee. If anything remains to be done to complete the gift, what so remains to be done cannot be enforced, as it is based upon no consideration; and, when the gift is thus incomplete, there is a *locus penitentiae*, and the gift may be revoked. Where the alleged gift is of a legal estate capable of legal conveyance, and no conveyance is made, the gift is revocable."

But, even if the testimony in this case be regarded as sufficient to establish an oral promise on the part of the father to give the premises in question to the son, the evidence does not show such a part performance of the promise as will take the case out of the statute of frauds. It is true that the son went into possession of the house, and occupied it as a home. Such possession and occupation were entirely consistent with a permission on the part of the father to the son to use the house, without any intention of making him the owner thereof. It must appear

that the son expended money, or made valuable improvements upon the property with his own money, in order to justify a court of equity in enforcing the promise or contract. The evidence in the present case is satisfactory to our minds that the money with which the improvements upon these premises were made was the money of William C. Goudy, and not of William J. Goudy. Where the son goes into possession of property owned by the father, and the improvements made thereon are paid for with the money of the father, and not of the son, there is not such part performance as satisfies the requirements of the statute of frauds. *Allen v. Webb*, *supra*; *Ackerman v. Fisher*, *supra*; *Eyre v. Eyre*, 19 N. J. Eq. 102. In all the cases where the acts of part performance are held to be sufficient to take the case out of the statute of frauds, the means of the donee or promisee, and not the means of the donor or promisor, were used to pay for the improvements. The facts upon this branch of the case are as follows:

William C. Goudy had a bank account with the Commercial National Bank of Chicago, where he deposited his money. On July 22, 1890, he sent to the cashier of the bank the following communication:

"Mr. J. B. Meyer, Cashier—Dear Sir: Mr. W. J. Goudy, my son, is authorized to draw checks in my name on my account. Yours, W. C. Goudy.

"Signature: 'W. C. Goudy, by W. J. G.'"

After the authority was thus given to William J. Goudy to draw checks upon his father's bank account, and sign his father's name thereto by himself as agent, William J. Goudy began to draw checks; and between September 18, 1890, about the time the erection of the house and stable upon the premises in question was begun, and January 22, 1892, he had drawn out \$61,064.07. The stubs of the check books from which the checks so drawn were torn had minutes in them as follows: "House on Root lot," and "House Root lot." These minutes upon the stubs, corresponding to the checks, showed that the money was drawn out for the purpose of the erection of the house on the "Root lot." The entries upon the stubs are in William J. Goudy's handwriting, except in the case of two stubs and checks, which were in the handwriting of William C. Goudy. These checks, drawn in the name of William C. Goudy, were payable to the order of William J. Goudy. William J. Goudy deposited all the checks which he thus drew to his own account in a bank account opened by himself. When he paid the contractors and material men for the work and labor performed on the premises, he paid them with checks upon his own account in the bank. But his own account consisted of checks drawn upon his father's account, which, after being deposited in his own name, were paid by his father's bank. Between September 18, 1890, and August 4, 1891, he had paid out, in checks drawn

by himself to the order of persons furnishing labor and material upon the premises in question, the sum of \$53,684.07. It thus clearly appears that all the money which was paid for the improvements made upon the premises belonged to William C. Goudy. Why William J. Goudy drew the checks in his father's name, payable to his own order, and then deposited them to his own account, and afterwards gave checks drawn by himself on his own account to the various parties doing work upon the premises, instead of drawing checks upon his father's account in favor of the parties doing the work, is not satisfactorily explained in the evidence. But, whatever may have been the reason for having two accounts instead of one, it is nevertheless true that William J. Goudy was not the owner of the money thus used. It cannot be said that there was a gift of the money by his father to him, but he was merely permitted to draw the money as his father's agent, and the minutes upon the stub books show that he appropriated it to the construction of the house in question. He drew other moneys, besides those already referred to, in his father's name, and upon his father's account. Between February 16, 1891, and March 20, 1893, he drew other checks upon his father's account to the amount of \$26,610. These checks were all drawn to the order of William J. Goudy by himself in the name of William C. Goudy, except the last one drawn by William C. Goudy. All are indorsed for deposit to the account of William J. Goudy, and stamped "Paid." Besides these, still other checks were drawn by William J. Goudy upon said bank upon the account of William C. Goudy. Between November 23, 1889, and January 11, 1892, other checks were so drawn to the amount of \$7,550, all to the order of himself by William J. Goudy, in the name of William C. Goudy, and were all deposited to the account of William J. Goudy. The stubs show that the sums going to make up the amount of \$7,550 were loans to William J. Goudy. There is no evidence showing the settlement of accounts between father and son.

In addition to the fact that the improvements made upon the property were made with the money of William C. Goudy, there is other evidence tending to show that William C. Goudy regarded himself as the owner of the premises in question. He may have intended at some time to convey these premises to his son, but such intention was not executed during his lifetime, and the proof is quite strong to the effect that the time had not arrived, before he died, when he had made up his mind that it was prudent to make a deed to his son. When the deed was originally made of the Root lot to William C. Goudy by John W. Root, it was made out to William J. Goudy as grantee. But "for some reason it was changed, and the property was deeded to Mr. Goudy." It would thus appear that the father purposely had the title conveyed to himself, rather than to William J. Goudy. If,

as is contended by appellee, the lot was originally bought for William J. Goudy, it is difficult to understand why the title was not conveyed to him. By taking the title himself, William C. Goudy intended to be the owner. The deed as finally made out to William C. Goudy was in the handwriting of William J. Goudy. On September 1, 1890, about the time when the erection of the house and stable was begun, William C. Goudy executed a party-wall agreement with one Nettie B. Mitchell as owner of the adjoining premises. In this agreement William C. Goudy describes himself as owner of the premises in controversy, and the instrument contains the usual covenants of ownership and possession in reference to the building being erected by William C. Goudy on the premises. This is a second instance in which he puts himself on record as owner of the property. Again, on May 30, 1891, about the time when the improvements upon the premises were finished and his son had taken possession, or was about to take possession, as the occupant thereof, William C. Goudy and his wife executed a trust deed conveying the premises to Francis P. Peabody to secure William C. Goudy's note for \$15,000, due in two years. This trust deed, signed by William C. Goudy, contains covenants by him, as grantor, as to title, ownership, and possession in himself. He therein covenants that he is well seised of the premises, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same, etc. To our minds, the execution of this trust deed seems strong proof of his intention to retain the ownership of the property.

But this is not all. Between September 18, 1890, and May 26, 1891, William J. Goudy had drawn checks upon his father's account, and taken out money from the bank belonging to his father, to the amount of \$45,489.35. During this period he paid out of these moneys upon the improvements the sum of \$40,582.11; the payments so made being made by checks drawn on his own account, formed by the deposit of checks drawn on his father's account, which were paid. The sum of \$4,957.24 appears not to have been applied towards the construction of the buildings upon the premises. What was done with it is not shown by the evidence. The last check, drawn upon William C. Goudy's account, going to make up the sum of \$45,489.35, was dated May 26th, and was for the sum of \$1,909.89. It is not shown whether or not William C. Goudy's account was thus exhausted on May 26, 1891. It does appear, however, that on May 30, 1891, he borrowed \$15,000 upon the premises in question. After this loan was made, and between June 6 and June 13, 1891, inclusive, William J. Goudy drew out by checks upon his father's account the sum of \$11,582.14. In addition to this, on June 18, 1891, William

C. Goudy himself drew a check on his account to the order of his son for \$3,000, which was deposited by William J. Goudy in his own account. On June 28, 1891, William C. Goudy himself drew another check for \$1,000, payable to the order of his son, which was also deposited by William J. Goudy in his account. It is thus clear that between June 6 and June 28, 1891, William J. Goudy drew out of the bank, upon checks drawn by himself and by his father, \$15,532.14; being an amount in excess of the loan made on May 30, 1891. On July 2, 1891, four days after this sum of \$15,000 had been exhausted, or an amount equivalent to that sum had been exhausted, William C. Goudy made his will. In that will he treats his adopted daughter, Mrs. Ira J. Geer, and his son, William J. Goudy, exactly alike. After making certain provisions for certain relatives and for his wife, he gives the residue of his estate to his daughter and son, equally. He makes no mention whatever in his will of any gift or intended gift of the premises in question to his son, William J. Goudy. By the terms of his will, the premises in question passed equally to Mrs. Geer and to William J. Goudy. As a lawyer, he must have known the effect of his will in this regard. He had always treated Mrs. Geer exactly as a child, and his treatment of her had not been different from his treatment of his son. His letters to her, which are in the record, are full of affection and tenderness and kindness. He addresses her as his daughter. When, at the age of 20 years, she first learned that she was not his daughter, she wrote him a letter indicating sorrow and surprise. His reply is full of the tenderest sympathy and emotion; telling her that she will always be a daughter to him, and will be treated by him with the same affection as he shows towards his son. When his daughter and son were married, in 1887, he gave each of them a house and lot, putting the same consideration in each deed. His will, as set forth in the statement preceding this opinion, shows the same care on his part to put his son and his daughter upon an equality, so far as their interests in his estate are concerned. In view of these facts, it seems almost impossible to believe that if Mr. Goudy had intended this property to be the property of his son exclusively, and not to pass under the provisions of his will just as the rest of his estate passed, he would not have made some mention in his will of the gift to his son. He held the title to some real estate in New York for the use of one Doud, and in his will he directs that such real estate be conveyed to such person as Doud wishes. If he held the premises in question in trust for his son, it would have been natural to direct that such premises be conveyed to his son. Besides all this, the taxes for 1890 and 1891 were paid by William C. Goudy, and not by William J. Goudy. In *Gosse v. Jones*, supra, which was a bill

in equity to compel the specific performance of an alleged parol contract for the sale of land, it appeared that the vendee, who had used the land for a number of years, paid no taxes upon it; and we there said, "The latter is pretty strong evidence that a party paying taxes on a lot of land has some claim to it as owner." It is a strong presumption that the party paying the taxes on land is the owner thereof. *Worth v. Worth*, supra; *Galloway v. Garland*, 104 Ill. 275; *Fairfield v. Barbour*, 51 Mich. 57, 16 N. W. 230; *Thorn. Gifts*, § 393.

Our conclusion is—First, that the evidence of a parol promise to convey is not so clear, certain, and unambiguous as to enable us to find that there was such a promise; and, second, that the evidence is not sufficient to show such expenditure of money or such making of valuable improvements upon the premises in question by William J. Goudy as to constitute the part performance which the authorities hold to be necessary to take the case out of the statute of frauds. We are therefore of the opinion that the decree of the court below is erroneous. Accordingly the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(175 Ill. 383)

NEW HAVEN CLOCK CO. v. KOCHERSPERGER, Treasurer, et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

TAXATION—FRAUDULENT ASSESSMENT—INJUNCTION
—STATUTORY REMEDIES—MANDAMUS.

1. Equity has jurisdiction to restrain collection of an excessive assessment, fraudulently levied to enable the assessor to obtain a bribe for reducing it, unless there are sufficient statutory remedies.

2. Injunction does not lie to restrain collection of an excessive assessment until the county board of review refuses to correct it, since the remedy for correction by said board is exclusive until then; and this even where such board refuses to pass on an application for its correction, since the remedy in such case is by mandamus to compel the board to act.

3. Collection of an excessive tax will not be enjoined because complainant's legal remedy for its correction does not stay proceedings pendente lite, and a collection might be attempted before their determination.

4. The fact that after the bringing of injunction proceedings, and after the court has acquired jurisdiction, defendant completed the act sought to be restrained, is no defense to the proceedings, since the court has power to place the parties in statu quo.

Magruder, J., dissenting.

Error to superior court, Cook county; Farlin Q. Ball, Judge.

Bill by the New Haven Clock Company against D. H. Kochersperger, treasurer and ex officio collector of Cook county, and others, to restrain collection of a tax. From a judgment of dismissal, complainant brings error. Affirmed.

Edgar Bronson Tolman and Harvey Mitchell Harper, for plaintiff in error. Frank L. Shepard, Asst. Co. Atty. (Robert S. Iles, Co. Atty., of counsel), for defendants in error Kochersperger and Knopf. J. T. Kretzinger and J. J. Rooney, for defendant in error Ernst.

CARTWRIGHT, J. Plaintiff in error filed its bill in the superior court of Cook county against defendants in error, as county treasurer and county clerk of Cook county and town collector of the town of South Chicago, in that county, praying for an injunction restraining the collection of the excess of taxes extended against it above the sum of \$22.13, which would be the amount of its taxes on an assessment of \$200. Demurrers to the original bill were sustained. The bill was amended, and demurrers to the amended bill were overruled, and the defendants were ruled to plead or answer. Thereupon the defendant the collector of the town of South Chicago filed his plea that there was no money due from complainant for taxes, and that he had not in his hands any warrant for the collection of a tax from it. The defendants the county clerk and county collector filed similar pleas. The abstract does not show any action on these pleas, but complainant, by leave of court, filed a supplemental bill reciting the previous proceedings, and alleging that afterwards, while the case was pending in court, the town collector, armed with his warrant, by means of threats to levy on and take possession of complainant's property, which he was about to execute, made a compulsory collection of the entire tax, \$553.20, which complainant paid under protest, and that this compulsory payment was the sole defense alleged by the pleas. The demurrers previously filed were ordered to stand to this supplemental bill, and the court sustained them. Complainant elected to stand by its bills, and the amended and supplemental bills were dismissed for want of equity.

The facts appearing by the amended and supplemental bills, to which the demurrers were sustained, and which were thereby admitted, were in substance as follows: The entire personal credits and effects, including cash on hand or money in bank, owned by complainant on May 1, 1897, were of the fair cash value of \$2,000. After the fourth Monday of June, and during the month of July, of that year complainant received a notice from Richard C. Gunning, the assessor of the town of South Chicago, that its property had been assessed at \$20,000, whereupon it made and filed with the assessor a schedule of its taxable property and assets in the town. The schedule showed a total value of \$2,000, and was received and accepted by the assessor. Other personal property in the town was assessed at not to exceed 10 per cent. of its fair cash value, and, at the rate at which such other

ment would have been \$200. Upon receipt of the schedule the assessor promised to assess the property at 10 per cent. of the fair cash value therein stated; but without notice to the complainant, and disregarding his agreement, he assessed the property at \$5,000. This assessment was willfully made, as a part of a general plan to assess complainant, and other selected persons, firms, and corporations, at a disproportionate and excessive rate, to extort money as a bribe for a reduction to the uniform rate applied to property in general; and persons who represented themselves to be emissaries of the assessor, and were charged to have been his representatives, offered to reduce the assessment to a satisfactory amount upon payment of money therefor. On July 12, 1897, complainant filed with the county board an application for the revision of the assessment, and afterwards filed an amended application, and appeared before the board and introduced evidence in its support, which was heard by the county board, and the application taken under advisement. The county board neither granted nor denied the application. It was referred to the finance committee, and that committee reported, as to this and other applications, that they had decided to make no recommendation, except that the complaints be placed on file, without prejudice to complainants' appeal to the courts. This report was adopted by the board. Again, on September 27, 1897, the finance committee made another report to the board on the subject of equalizing valuations between the towns of Cook county; reciting, among other things, the existence of unfair assessments, and inequality and injustice between individuals, which it was impossible for the board to go into further than had been done, and containing a resolution that the assessments as returned by the assessor, with certain reductions made by the county board, should be declared to be the assessments for the year 1897. This report was also adopted by the board, and by this action the county board refused to act upon the application of complainant, and to decide the question of complainant's grievance submitted to it under the statute. Complainant's application was then placed on file under this order that it should be without prejudice to its appeal to the courts. Taxes were assessed upon this fraudulent assessment to the amount of \$553.20.

This case has been argued with five others (51 N. E. 648), and counsel say that the six cases present substantially the same questions. We find, however, that there is an important difference between this case and the others, which renders a considerable part of the argument entirely inapplicable. This difference is that in the other cases the property was assessed at less than its fair cash value, and as to them it is urged that the only real complaint is that the complainants therein were assessed at a higher

rate than others. The argument that there is no just cause of complaint where the assessment does not exceed the fair cash value, although others are assessed at a less rate, cannot be applied to this case, since the fair cash value is \$2,000, and the assessment \$5,000. The question in this case is whether complainant could have relief against an excessive assessment which was made with full knowledge of the facts, and from a wrongful and fraudulent motive. The law provides for a valuation of property by the assessor. The statute has also provided a board of review, and a further revision by the county board, for the protection of a taxpayer who may consider himself aggrieved by the opinion or judgment of the assessor. Value is largely a matter of opinion, and the opinions of these officers, when honestly exercised and applied upon a basis authorized by the law, cannot be reviewed or revised by the courts. The provisions of the statute are intended to be sufficient to reach the ends of justice between the taxpayers, and there is no appeal to the courts in mere matters of judgment. The assessor and boards for review are invested with the only power to fix valuations, and their decisions can only be questioned for fraud or want of jurisdiction. *Railroad Co. v. Frary*, 22 Ill. 34; *Spencer v. People*, 68 Ill. 510; *Insurance Co. v. Pollak*, 75 Ill. 292; *Railway Co. v. Hodges*, 113 Ill. 323; *East St. Louis C. R. Co. v. People*, 119 Ill. 182, 10 N. E. 397; *Coal Co. v. Stookey*, 122 Ill. 358, 13 N. E. 516; *Spring Valley Coal Co. v. People*, 157 Ill. 543, 41 N. E. 874; *Keokuk Bridge Co. v. People*, 161 Ill. 514, 44 N. E. 206. But while it is not the duty of courts, nor within the power of equity, to supervise the honest judgments of statutory officers as to valuations, equity will interfere if the valuations are fixed from improper motives and in disregard of duty. The law authorized the assessor to exercise his judgment as to the value of property, but not to enter upon a system of pillage and plunder, and to make use of his office to carry it out. Courts of equity have always relieved against fraud, and even the most solemn judgments are vitiated by it. If an assessor, under cover of his office, with intent to defeat the justice and uniformity required by the law, or for the corrupt motive of obtaining a bribe, steps aside from his duty to accomplish such a purpose, the wrong inflicted may be redressed in equity, and the assessment will be vitiated by the fraud. *Cooley, Tax'n*, 157, 526, 547; *Porter v. Railway Co.*, 76 Ill. 561; *Hotel Co. v. Lieb*, 83 Ill. 602; *Railroad Co. v. Cole*, 75 Ill. 591; *Railway Co. v. Hodges*, supra; *Spring Valley Coal Co. v. People*, supra. It is the rule that an excessive valuation, merely, does not establish fraud, but the attending circumstances may be such as to lead to the conclusion that it was fraudulently and dishonestly made. *Hotel Co. v. Lieb*, supra; *Spring Valley Coal Co. v. People*, supra.

The facts alleged in this case, which we must assume to be true, are that the property of complainant was assessed at $2\frac{1}{2}$ times its cash value, as part of a general plan of dishonest spoliation, by which complainant and others were selected as victims from whom bribes might be obtained, and these bribes were solicited by representatives and emissaries of the assessor. The result of this scheme was a corrupt, fraudulent, and excessive assessment of complainant's property; and it should be set aside, unless complainant is barred from relief in a court of equity by submitting to be sent away from the statutory board without a hearing and decision.

Complainant presented its grievance to the county board, and that board undertook to divest itself of the duty imposed upon it by law, by resolving that it was impossible to go into inequalities and injustice against individuals, and to hear and decide the case as required by law. Its committee made no recommendation, except that the complaint be placed on file, without prejudice to complainant's appeal to the courts. This report was adopted by the board, and complainant was ordered to take its departure from that forum without a decision. This was no more or less than a refusal of the board to do its duty, and the law would have compelled its performance on the application of complainant. It is said by Judge Cooley of the writ of mandamus: "A suitable case for the employment of the writ is where it is found necessary to compel county commissioners to proceed to the hearing of an appeal from an assessment, where the hearing is of right under the statute." *Cooley, Tax'n*, 521. Following this rule, in the recent cases of *Beldier v. Kochersperger*, 171 Ill. 563, 49 N. E. 716, and *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988, where there was similar conduct on the part of the county board of Cook county, it was held that mandamus would lie to compel a consideration of the complaint. Upon being sent away from the county board, complainant did not pursue a remedy which the law affords, and which is intended to be adequate for the relief of the taxpayer. It has always been held that equity would enjoin the collection of a tax upon property exempt from taxation, and the question as to what effect the failure to follow the statutory remedy will have as to such a tax has been before the court several times. Section 97 of the revenue act provides for a hearing and determination by the county board of the question whether property is exempt from taxation, and for an appeal from such decision, when the auditor shall present the case to this court for final decision. In *Preston v. Johnson*, 104 Ill. 625, it was charged in a bill in equity that a tax was illegally levied upon property not subject to taxation. There had been an application to the county board, where it was claimed that complainants were denied a hearing; but it was held that there was an

adequate remedy at law, and that, if complainants were aggrieved by any action whatever of the board, their plain remedy was by an appeal. It was there said that the remedy through the county board of review and by appeal is adequate and exclusive. In *Peoria Fair Ass'n v. People*, 111 Ill. 559, the association petitioned the county board to strike its lands from the assessment roll, but the board refused the petition, and no appeal was taken. It was held that on application for judgment the defense could be made, and that it was only in case the question had been brought before this court, and this court had passed upon it, that the party would be concluded, when the question would be res judicata. The decision in *Preston v. Johnson* was afterwards explained in *Railway Co. v. Hodges*, supra; and it was said that, if a party selects the remedy provided by the statute, he will not be allowed to abandon it, and then go into equity, but he may go into equity in the first instance, and have relief. It was held that the remedy afforded by the statute is adequate, and, when selected, is exclusive; but, before the selection of a tribunal, it must be regarded as only affording a cumulative remedy. In those cases, however, the statute then under consideration gave a direct means of obtaining the judgment of this court upon the question involved, while there is no appeal to a court on a question of overvaluation, and the further material distinction was pointed out in the latter case that an assessment of exempt property is an act without jurisdiction.

Where property is exempt from taxation, the owner has a right to assume that the law will be observed; and he is not required to take notice of its illegal assessment, nor to appear before the local tribunal, but is protected by the law, and may resort to a court of equity for an injunction. When complaint is made that the assessor has overvalued the property, whether as a mistake of judgment, or from whatever motive, the situation is different. The property is subject to assessment, and it is the duty of the owner to take notice of the assessment. The valuation is not an act without jurisdiction or authority, and, if it is excessive, the law intends that application shall be made to the board. The statute embraces every kind of grievance in the assessment, and, whatever its nature may be, the taxpayer may make his complaint known, and have a hearing. *Felsenthal v. Johnson*, 104 Ill. 21. It was proper for complainant to appeal to the county board directly, as the assessment was made after the fourth Monday of June. This remedy afforded by the statute is intended to be sufficient for the relief of the taxpayer. The statute permits a grievance of the kind complained of here to be heard, and presumably that remedy will be adequate. In *Spring Valley Coal Co. v. People*, supra, where fraud was charged, the coal company applied to the town board of review, and secured reductions in

some of the values; and on appeal to the county board there was a hearing, where it obtained still further reductions in value. It was there said that, assuming the assessment to be fraudulent, the coal company availed itself of the remedy given by the statute, and the decision made by the board of supervisors was final and conclusive, and it must be regarded that the fraud, if any, that there was in the original assessment, was purged out of it. In that case the presumption that the owner had obtained full relief was indulged, but, if he does not obtain relief as against a fraudulent assessment, we do not think that the statute is the sole remedy. Fraud is a familiar ground of equity jurisdiction, and, if an assessment is fraudulent, equity should relieve against it, where the taxpayer has been diligent in seeking the remedy which the statute affords. In matters of revenue it is important that all questions should be speedily settled, and the taxpayer should first seek the remedy given by the statute, which it is presumed will be sufficient. If he fails to do so, it is his own neglect or folly. The remedy against fraud is of an equitable nature, and should be applied where the injured party has been diligent for his own protection; but we think it should be withheld in a case of this kind, where the party has failed to insist upon a legal right which probably would have given full relief. The reports of the committee to the board plainly show that, in its judgment, assessments returned by some of the assessors, and complained of, were unequal and unjust. The board merely refused to do its duty and decide the cases. Although complainant was denied a hearing before the county board, it had an adequate remedy to compel its performance. It is said that this remedy was insufficient, because it would not stay a collection of the tax while the proceeding was pending. If complainant was pursuing its legal remedy, and had not obtained it when a collection of the tax was attempted, an entirely different question would be presented. The mere fact that it might not get a hearing before an attempted collection of the tax would not justify an abandonment of its legal remedy, and the resort to a court of equity. The fact that the abstract does not show what was done with the pleas of defendants is immaterial, in the view taken of the case. The bill was filed, and the court had acquired jurisdiction of the subject-matter and the parties. Complainant had prayed for an injunction, which had not been secured; but, after the court had acquired jurisdiction, if the collector enforced payment of the tax that fact would not constitute any defense to the bill, but the money was collected subject to the power of the court to compel the collector to refund it, or submit to such other decree concerning it as might be equitable. A party filing a bill for an injunction may fail to procure a preliminary injunction, but any act after the court has

acquired jurisdiction will be subject to the power of the court to compel a restoration of the status, or to enforce such other relief as may be proper. Pleas making such a defense would be insufficient as answers to the amended bill, but the final decree of the court dismissing the amended and supplemental bills was correct, as we think, for the reason given, that complainant had not availed itself of the remedy secured to it by the statute to be relieved from the wrong complained of in the bill before seeking such relief in a court of equity. The decree of the superior court will therefore be affirmed. Decree affirmed.

MAGRUDER, J., dissents.

(175 Ill. 9)

PEOPLE ex rel. MACK v. BOARD OF EDUCATION OF SCHOOL DIST. NO. 5.

(Supreme Court of Illinois. Oct. 24, 1898.)

BOARDS OF EDUCATION—CHANGE OF TEXT-BOOKS.

1. School Law, art. 5, § 26 (Hurd's Rev. St. 1889, p. 1235), providing that the board of directors of each district "shall not permit text-books to be changed oftener than once in four years," applies to boards of education in school districts having more than 1,000 and less than 100,000 inhabitants; since by article 6, § 1, such boards are subject to this provision, unless said article provides otherwise, and there is nothing therein showing an intent to exempt them therefrom.

2. Books described as "twelve graded writing or copy books, with printed forms and texts, scientifically arranged, with printed instructions to the pupil in each book, and with a manual of instruction for the teachers," are text-books, within School Law, art. 5, § 26 (Hurd's Rev. St. 1889, p. 1235), providing that the board of directors of each district "shall not permit text-books to be changed oftener than once in four years."

Application for mandamus by the people, on the relation of William S. Mack, against the board of education. Writ awarded.

This was a proceeding by mandamus in this court, the petition being filed in the name of the people of the state of Illinois, on the relation of William S. Mack, against the board of education of school district No. 5, township 38 N., range 8 E., of the third P. M., in Aurora, Ill., to prohibit the use and introduction in any of the public schools of said district of books for the Sheldon system of writing for a period of four years from June, 1895, and to prohibit for such period the introduction or use in such schools of any other books for the vertical system of writing than books for the system known as "Merrill's Vertical Penmanship." The petition shows that said district No. 5 has more than 1,000 and less than 100,000 inhabitants, to wit, more than 13,000 inhabitants, is organized under the general school laws of the state of Illinois, and has a board of education; that the relator is a citizen, voter, and taxpayer of the said school district, and has had children of school age attending the public schools there-

of for more than five years last past; that said board of education has been duly and regularly constituted according to law, and has heretofore adopted certain rules and regulations for the government and control of the schools, and has had in force a rule requiring all adoptions of text-books and all changes in the same to be acted upon at the regular meeting in June for the ensuing school year, which said rule has been in force for more than three years last past; that penmanship is one of the branches which is now, and always has been, taught in all the public schools of said district; that prior to June 19, 1895, a system of penmanship, known as the "slanting" system, was taught in the public schools of said district; that at the regular June meeting, in 1895, of said board of education, the said board voted to adopt a "vertical" system of penmanship in the said schools, and adopted books for teaching in said schools the system known as "Merrill's Vertical Penmanship," and that, accordingly, said books of the Merrill system were generally adopted as the text-books for the teaching of the so-called system of vertical penmanship; that at a meeting of the said board of education held on October 4, 1897, the said board of education voted to adopt other books for the teaching of said vertical system of penmanship, known as "Sheldon's New Vertical Series Writing-Books," and that accordingly said board of education proceeded to cause the said books of the said "Merrill's Vertical Penmanship" to be replaced and supplanted in said schools by the said Sheldon's New Vertical Series Writing-Books; that the conditions of the sale, publication, and supply of the books of the said Merrill's Vertical Penmanship are in all respects the same as at the time of such adoption, and have continued to be the same from said time until the present time; that, by the adoption of the books known as "Merrill's Vertical Penmanship," the same became, and were under the statute, legally adopted for the period of four years, during which time they could not be lawfully supplanted by any other books for teaching the same system of penmanship, and that under the statute it was and is the duty of the said board of education to prevent any such change; that said board of education has refused, and still refuses, to prohibit the introduction and use in the public schools under its control of the said Sheldon system of writing text-books. Said petition prays for a writ of mandamus to forthwith prohibit the further use and introduction in any of the public schools of said district of the said Sheldon system of writing text-books for a period of four years after the 19th day of June, 1895, etc. The answer of the board of education admits that William S. Mack is a resident, citizen, voter, and taxpayer of said school district, and is the head of a family, and has children of school age attending the public schools of said school district; admits that the school district contains more than 1,000

inhabitants; that said board of education has been duly and regularly constituted and organized according to law, and has heretofore adopted certain rules and regulations for the government and control of the schools within its jurisdiction, among which said rules and regulations is the following: "All adoptions of text-books, and all changes in same, shall be acted upon at the regular meeting in June for the ensuing school year;" but avers that, notwithstanding said rule and regulation, the said board of education had a right to change said rule at any time by a majority vote of said board. Defendant further states that said board of education has heretofore adopted certain other rules and regulations for the government and control of the said schools, to wit, the following rule: "To adopt or change a text-book, a majority vote of the whole board shall be required,"—which said rule has been in force and binding upon said board of education for more than three years last past; admits that penmanship is one of the branches which is now, and always has been, taught in all the public schools of said district No. 5, and that prior to the 19th day of June, 1895, the "slanting" system of penmanship was generally taught, and that said board adopted Merrill's Vertical Penmanship, but it denies said books are text-books; admits the board adopted said Merrill's Vertical Penmanship, as set forth in the petition of the relator; avers that said Merrill's Vertical Penmanship books are not such books as come within the purview of the statutes of this state regulating the use and change of text-books, and that the statutes of this state and the rules and regulations of said board defining and limiting the action of boards of education upon the adoption and change of text-books do not apply to the copy-books of the Merrill's Vertical Penmanship series, nor to other books of that kind or nature; avers the said board of education can supplant or change said writing-books, or any writing-books that may at any time be in use in any of said public schools, whenever it so desires, by a majority vote of said board, and in so doing avers that said board of education will not be guilty of any violation of any statute of this state, nor any rule or regulation of said board; denies that said Merrill's Vertical Penmanship system became and was the legally adopted system of text-books of penmanship for the period of four years from and after its adoption, or for any specified time or period, but only for such a period as the said board should designate, or until the further action of said board; denies that during the said period of four years it became and was illegal for said board to adopt and use, or permit to be adopted and used, any other books for the teaching of such vertical system of penmanship, but avers that said board could adopt at any time any other books for the teaching of penmanship by a majority vote of said board; avers that the statute of this state defining and limiting

boards of education in districts of 1,000 and not over 100,000 inhabitants nowhere provides that such boards of education shall be restrained or prohibited from adopting or changing text-books within four years, but that the only law in this state placing a limitation upon the adoption and change of text-books is found in the statute governing boards of directors in districts having a population of less than 1,000, and does not apply to the board of education in this case; admits that said Merrill books were uniformly used for the period of two years, until they were replaced at the beginning of the present school year; admits that said board, at a regular meeting held on the 4th day of October, 1897, voted to adopt Sheldon's New Vertical Series Writing-Books, as set forth in the petition of relator; admits that said board is about, in all the public schools under its direction and control, to introduce and use the said Sheldon's New Vertical Series Writing-Books, and denies that said acts of said board are contrary to the statute; admits that said board has refused, and still does refuse, to prohibit the introduction of the Sheldon system, and asks to be dismissed, with its costs. To this answer the petitioner demurred.

Alschuler & Murphy, for relator. Hanchett & Plain and M. O. Southworth, for respondent.

CRAIG, J. (after stating the facts). The principal question presented by the petition, answer, and demurrer is, does the statute prohibiting the change of text-books oftener than once in four years apply to boards of education in school districts having more than 1,000 inhabitants? Section 26 of article 5 of the school law (Hurd's Rev. St. 1889, p. 1235), which article defines the duties of boards of directors, is as follows: "It shall be the duty of the board of directors of each district: * * * Ninth. The directors shall direct what branches of study shall be taught and what text-books and apparatus shall be used in the several schools, and strictly enforce uniformity of text-books therein, but shall not permit text-books to be changed oftener than once in four years, but shall prohibit such change." Respondent contends that this section applies only to boards of directors of schools, and not to boards of education. In determining this question, it will be necessary to consider this section in connection with that portion of the school act relating to boards of education.

Section 1 of article 6 of the school law, which article is entitled "Board of Education," is as follows: "Incorporated cities and villages, except such as now have charge and control of free schools by special acts, shall be and remain parts of the school townships in which they are respectively situated, and be subject to the general provisions of the school law, except as otherwise provided in this article." The foregoing, being the first

section of the article relating to boards of education, must be regarded as applying to boards of education; and, by the express terms of the statute, boards of education are thus made subject to the general provisions of the school law, except as otherwise provided in article 6. Unless there is some provision in article 6 superseding it, or showing an intent on the part of the legislature to exempt boards of education from the operation of the provisions of this statute restricting the change of text-books oftener than once in four years, it must be held applicable to boards of education. On examining section 10 of article 6, which provides that "the board of education shall have all the powers of the school directors, and in addition thereto and inclusive thereof they shall have the power and it shall be their duty" (enumerating 18 additional powers and duties), and comparing it with section 26 of article 5, which enumerates the duties of school directors, we are forced to the conclusion that it was the evident intent of the legislature to make the duties and powers of school directors applicable to boards of education like respondent; otherwise, boards of education would be without some essential powers which are enumerated only in those portions of the school act pertaining to the duties and powers of school directors. Many powers legally exercised by boards of education are found only in that part of the school law concerning school directors. The provision that teachers shall not be paid until they have kept and furnished schedules required by the school act, and shall have satisfactorily accounted for books, apparatus, and other property of the district that they may have taken in charge; the provision requiring teachers to be paid monthly; the power to decide when the school-house site or the school buildings have become unnecessary or unsuitable or inconvenient for a school; the power of eminent domain; and many other provisions which it is unnecessary to mention,—are found only in the article of the school law relating to directors. Section 27, which clothes directors with additional powers, giving them, among others, the power to borrow money and to issue bonds for building school houses, purchasing sites, and repairing and improving school houses, appears to be the only authority by which boards of education can exercise this important power. The ninth clause of section 26 of article 5 is the only provision in the school law which confers the power or duty to specifically direct what branches of study shall be taught, and what text-books or apparatus shall be used; in the several schools, prescribing uniformity of text-books, but limiting the right to change text-books oftener than once in four years. The only special provision in article 6, relating to boards of education, upon this subject, is the following, found in the tenth clause of section 10: "To prescribe the method and course of discipline and instruction

in the respective schools, and to see that they are maintained and pursued in the proper manner." This provision is not as comprehensive as the provision empowering boards of directors to direct what branches of study shall be taught, and what text-books and apparatus shall be used, in the several schools, and was not, in our opinion, intended to supersede the ninth clause of section 26 of article 5. Another reason for the view that the legislature did not intend this is found in the fact that in the general revision of the school law in 1889, in that portion of article 6 applying to cities of over 100,000 (Laws 1889, p. 308), the ninth clause of section 23 is precisely like the tenth clause in question, viz. "to prescribe the method and course of discipline and instruction in the respective schools, and to see that they are maintained and pursued in proper manner." Then follows the tenth clause in this section, relating to powers of boards of education in cities of over 100,000. The legislature thought it necessary to provide therein, "to prescribe what studies shall be taught and what books and apparatus shall be used," which tenth clause is almost identical with the ninth clause of section 20 of article 5. The power granted to boards in the larger cities by the ninth clause was evidently not regarded as sufficient to give boards of education power in regard to the school-books and apparatus to be used; consequently, the power was given the board by the tenth clause. If it was necessary, in the case of larger cities, to prescribe the powers and duties of boards of education in regard to school-books and apparatus, it would seem necessary in the case of boards like the case at bar.

Boards of education derive this power because it is primarily conferred upon boards of directors, and by the general provision upon boards of education. This being true, boards of education must be also subject to the restrictions imposed by the statute. The reason for prohibiting the change of text-books oftener than once in four years undoubtedly was to save expense to parents of small means. Besides, it was regarded as detrimental to the pupils to change their text-books too frequently. If necessary to limit changes in districts under school directors, we believe the reason holds equally good in cities and villages in districts under boards of education. We therefore hold that the statute prohibiting the change of text-books oftener than once in four years must be held to apply to boards of education in school districts having more than 1,000 inhabitants. The case of *Kuenster v. Board*, 134 Ill. 165, 24 N. E. 609, cited by respondent, is not in conflict with the views expressed in this case, the court holding in that case that, the statute having conferred the power and duty in respect to examining teachers, and fixing their salaries, upon the board of education, it superseded the power and duties of the school superintendent.

Are the books in question text-books, within the meaning of the statute? The petition describes the books in question as "a system of text-books consisting of twelve graded writing or copy books, with printed forms and texts, scientifically arranged, with printed instructions to the pupil in each book, and with a manual of instruction for the teachers." This description is not denied in the answer of respondent, but it denies they are text-books. Penmanship is "one of the branches of education" required to be taught in the public schools. A teacher, to receive a certificate, must, upon due examination, be found qualified to teach penmanship. Hurd's Rev. St. 1889, p. 1243, § 3. In determining whether the books are text-books, within the meaning of the law, it will be necessary to inquire what text-books are. Webster defines a "text-book" as "a book or manual used in teaching; a book for students, containing the principles of a science or any branch of learning." Stormonth's Pronouncing Dictionary defines a "text-book" to be "a book to be used as a standard book for a particular branch of study, for the use of students." The books here in question come within the definition given by Webster. They are books used in teaching penmanship. Text-books must be considered with reference to the particular branch of study for which they are designed. Rules for instruction in penmanship are necessarily simple. The books described in the petition as "twelve graded writing or copy books, with printed forms and texts, scientifically arranged, with printed instructions to the pupil in each book, and with a manual of instruction for the teachers," must be regarded as text-books for penmanship. Text-books for instruction in arithmetic, or Greek or Latin, are books of a very different character, but still are text-books applicable to the particular branch of study for which the author designed them. These books, being for the teaching of penmanship, meet, in our judgment, the requirements of a text-book. We are of opinion that a peremptory mandamus should issue, as prayed for in the petition of the relator, and it is therefore ordered. Mandamus awarded.

(175 Ill. 570)

WALKER v. VILLAGE OF MORGAN PARK.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—SIDEWALKS—CONSTRUCTION—NECESSITY.

Under Sidewalk Act April 15, 1875 (Hurd's Rev. St. 1897, p. 309), authorizing a village to construct sidewalks, that an ordinance requires the construction of a sidewalk in a thinly-settled part of a small village, where there is no great necessity for it, does not show that the ordinance is so unreasonable, unjust, and oppressive as to justify interference by a court of equity.

Appeal from superior court, Cook county; Henry V. Freeman, Judge.

Bill by George C. Walker, trustee, against the village of Morgan Park, to enjoin defendant from constructing a sidewalk along complainant's property. From a decree for defendant, complainant appeals. Affirmed.

On the 20th day of July, 1897, the president and board of trustees of the village of Morgan Park passed an ordinance for the construction of sidewalks in certain streets of the village. The ordinance was passed under and in pursuance of the sidewalk act of April 15, 1875 (Hurd's Rev. St. 1897, p. 309), and in strict conformity to that statute. The village of Morgan Park, as appears, contains about 2,000 inhabitants, and is located some 12 miles out from the city of Chicago. Upon the passage of the ordinance, appellant, who owned certain lots fronting on certain streets along which the sidewalk was ordered constructed, filed this bill to enjoin the village and its officers from proceeding, under the ordinance, in the construction of sidewalks along or upon his property. The defendants to the bill appeared, and filed a demurrer, which, upon the argument, was sustained, and the bill dismissed. To reverse the judgment the complainant has prosecuted this appeal.

Dupee, Judah, Willard & Wolf, for appellant. George W. Northrup, Jr., Village Atty., (Newman, Northrup & Levinson, of counsel), for appellee.

CRAIG, J. (after stating the facts). It is alleged in the bill that among the sidewalks required by the ordinance are one on the east side of Prospect avenue, from the south line of Raymond street to the north line of 119th street, and one on the north side of 119th street, from the east line of the right of way of the dummy line of the Chicago, Rock Island & Pacific Railroad Company to the east line of Western avenue; that the sidewalk on Prospect avenue will run in a northerly and southerly direction, and be upwards of 2,475 feet in length, and that complainant owns various lots on the line of the proposed sidewalk, having an aggregate frontage thereon of upwards of 1,950 feet, being by far the greater part of the frontage; that the sidewalk on 119th street will run in an east and west direction, connecting, some distance east of its center, with the Prospect avenue sidewalk, and will be upwards of 1,850 feet in length, and that complainant owns various lots on the line of that proposed sidewalk, having an aggregate frontage thereon of upwards of 1,150 feet, being all the frontage thereon from Prospect avenue to Western avenue; that if the proposed sidewalks, so far as contiguous to complainant's lots, be constructed by complainant, such construction will cost complainant not less than 22 cents per foot, or for the Prospect avenue sidewalk not less than \$429, and for the sidewalk on 119th street not less than \$253,—making a total of \$682; that if said sidewalks, so far as contiguous to complainant's lots, be constructed by the village,

the expense thereof, as complainant is informed and believes, will be not less than 38 cents per foot, or for the part on Prospect avenue \$741, and for the part on 119th street \$437,—making a total of \$1,178, which amount will be assessed by the village against complainant's lots. It is then alleged that there are no improvements of any character on any of the property owned by the complainant; that there are a few scattering houses just east of the dummy line of the Chicago, Rock Island & Pacific Railroad Company and just north of 119th street; that the people living in these houses, as complainant understands, are all, or nearly all, laborers, some of whom work in the said village, some in West Pullman, which lies southeast of said Morgan Park, and some, perhaps, in the city of Chicago; that said dummy line is a branch railroad running in a northerly and southerly direction just east of Washington avenue, and that there are stations on said dummy line at 119th and 115th streets; that the line of the Northern Pacific Railroad Company runs north and south about a block west of Western avenue, and that there is a regular station on said line at 115th street; that trains also stop on said line, as complainant is informed, at a point in Blue Island about a half a block or a block south of 119th street, and that complainant understands that it is for the purpose of enabling the few persons living near the corner of Vincennes avenue and 119th street, who may occasionally desire to catch said Northern Pacific trains at this last-mentioned stopping place, that said sidewalk on 119th street has been ordered, the fare into the city of Chicago on said Northern Pacific line being 5 cents and on said Rock Island dummy line 15 cents; that there is no other use to which said sidewalk on 119th street could be put, and that there is practically no use whatever to which the proposed sidewalk on Prospect avenue could in any near future be put; that there is already existing a connected line of sidewalks on said Vincennes avenue, Raymond street, and Lothair and Medora avenues, leading to said stations on said dummy line at 119th and 115th streets, and that of said Northern Pacific line at 115th street.

From the allegations of the bill it is apparent that the real ground relied upon to defeat the ordinance providing for the construction of the sidewalk is that the locality where the sidewalk is ordered constructed is so thinly settled that there is no necessity whatever for the construction of a sidewalk,—that no sidewalk was needed where it was ordered to be laid. What the public necessities were was a question solely for the determination of the president and board of trustees of the village of Morgan Park, and when the incorporation clothed with power has acted in strict conformity to the statute conferring the power, as was the case here, its decision must be held final and conclusive, unless it is apparent that the action of the municipality is unreasonable, unjust, and oppressive, as

held in *Hawes v. City of Chicago*, 158 Ill. 653, 42 N. E. 373. It may be that there was no pressing demand for the sidewalk in question, and that it would, in the end, have been better had its construction been postponed until the population of the village had increased; but that was a matter for the board of trustees to settle for themselves; and when they provide for improvements not needed or demanded by the majority of the people of the municipality the remedy is an appeal to the ballot box, and the election of men who will heed the wants and necessities of a majority of the people.

There is no similarity between this case and the *Hawes Case*. There the appellant, *Hawes*, had constructed a plank sidewalk 1,256 feet long in front of his property, in conformity to an ordinance of the city. Five months after the walk had been put down, and when it was in good condition, and safe and sufficient for public use, the city council passed another ordinance, which ordered the plank walk to be torn up, and a cement walk to be constructed, at a cost to *Hawes* of \$1,915. This was such a glaring fraud and imposition upon the property owner that the court held the ordinance unreasonable, unjust, and oppressive; but it was there said (page 650, 158 Ill., and page 375, 42 N. E.): "The rule is that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority." No such case was made by the bill here. No sidewalk had ever been laid over complainant's property, and, while we do not think a great necessity existed for the improvement, still we do not regard the action of the village so unreasonable, unjust, and oppressive as to call upon a court of equity to interfere. The sidewalk act of 1875 expressly authorized the village to provide for the construction of sidewalks by ordinance, as was done in this case. The validity of that act was before this court in *White v. People*, 94 Ill. 604, and the act was held valid. The ruling in that case has been followed in a number of cases since that decision. The village of Morgan Park, therefore, having passed an ordinance for the construction of a sidewalk as it was authorized to do under a valid act of the legislature, and the ordinance not being unreasonable, unjust, and oppressive, it must be sustained. The decree of the superior court will be affirmed. Decree affirmed.

(176 Ill. 322)

METROPOLITAN LIFE INS. CO. v. MITCHELL.

(Supreme Court of Illinois. Oct. 24, 1898.)

LIFE INSURANCE—ACTION ON POLICY—EVIDENCE.

1. Where the medical examiner of an insurance company testified that deceased was examined, and identified his signature to a written statement made by witness as examiner, error in permitting him to be asked on cross-examination if the signature to the medical

report on the back of the examination was his, and if that report stated the result of his examination, and in permitting the entire paper relating to the same subject-matter to go in, was harmless.

2. Where proofs of death were made in the manner and to the extent required by the policy, it is not error, in an action on the policy, to exclude evidence that the company called for additional proof.

3. Where an insurance company rejected a claim without mention of alleged failure to furnish additional proofs called for, it is not error to exclude evidence on the trial that the proofs were called for.

4. Assured, having stated that he had no consumption or bronchitis, and had not consulted a physician, died of consumption in one year after issuance of the policy. A physician treating him two months before his death gave his opinion that the disease had existed eighteen months. A physician of large experience testified that one may contract consumption and die of it in six weeks. The certificate of the company's examining physician showed assured had no derangement of function of the respiratory system. There was evidence of the good faith and truthfulness of the representations in the application. *Held*, that a judgment against the company was sustained by the proof.

Error to appellate court, Second district.

Action by Annie Mitchell against the Metropolitan Life Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

William D. Fullerton, for plaintiff in error. Haskins & Panneck and Vincent J. Duncan, for defendant in error.

PHILLIPS, J. Judgment was recovered by defendant in error on a life insurance policy, which judgment was affirmed by the appellate court. The errors assigned here, and relied upon to secure a reversal, consist altogether of the rulings of the court in the admission and rejection of evidence. Dr. Sprague was the medical examiner of the company. He testified for it that the deceased, Frank Mitchell, was examined, and identified his signature to a written statement made by him as such examiner. On cross-examination he was asked, in substance, if he made the examination, if the signature to the medical report on the back of such examination was his, and if that report stated the result of his examination. The report being a part of the same paper which the company offered in evidence, there was no serious error committed in identifying such signature by the witness while on the stand, and in permitting the entire paper relating to the same subject-matter to go in evidence at the same time.

There was no error committed in refusing to admit evidence that the company called for additional certificates of physicians after the proof of loss made out by the company's agents (and, according to their requirements, on the company's blanks) had been sent in. The policy required the proofs of death to be made in the manner, to the extent, and upon the blanks required by condition No. 9. Con-

dition 9 provides such proof shall be made upon blanks furnished by the company, and the proofs shall contain answers to each and every question propounded in said blanks to the claimant, physician, and other persons to whom such questions shall be propounded. This was complied with. But, aside from this view, the company, by its letter of June 21, 1895, unequivocally rejected the claim, and made no mention of the alleged failure to furnish such additional certificate.

The assured took out the policy March 18, 1894, and died of consumption March 31, 1895. The defense interposed was that to secure the insurance he had made false statements as to his former condition,—especially as to not having consumption or bronchitis and as to not having consulted a physician. The company offered evidence to show by a physician who treated deceased January 8, 1895,—a little over two months before his death,—that he had consumption, and that the disease, in his opinion, had existed for at least eighteen months. On the other hand, a physician of large experience testified that a person may contract the disease of consumption and die of it in six weeks. It is a matter of common knowledge there are at least two kinds of such disease. If afflicted with one kind, the patient often lingers, while with the other he soon passes away. The latter, in popular phrase, is called quick or galloping consumption. In addition to this evidence, the company's examining physician's certificate showed that, at the time of the application for the insurance, deceased had no "derangement of function of the respiratory system." There was other evidence of a similar nature. In view of the nature and character of the evidence offered in support of the good faith and truthfulness of the representations in the application, as well as in view of the common knowledge that the disease sometimes runs its course rapidly, the judgment is believed to be fully sustained.

Error is assigned in the refusal of the court to admit the records of medical institutions, and entries in a book of a physician, made about or before the time of the application for insurance, of an examination of one Frank Mitchell, and a statement in such entries that he was suffering from lung trouble, etc. It is conceded that, before such records or entries would be proper in any event, there must be proof of identity of such person as the insured. This proof seems not to have been deemed sufficient by the lower court, and the appellate court states as a fact "there is no pretense of such identification." A careful examination of the record seems to show there is some evidence tending to prove identity, but we do not feel called upon to hold on this question of fact, especially in view of the other facts in this case and the holding of the other courts, that such proof was sufficient to require the admission of such records and entries, even

if clearly competent. There being no substantial error in the record, the judgment is affirmed. Judgment affirmed.

(174 Ill. 618)

WESSELS et al. v. COLEBANK.

(Supreme Court of Illinois. Oct. 24, 1898.)

EASEMENTS—DRAINS—REPAIR—APPEAL—JURISDICTION.

1. A license acquired under Laws 1889, p. 116, § 4, making a license to construct a drain upon the lands of another irrevocable if not revoked within one year, vests in the licensee a perpetual easement.

2. A proceeding in error involving the right of one owning an easement in a drain on the lands of another to go upon the land to repair the drain, involves a freehold estate, and is within the jurisdiction of the supreme court.

3. The owner of an easement in a drain on the land of another may go upon the land to repair the drain.

4. The "Farm Drainage Act" (Laws 1886, p. 77), providing for the formation of districts to maintain drains, and for the apportionment of the expense, did not destroy the common-law right of one owning an easement in a drain on another's land to go upon the land to repair the drain.

Error to circuit court, Iroquois county; John Small, Judge.

Action by L. S. Colebank against Gerd Wesseles, A. J. Vliet, Louis Lubben, Henry Bohlman, and Christ Toback. There was a judgment for plaintiff, from which defendants bring error. Reversed.

This was an action of trespass *quare clausum fregit*, brought by defendant in error, L. S. Colebank, against the plaintiffs in error, for breaking and entering his close, and with shovels, spades, etc., cleaning out and deepening a ditch across the same, piling up the earth and sediment in mounds and ridges, and damaging his grass and crops. To this plaintiffs in error filed their plea of not guilty, and also a special plea, in which they admitted the acts complained of, and attempted to justify under a claim of right. Defendant in error demurred to the plea, the court sustained the demurrer, and the plaintiffs in error elected to stand by their plea. A trial was then had before the court without a jury, and plaintiffs in error admitted the doing of the acts charged. The court rendered judgment in favor of defendant in error for one cent and costs, to which judgment plaintiffs in error excepted, and have sued out this writ of error from this court. Defendant in error has entered a motion in this court to dismiss the writ of error, alleging that no freehold is involved in this controversy.

A special plea averred that a number of landowners adjoining the close now the property of defendant in error, and whose lands naturally had surface drainage over said close, in the year 1887 did, by mutual license, consent, and agreement, construct a continuous open drain from the highway on the south of section 22 over and across the west half of said section to the road ditch on the north

of the section, said open drain running across the aforesaid close, which was then the property of George Egley, who joined in the construction and maintenance of the drain for the benefit of his own land; that said drain has, from the time it was constructed, been maintained, cleaned out, and repaired by the town authorities and the owners of the lands affected, from time to time, and that said acts of maintenance, cleaning out, and repairing were at all times done with the license and consent of the owner, for the time being, of this close; that neither Egley nor any of his grantees ever did, in any manner, prior to July 2, 1880, revoke the parol license so given in 1887 to construct the said open drain across this close; that thereby the drain became, and was, prior to July 3, 1890, and has remained from thence to this time, according to the statute, a continuous open drain for the mutual benefit of all the lands affected; that in 1897 this drain was in need of repair, and required spading out of the earth and sediment that had collected in the same, and that certain of the defendants who were property holders interested in the maintenance of the drain—one of them being a highway commissioner—had directed the other defendants to clean out the drain, which was done without doing any unnecessary damage to plaintiff's close. The grounds of demurrer were that it did not appear from the plea that the defendant landowners, by any legal or sufficient conveyance or by any ancient right, ever acquired or had any permanent or good right or authority to keep up or repair said drain, or to enter upon said close for that or for any other purpose.

Kay & Kay, for plaintiffs in error. A. F. Goodyear, for defendant in error.

CARTER, J. (after stating the facts). The motion to dismiss the writ of error on the ground that no freehold is involved in the case has been reserved to the hearing, and will be disposed of first. The rule, as frequently announced by this court, is that a freehold is involved in cases only where either the necessary result of the judgment is that one party gains and the other loses a freehold estate, or where the title to a freehold is so put in issue by the pleadings that a decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate. *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 576, 41 N. E. 918; *Goodkind v. Bartlett*, 136 Ill. 18, 26 N. E. 387, and cases cited. The question is presented by the decision of the court in sustaining the demurrer to the plea. If the facts alleged in the plea, which were admitted by the demurrer, show that the plaintiffs in error, who were the owners of the adjoining lands through which the ditch had been excavated and maintained, had a perpetual easement in the close of defendant in error to have the drain kept open, so that

the waters flowing through the same upon their lands might flow unobstructed through the ditch as it extended through the close of the defendant in error, then a freehold is involved. *Chronic v. Pugh*, 136 Ill. 539, 27 N. E. 415. Independently of the statute, it is clear that the right enjoyed by plaintiffs in error was a mere license, revocable at the pleasure of the owner of the close, and that the conveyance of the close without reservation of the right would revoke the license. The statute referred to is the act entitled "An act declaring legal, drains heretofore or hereafter constructed by mutual license, consent or agreement, by adjacent or adjoining owners of land, and to limit the time within which such license or agreement heretofore granted may be withdrawn," approved June 4, 1889, in force July 1, 1889. Laws 1889, p. 116. Section 1 makes drains constructed by mutual license, consent, or agreement, like the one here in controversy, drains for the mutual benefit of all the lands interested therein. Section 2 provides how other parties may join. Section 3 prohibits any of the parties interested therein from filling up the same, or in any manner interfering with the same so as to obstruct the flow of water therein, without the consent of all the parties, and provides that "the license, consent, or agreement of the parties herein mentioned need not be in writing, but shall be as valid and binding if in parol as if in writing, and may be inferred from the acquiescence of the parties in the construction of such drain." Section 4 provides that the right to revoke any parol license before granted to construct such drain upon, across, or over the lands of any party shall be exercised, and suit commenced to enforce the same, within one year from the time the act took effect; and if not thus exercised, and suit brought within one year, then such party shall be forever barred from thereafter revoking such license.

It is admitted that plaintiffs in error were the owners of the dominant, and the defendant in error of the servient, heritage; that the former and the grantors of the latter jointly, and by mutual consent and agreement, excavated the ditch for the drainage of these lands of the several owners, and for several years maintained the ditch, and kept it open and in repair, and that the license was not revoked within the time fixed by the statute. Under these facts, and by virtue of the statute, this license became irrevocable, and the question is, was it converted into an easement? An easement is an incorporeal hereditament, and consists of a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. Real Prop. c. 1, § 3, pl. 1. It is always distinct from the occupation and enjoyment of the land itself. It is a liberty, privilege, or advantage in land distinct from the ownership, and rests upon grant or prescription. 1 Washb. Real Prop. c.

12, § 2, pl. 1. Except in what are known as "common-law dedications," parol gifts of land, or of easements therein, are ineffectual, it being elementary law that the title to lands cannot be transmitted inter vivos except by deed or its equivalent, and that easements or other incorporeal hereditaments cannot be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised. *Railroad Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014; *Forbes v. Balenseifer*, 74 Ill. 183; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218. A license is an authority to do a particular act or series of acts upon another's land without possessing any estate therein, and may be created by parol, and is generally revocable at the will of the licensor. It will be noticed that the statute declares that such a continuous drain over the lands of several owners, constructed, as this was, by mutual agreement, "shall be held to be a drain for the mutual benefit of all the lands so interested therein," and forbids the filling up of such drain, or the obstruction of the flow of water therein, without the consent of all the parties in interest. The defendant in error had one year after the statute took effect in which to revoke his license or agreement under which this ditch was excavated, but, failing to exercise this privilege, the statute became applicable, and the rights of the parties fixed. We are of the opinion that by force of the statute the license has been converted into a perpetual easement.

The effect of the statute is to make such a ditch so constructed an incumbrance, so to speak, upon all the lands through which it passes. The right to it and its maintenance is an interest in the land itself, and passes with the land by conveyance, devise, or descent, for the statute declares that it shall be held to be for the benefit of all the lands, and the obstruction to the flow of water is prohibited, and it is, in effect, made perpetual. In *Wilson v. Dondurant*, 142 Ill. 645, 32 N. E. 498, it was held that this statute does not restrict or abridge the rights of drainage as they existed at common law, but that its sole purpose is to enlarge those rights. By the common law the owner of the dominant heritage has the right to have the surface waters flow from his land over the lands below as they would naturally flow; and, as the statute in question was intended to enlarge the rights of drainage, it would seem that it was the intention of the legislature, from the language employed, that in cases where the owners of such lands, by agreement among themselves, construct a channel through their several tracts to carry off the water, the right to maintain the same, and to have the water flow through it unobstructed, should be a permanent one, and pass with the land as an incident of ownership. In *Totel v. Bonnefoy*, 123 Ill. 653, 14 N. E. 687, where an easement, by prescription, in the use of a ditch over

the land of another for the flowing of water was claimed, this court held that the easement did not exist where it appeared there had not been 20 years' user of the same ditch; and it is apparent that it was the intention of the general assembly to make some changes in the law in respect to drainage. In *Chronic v. Pugh*, supra, it was held that under sections 4 to 10 of the "Act to provide for drainage for agricultural and sanitary purposes," etc., approved June 27, 1885, where a landowner had acquired the right, by proceeding under the statute, to put in a tile drain across the land of another to drain his land into a natural water course, he acquired an easement in such land which was a freehold estate. We are of the opinion that a freehold is involved in the case at bar also, and the motion to dismiss will be overruled.

There remains the further question whether the right to maintain the drain over the close of defendant in error includes also the right to enter upon his close for the purpose of repairing or cleaning out such drain. The right to the use of the drain must, in reason, be something more than the mere right to have the surface water flow over the lower land. It is the right to have the water collected in the drain on the upper land flow through the drain on the lower land, and includes the right to have such drain remain in its former condition and fit for the use intended. It is a well-settled rule that the grant of an easement is accompanied by such secondary easements as may be necessary for its enjoyment. *Alexander v. Tolleston Club*, 110 Ill. 65; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356. As a general proposition, whoever has an easement in or over another's land has the right to do all such things as are necessary to preserve the easement; that is, he may keep it in repair, and has the right of access to make the necessary repairs. *Washb. Easem. c. 6, § 1, pl. 1; 6 Am. & Eng. Enc. Law*, 149. The right to keep in repair a way is fully established. The cases on the subject of obstructions erected in or to water courses or drains are quite numerous, but there seem to be few authorities in regard to the right of entering upon the land of the owner of the servient heritage, and removing obstructions occurring through natural causes in an artificial channel. In *Chapman v. Manufacturing Co.*, 18 Conn. 269, it was held that obstructions in an artificial channel, through which there exists the prescriptive right to flow the waters of a lake, though occasioned by natural causes, may be removed by the persons whose lands are overflowed, without there being any right on the part of the owner of the channel to object. In *Roberts v. Roberts*, 55 N. Y. 275, the former owner of a tract of land had drained the upper part of it, by means of a ditch, into the lower part, and afterwards conveyed the tract in two parts to different persons. In an action by the owner of the upper tract against the owner of the lower tract the court said: "If the

ditch got out of repair by reason of floods or washing away its banks, or otherwise, it was the legal right of the plaintiff to repair it, so as to restore it to its original condition, and make it subserve the purpose which it originally effected, of carrying off the water of the stream. He was entitled to have the ditch kept up as it was when he purchased, and to keep it in that condition, and, if necessary, to enter upon the defendant's lands to make repairs, doing no unnecessary injury." In *Liford's Case*, 11 Coke, 46b, it is said: "The law giveth power to him who ought to repair a bridge to enter into the land, and to him who hath a conduit within the land of another to enter the land and mend it, when cause requireth, as it was resolved in 9 Edw. IV. pl. 35," where it was held that the right to scour and amend a trench was incident to a grant of a right to dig it in another's land for the purpose of drawing water through the same; and the same doctrine is sustained in *Peter v. Daniel*, 5 C. B. 568. *Washb. Easem. c. 6, § 1, pl. 4*. It would seem, therefore, that the common law annexes to the easement of a drain in another's land the right to go upon such land, and clean out or repair such drain without doing unnecessary injury to the land. Nor can we conclude that the statute has taken away this right. Section 76 of the act of June 27, 1885, known as the "Farm Drainage Act" (*Laws 1885, p. 77*), provides that where two or more parties owning adjoining lands which require a system of combined drainage have, by voluntary action, constructed ditches which form a continuous line, the several parties shall be liable for their just proportion for such repairs and improvements as may be needed therefor, the amount to be determined on the same principle as if these ditches were in an organized district. It then directs that, when such repairs or improvements are not made by voluntary agreement, any of the parties may "petition for the formation of a drainage district to include the lands interested in maintaining these ditches." It also provides that the ditches shall be taken as a dedication of the right of way, and the construction and joining as the consent of the several parties to be united in a drainage district. The principal object of this section seems to be to provide a way to compel the different landowners to pay their proportion of the expense of repairs and improvements. In the case at bar it is not, of course, claimed by plaintiffs in error that they were authorized to make improvements, or to do anything more than was necessary to clean out the ditch and maintain it in its original condition; nor is there any question of apportioning the expense of cleaning out the ditch. The section of the statute last mentioned does not purport to take away the common-law right possessed by plaintiffs in error to preserve their easement, nor is it inconsistent with its exercise. It would be unreasonable to say that the statute means that in such a case the landowners

should form a drainage district before they could, at their own expense, remove a little earth and rubbish from a ditch, which, without the statute, they would have the right, at common law, to remove. In cleaning out the ditch they would, of course, be liable for any abuse of their right; but it is not shown or claimed in the case at bar that there was any unnecessary damage done, or anything more than to clear the ditch from obstructions. The plea was a good defense, and the demurrer should have been overruled. The judgment is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 89)

**ROCKFORD WHOLESALE GROCERY CO.
v. STANDARD GROCERY &
MEAT CO. et al.**

(Supreme Court of Illinois. Oct. 24, 1898.)

CORPORATIONS—INSOLVENCY—PREFERENCES.

Directors who guarantied a debt of the corporation while it was solvent may prefer the creditor after the corporation becomes insolvent.

Appeal from appellate court, Second district.

Bill by the Rockford Wholesale Grocery Company against the Standard Grocery & Meat Company and others. A decree sustaining a demurrer to the bill and dismissing it was affirmed by the appellate court (74 Ill. App. 317), and complainant appeals. Affirmed.

A. D. Early, for appellant. Works & Hyer, for appellees.

PHILLIPS, J. The question of law raised by this record arises from this state of facts: A corporation, while solvent and a going concern, borrowed money of a bank, which indebtedness was guarantied by the directors. Thereafter it became indebted to the appellant. By authority of the directors a judgment note was afterwards given the bank in lieu of the original note, on which judgment was at once taken, and the corporation property sold. Appellant recovered judgment thereafter, and, on return of execution nulla bona, filed a bill against said directors seeking to hold them personally liable for a breach of trust, setting up the foregoing facts, and alleging fraud in giving said judgment note while said corporation was known to them to be insolvent, for the purpose of the sale of said property under legal process. A demurrer thereto was sustained, and a decree entered dismissing the bill, which was affirmed by the appellate court on the authority of *Blair v. Steel Co.*, 159 Ill. 350, 42 N. E. 895.

The corporation being insolvent, and the directors being guarantors of said debt, were they at such time legally authorized to give such preference? The principle is firmly established that, in the absence of statu-

tory prohibition, an insolvent corporation can prefer its creditors the same as any individual, which preference, of course, is given by the action of the officers of the corporation. *Burch v. West*, 134 Ill. 258, 25 N. E. 658; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992. The law is, however, that an insolvent corporation cannot prefer a creditor who at the time is a director therein. *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464. Is the creditor deprived of the legal right to this preference by reason of the fact that such debt of the corporation is guarantied by one or all of the directors? for if the directors, in such case, have no legal right to give, the creditor has no legal right to receive, such preference. One proposition is necessarily the corollary of the other, for the element of fraud is involved in such preference, if illegal. Mere insolvency does not dissolve the corporation, or ordinarily abridge the statutory or common-law power of the directors. It does, however, prohibit them from giving a creditor director a preference. In such case, he, as an individual, alone receives the benefit. The law will not allow him, in such case, to take advantage of his official position, as it would not be equitable to the other creditors. That equitable principle should not apply to a bona fide creditor where a debt is created and guarantied by the director during solvency. Such guaranty, at least at such time, does not render such debt fraudulent. No law has been violated, and no reason exists why such a debt should be tainted with even the suspicion of illegality. His relation as a creditor is created by his contract with the corporation, and not with the guarantors. He is just as clearly, by law, a creditor with such guaranty as without it. His rights as such creditor remain, to the end, unimpaired, during solvency and through insolvency.

The relation which the directors occupy is primarily that of trustees of the stockholders. *Cook, Stock & S.* § 648. So long as it is doing business, there is no priority whatever between the directors or other officers and its creditors. It is a mere equitable principle that directors shall not prefer themselves as creditors. *Clark, Corp.* p. 608. When the corporation becomes insolvent, then, it is said, in equity the officials become trustees for the creditors; but the rule of law is fixed that after insolvency the authority to give a preference, in the absence of statutory prohibition, is as complete and absolute as that of an individual, for, as stated in *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, "the doctrine that the property of the corporation is a trust fund, only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders," and before any of it can be distributed to the directors, as creditors, by way of preference. This court has not enlarged upon this rule, in the way of

enforcing such trust in favor of creditors, by holding, as some courts have, that a relative of a corporate official who is a creditor, or a creditor who has the guaranty of the directors, cannot secure such preference. *Blair v. Steel Co.*, supra. In fact, many courts hold that where directors are guarantors or creditors in good faith, they, as creditors, are entitled to a preference. See *Gould v. Railway Co.*, 52 Fed. 680, for a review of authorities. The directors were not the creditors of the corporation, and were not primarily standing in that relation to it. The creditor loaned this money to the corporation in good faith, while solvent and a going concern, and the money so obtained was used for its benefit. On no principle of law or reason can such creditor be deprived of its right to a preference merely because the directors guarantied the debt. The act of obtaining such guaranty on the part of the creditor, or of giving it on the part of the directors, was neither illegal nor improper. It is not uncommon for the directors to be compelled to lend their personal credit, by way of surety or guaranty, in order to secure means to carry on the business. If this is done during solvency, for the benefit of the corporation, neither the right of such creditor so loaning on such guaranty nor the power of the directors is in any way affected or abridged as to a preference of such a debt. It necessarily follows that fraud could not be predicated on the act of the directors in giving this judgment note to the bank, which resulted in a preference to it, as a creditor, in the distribution of the assets of said corporation. The demurrer was therefore properly sustained, and it was not error in the appellate court to affirm the decree. The judgment is affirmed. Judgment affirmed.

(175 Ill. 20)

GLOS v. GOODRICH.

(Supreme Court of Illinois. Oct. 15, 1898.)

QUIETING TITLE—INTEREST—POSSESSION—OCCUPANCY—TENDER—PLEADING—SUFFICIENCY—COSTS.

1. Possession of lands is not shown in the owner by proof of their occupancy by a mere squatter without color of right of possession.

2. Lands occupied by a squatter without color of right of possession are not vacant, within the rule that one out of possession cannot sue to quiet title unless the lands are vacant.

3. In equity, an offer to pay any amount found due sufficiently pleads a tender.

4. A tender of the amount due on a tax certificate, with interest and costs, and requiring the holder to convey his title, is insufficient, since only conditions enjoined by law or arising out of a contract or trust relation between the parties can be attached to a tender.

5. Where a tender of the amount due on a tax certificate is coupled with an invalid condition, costs cannot be adjudged against the holder in an action for its cancellation.

6. Tendering a greater sum than is actually due does not require a decree for more than the true amount, where the plea of tender is an offer to pay the amount found due.

7. A person who sold premises and delivered possession to his grantee cannot maintain a suit to remove a cloud thereon, even where he conveyed by warranty.

Appeal from Cook county court; *M. F. Tukey*, Judge.

Bill by Julia A. Goodrich against Jacob Glos. From a decree for complainant for a portion of the relief demanded, defendant appeals, and complainant assigns as cross error the dismissal of her bill in part. Reversed.

Enoch J. Price, for appellant. James M. Cleaver, for appellee.

PHILLIPS, J. Appellee filed a bill in chancery to set aside appellant's tax deed to the east one-hundredth part of lots 25 to 32, inclusive, and 42 to 45, inclusive, of block 1, in Lingle & Darlow's subdivision of blocks 11 and 12, in Hunter's subdivision of the N. W. ¼ of section 31, township 38 N., range 18 E. of the third P. M., in Cook county. She alleged that she was the owner and in possession of lots 25 to 32, inclusive, and that she was formerly the owner of lots 46, 47, and 48, but prior to the filing of the bill conveyed them to the Baltimore & Ohio Connecting Railroad Company by warranty deed, and averred said company was in possession, and refused to complete payment for the said three lots until Glos' tax title was set aside. Appellant appeared and answered, denying the possession of the said property being in appellee, and set up his tax deed. On hearing, the court granted the prayer of the bill, and set aside the tax deed as to the lots named, except lots 46, 47, and 48, and awarded costs to the complainant. Appellant brings the record to this court, alleging as error there was no sufficient evidence of possession of the land in question, and that there was no valid tender of the proper amount which appellant was entitled to on his tax deed being set aside. Appellee assigned a cross error in dismissing her bill as to lots 46, 47, and 48.

The allegation of the bill is that the complainant is the owner in fee simple and in possession of certain lots, naming them. A bill to remove cloud from title must allege that the complainant is in possession, or that the property is vacant. *Wetherell v. Eberle*, 123 Ill. 666, 14 N. E. 675; *Gage v. Abbott*, 99 Ill. 366. This allegation is material, and the proof must show that the real estate is vacant and unoccupied, or in the possession of the complainant, except where it is sought to set aside a deed for fraud. *Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599; *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426; *Johnson v. Huling*, 127 Ill. 14, 18 N. E. 786; *Hardin v. Jones*, 86 Ill. 313. The evidence shows this land, anterior to the time it came to the complainant, was being plowed by one who was a mere squatter, and between whom and the complainant there was no relation of landlord and tenant, neither had there been with any one in privity with her title. According

to his testimony, this squatter was then in possession thereof. Complainant's agent never gave him any authority to enter into possession of the property, and did not know he was in possession. This is the only evidence that refers to the property, and it shows a possession in the squatter without his being a tenant of complainant, or privy to her title. The averment of the bill as to complainant's possession was not sustained by this proof, nor did it show the land was unoccupied.

Appellant insists that on a bill to set aside a tax deed he is entitled to receive all money paid by him at the tax sale, subsequent taxes paid, with interest at 6 per cent., and his costs in the proceeding, as a condition precedent to relief, unless a valid tender of the amount was made before bill filed, and kept good by payment of the money tendered into court. A court of equity is not bound by any rule requiring the complainant to bring money into court in a case in which he may, by a decree, be required to pay money, before a decree will be entered by the court. The money may be ordered into court at any time when the rights of the defendant require it, and the failure to produce it in court at the time of filing the bill, and constantly having it there, cannot be permitted to defeat the ends of justice, and prevent the rendition of a decree. *Webster v. French*, 11 Ill. 254; *Anderson v. White*, 27 Ill. 57; *Board of Sup'rs v. Henneberry*, 41 Ill. 179; *Dwen v. Blake*, 44 Ill. 135. A bill, under the practice in chancery, may be sufficient by offering to bring the money into court, and abide by the order of the court as to its payment. As a basis of equitable relief, an actual tender, and the bringing of money into court, and depositing the same subject to the order of the court, or an averment made in the bill of a readiness and willingness to bring the money into court and pay the same on the order of the court, must be shown to authorize relief such as is asked in this bill. *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138. The appellee in this case offers to pay any amount found due, and this is sufficient as an averment of tender in that regard.

Before one holding a tax deed can have a decree against him for costs, he must be placed in the position of having refused to do equity. The evidence shows that the attorney for the complainant called upon Jacob Glos, and offered to pay him the amount of money paid by him for tax certificates, together with costs and interest thereon, and demanded a quitclaim deed from appellant for the interest acquired by him, and offered to pay him \$30. Appellant declined to receive the money or execute the quitclaim. A valid tender is an offer to deliver something, made in pursuance to some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer. No condition can be

attached to its acceptance except in conformity with some contract between the parties, or in conformity with some duty arising out of a trust relation between them, or in conformity with a reciprocal duty enjoined by law upon the person to whom the tender is made. There is no averment in the bill of any contract or trust relation or equitable ground which would require appellant to convey his title to appellee, and a condition requiring appellant to so make a conveyance renders the tender insufficient. Costs should not have been adjudged against the appellant. *Gage v. Busse*, 102 Ill. 592; *Gage v. Arndt*, supra; *Reed v. Reber*, 62 Ill. 240; *Barnett v. Cline*, 60 Ill. 205; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320. The tender made by the complainant was coupled with a condition of its acceptance, which she had no right to impose; and the refusal of its acceptance by the appellant did not place him in a position that a judgment for costs could be entered against him in the circuit court. The averment of being ready and willing to pay whatever amount should be decreed to the defendant was sufficient as a tender to authorize relief to be granted to the complainant, if the facts were such that she was entitled to a decree.

The objection that the sum of \$30 was tendered, and the decree only required the payment of \$25.50, cannot be held well taken, because in a chancery proceeding the offer to bring the money into court, and abide by the order of the court as to its payment, is a sufficient tender; and, being incorporated in the bill, the court may find the actual amount due, and require that sum to be paid, and is not required to find a greater amount due than actually exists because a tender for such greater sum had theretofore been made.

Appellee assigns as a cross error the dismissal of her bill for relief as to lots 46, 47, and 48, which she had sold to the Baltimore & Ohio Connecting Railroad Company, which was made a defendant. One having no title to land cannot contest a cloud upon the title created by an incumbrance or an adverse title. *Hopkins v. Granger*, 52 Ill. 504; *West v. Schnebly*, 54 Ill. 523; *Hutchinson v. Howe*, 100 Ill. 11. A bill to set aside a cloud on title is a proceeding in equity, and one who holds an equitable fee will be treated as the owner, and such equitable title will support the allegation of ownership of the title. *Hemstreet v. Burdick*, 90 Ill. 444; *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 576, 41 N. E. 918. The averment in this bill shows an actual sale by the appellee, and delivery of possession to her grantee, who is alleged to be in possession. She has no interest, legal or equitable. Under the averments of this bill the cross error cannot be sustained. The decree of the circuit court of Cook county is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 310)

DALLEMAND et al. v. SAALFELDT.

(Supreme Court of Illinois. Oct. 24, 1898.)

INJURIES TO SERVANT—NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE—ASSUMED RISKS—DEFECTIVE APPLIANCES—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.

1. The negligence of defendants in failing to comply with a city ordinance requiring elevator shafts to be kept inclosed was the proximate cause of the death of a servant, who, when operating an ascending elevator, fell from it through an uninclosed opening in the shaft to a floor, and from there back through the opening down the shaft to the basement.

2. Where the evidence shows that the injured servant was sober and careful, the jury may, in the absence of evidence to the contrary, find that at the time of the accident the servant was exercising due care.

3. One employed to wash bottles did not assume the dangers incident to the operating of a freight elevator which he knew how to run, and occasionally operated.

4. Whether a servant injured while performing duties outside of his employment was a volunteer, or was directed to perform the service by his employer, is a question of fact for the jury.

5. Evidence that a servant 19 years of age had been employed by defendant for seven weeks, and was not instructed regarding the use of an elevator, nor informed of the dangers of using it, is sufficient to support a finding that he did not know the danger.

6. In an action to recover for injuries received by using an appliance, the burden is on the master to show that the servant knew the danger incident to its use.

7. A servant, though he knows the danger incident to the use of an appliance, does not, by using it at the direction of his master in a service not incident to his employment, assume the risk, unless the danger is such that an ordinarily prudent man would not encounter it.

Appeal from appellate court, First district.

Action by Isaac Saalfeldt, as administrator of the estate of David Saalfeldt, deceased, against Albert Dallemand, Tobias Oberfelder, Max Oberfelder, and James P. Edoff, doing business as Dallemand & Co. From a judgment for plaintiff, affirmed by the appellate court (73 Ill. App. 151), defendants appeal. Affirmed.

David Saalfeldt, a youth 19 years old, was employed by appellants in their bottling works in the city of Chicago, to wash bottles. While thus employed, together with two other servants of appellants, in the basement of appellants' establishment, Cavanaugh, the foreman there, received an order from Casey, the foreman on the third floor, to send him (Casey) some bottles. The foreman shouted an order to the three bottle washers to send some bottles to the third floor, without designating which of them should do it. Cavanaugh testified that Saalfeldt had no orders to send up bottles, but that there were standing orders that the two other men should send them, but Keating, the general manager, testified: "His duty was to wash bottles, clean them properly, and put them to drain. It was not his special duty to bring up and down bottles, but he did so at times. When he was asked to

assist one of the foremen in taking a large load of bottles off, it was his duty to accompany the men. The bottles were carried in cases and barrels." Saalfeldt, however, put a case of bottles on the freight elevator, and went up, managing the elevator himself, and delivered the bottles to Casey on the third floor. He then returned to the elevator, to go up and get some bottles, as he said, from the fifth floor, for Casey. Casey testified that he was looking at the elevator at the time, and in about half a minute after Saalfeldt started up saw him falling below the elevator down the elevator shaft. Saalfeldt fell to the basement, and was killed. The elevator stopped automatically a few inches above the fifth floor. No one saw Saalfeldt when he fell into the shaft, or testified how the accident happened.

At the time of the injury the following ordinances were in force in Chicago, and were given in evidence.

"Sec. 1571. Hoistways in which an elevator shall be used shall be constructed entirely of brick, from its lowest point, extending up through and six feet above the roof. All openings in such hoistway shall be protected by iron doors, and no wood shall be used upon the inside of such hoistways.

"Sec. 1572. Doors in such shaft shall be made of metal, and the catches or fastenings upon such doors shall be so placed that they can be opened only from the inside of the shaft and entirely under the control of the elevator operator.

"Sec. 1573. All openings not having doors shall have metallic frames, with prismatic lights in iron frames."

"Sec. 1614. All doors in shafts of elevators shall have latches so contrived that a key shall be used to unlatch the doors from the outside, but may have a knob or handle to open the door from the inside."

"Sec. 1653. It shall be the duty of every person owning, controlling and operating or using, as owner, lessee or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and operate the same, and any such person who shall neglect to comply with the provisions of this section shall be fined the sum of \$10 for each and every day of such neglect."

The doors to the elevator shaft were of wood, and could be opened either from the elevator side or the room side. "In the basement and fourth and fifth floors were folding doors, working on hinges, and, including both doors, about six feet wide. The first, second, and third stories had sliding doors the full width of the respective openings, and were operated by lifting or sliding up the door toward the ceiling, where it remained until pulled down. There was a bar across each door, from two and a half to three feet from the floor, which was attached by hinges at one end, and could be raised or lowered from either inside or outside the elevator.

No particular person had charge of the elevator or its operation at the time of the accident, nor was any person employed by appellants for that special purpose." The doors were kept open in the daytime. Eisendrath, an architect, testified that the elevator carriage was in the regular form of a freight elevator,—“simply a large platform with the usual side-bars and cross-bars to hang the carriage on.” Saalfeldt had run the elevator up and down a number of times,—one witness testified to a dozen times, and another testified that he manifested ability to handle it,—but it did not appear from the evidence whether or not the proper and safer mode of using it had been explained to him, or whether he fully understood how to use or control it. The evidence tended to show that the deceased was an intelligent boy, sober, industrious, and careful. Appellee recovered a judgment for \$1,700. The appellate court has affirmed the judgment, and appellants have further appealed to this court.

Marcus Kavanagh and C. Le Roy Brown, for appellants. Moses, Rosenthal & Kennedy, for appellee.

CARTER, O. J. (after stating the facts). The only error insisted upon by appellants is that the trial court erred in refusing to give to the jury the instruction asked by them, at the close of the evidence, to find the defendants not guilty. We are therefore called upon to decide whether or not the evidence, taken as true, and in its most favorable bearing in support of plaintiff's cause of action, with all proper inferences which might be justifiably drawn from it, was so insufficient to support the judgment that it should, for that reason, be set aside. Whether or not the verdict should have been set aside as being against the weight of the evidence, is, of course, a question of fact which has been finally settled. We have to do only with the question of law.

It is not contended that appellants were not in default in failing to comply with the ordinances of the city respecting elevators, but the first contention is that such default was not the proximate cause of the injury,—that no causal connection is shown between such default and the accident to the deceased. It is plain from the evidence that, had the ordinance been complied with, and the doors to the openings been kept closed, the accident could not have happened. There was no opening between the platform of the elevator and the walls of the elevator shaft through which Saalfeldt could have fallen, and it is clear from the evidence that he must have fallen into the shaft from the open space at the doors after the elevator passed up; and, taking the evidence as true, this could have happened only at the fourth floor, and as Casey, who had charge of the work on the third floor, testified that it was only about half a minute after the elevator started up

from the third floor that he saw the deceased falling down the shaft beneath the elevator, we cannot say, as a matter of law, that it was an unjustifiable inference for the jury to draw that Saalfeldt was in some manner caused to fall from the elevator into the open space at the open doors of the fourth floor, and from thence into the shaft beneath. As we understand the evidence, the platform of the elevator was supported by a framework of bars, but was not inclosed, and its entire front was open, and of the same width as the doors,—six feet. There was a wooden bar across the open doors at the fourth floor, three feet and a half from the floor. These were double doors, eight feet and three inches high, and swung on hinges opening into the room. At the top, when closed, they fitted against or into the lower edge of the wooden partition or lining of the elevator shaft that extended up to the next opening. The operating cable was one foot from the opening. We are of the opinion that it would not have been, in the eye of the law, an unreasonable conclusion for the jury to reach, from the evidence, that the combination of these open doors, with the bar across them, and the horizontal edge of the partition projecting downward from above, were unsafe to one on the ascending elevator, and necessarily standing near the opening to work the cable; and when this condition of things, connected with the elevator, was maintained by the appellants in violation of the city ordinances, their negligence was sufficiently established. It seems not at all unreasonable that the jury should have found, not only that the defendants below were guilty of negligence, but that such negligence was the proximate cause of the injury. Both were questions of fact, and it would have been error had the court given an instruction to the contrary.

The evidence shows that Saalfeldt was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, and as there was no eyewitness to the accident, and no countervailing evidence, the jury were authorized to find that he was, at the time of the injury, using due care for his own safety. *Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358. And as the record is made up we must assume, if such an assumption were at all necessary, that the court below instructed the jury that the plaintiff could not recover unless they believed, from the evidence, that at the time of the accident he was observing due care, for the record shows that, after the court refused the instruction to find defendants not guilty, other instructions were asked and given on behalf of each party, but they are not in the record.

So far we have a case where there is such evidence tending to prove that the injury complained of was caused by the neglect and default of the appellants, and while appellee's intestate was observing due care for his own safety, that the jury could, without acting unreasonably in the eye of the law, so find; thus

making these questions of fact, and not of law. A more serious question is presented by the objection urged that Saalfeldt, as the servant of appellants, assumed the risk as one incident to his employment. The general rule of law on this subject is too well settled and understood to require comment or citation of authority, but whether a given case comes within the rule is not always easy to determine. As a question of fact it has, by the judgment of affirmance of the appellate court, been finally determined in this case that the risk was not incident to the duties which, by his employment, Saalfeldt undertook to discharge, or else that the facts were such as to bring it within an exception to the general rule; and we are concerned only with the legal question whether or not there was any evidence on which such finding could reasonably be based. The witness Keating, who testified that he was the superintendent of appellants' whole business outside of the office, further testified that Saalfeldt was employed to wash bottles in the basement, that he had no other duties, and that he had nothing to carry upstairs or downstairs as a part of his duties. Cavanaugh also testified that that was no part of his duties. There was no one employed for the special purpose of running the elevator, but there was evidence that Saalfeldt had run it a number of times, and appeared to understand how to run it. The jury were warranted in finding, from the evidence, that it was no part of the duty of Saalfeldt to take cases of bottles up or down on the elevator, and that, therefore, the dangers attending that work were not incident to his employment, nor assumed by him by virtue of his contract of service with his employers.

But it is said that Saalfeldt volunteered to take the bottles up on the elevator without any order to do so by any one having authority so to direct, and that in so doing he voluntarily assumed the risk also. We agree with the appellate court that it was a question of fact for the jury whether or not Saalfeldt acted voluntarily in taking the bottles upon the elevator, or in good faith upon the order of Cavanaugh. Cavanaugh had charge over the men in that department, and gave the order to take up the bottles. Saalfeldt had done such work before, and had not been forbidden to do it. Cavanaugh, the foreman, did not specify which of the three men should obey him, and clearly the jury may have found that the order was addressed to the three men, to be obeyed by any one of them. Whether Saalfeldt properly acted in obedience to such order or not was clearly a question of fact for the jury, and not of law for the court.

It is, however, further contended that, whether the risk was incident to his contract of employment, and therefore one assumed by him, or whether it was incident to the special service which he undertook to perform in obedience to orders, the judgment is erroneous, because, it is said, he had knowledge

of the condition of the elevator and its unsafe surroundings, and, having undertaken to perform it with such knowledge, he could not hold his employers, the appellants, liable. He had been engaged in his work for appellants from five to seven weeks. The evidence does not show that they ever gave him any instructions regarding the use of the elevator, or any information respecting the dangers to be guarded against in using it; and in view of the facts and his inexperience and youth it cannot be said, as a matter of law, that there was no evidence upon which a finding could be based that he did not have knowledge of the danger, or that the danger was not apparent. Whether or not the danger was apparent, or he had knowledge of it, were questions of fact. Besides, the burden of showing such knowledge was on the defendants below. 14 Am. & Eng. Enc. Law, 844. Again, if the fact was—and in support of the judgment, there being evidence to the point, we will assume the jury so found—that Saalfeldt performed this particular service by order of his employers, given through the foreman, and that it was outside the scope of his employment, then the risk would be one which he did not, by virtue of such employment, necessarily assume (2 Bailey, Mast. Liab. §§ 3476, 3502; 14 Am. & Eng. Enc. Law, 856, 857; Linderberg v. Mining Co., 9 Utah, 163, 38 Pac. 692; Railway Co. v. Adams, 105 Ind. 151, 5 N. E. 187), and in such case, although he had knowledge of the dangers attending the use of the elevator in its unsafe environment, he was not bound to disobey on pain of assuming the risk, but might perform the service, and hold his employers liable, unless the danger was such that an ordinarily prudent man would not encounter it (Id.; Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876). However weak the plaintiff's case may have been upon the evidence, we are unable to find, as matter of law, that any fact necessary to a recovery has been found without evidence to support the finding. The judgment must be affirmed. Judgment affirmed.

(175 Ill. 19)

**SUPREME LODGE KNIGHTS OF HONOR
et al. v. GOLDBERGER et al.**

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL AND ERROR—REVERSAL.

Where a judgment rendered against two defendants is erroneous as to one because he was not served with process, the judgment must be reversed as to both.

Appeal from appellate court, First district. Action by Otto Goldberger and Fred Goldberger, for the use of Anna Beresh, against the Supreme Knights of Honor and the Chicago Lodge No. 932, Knights of Honor. There was a judgment for plaintiff, which was affirmed by appellate court (72 Ill. App. 320), as to one defendant, and defendants appeal. Reversed.

Ashcraft & Gordon, for appellants.

WILKIN, J. This is an action of assumption by appellees against appellants jointly. Service was had upon the grand lodge, but no service or appearance is shown as to the defendant Chicago Lodge No. 932, Knights of Honor. The trial court entered judgment against both, and they prosecuted a writ of error to the appellate court for the First district. That court reversed the judgment of the trial court, but remanded the case, with directions to enter judgment against the grand lodge. The defendants prosecute this appeal. No briefs and arguments have been filed on behalf of appellees.

The action of the appellate court in directing the trial court to enter judgment against one defendant, the verdict and judgment having been against both, although only one was served, was manifest error. The judgment was a unit as to both defendants, and should have been reversed as to both, and remanded generally. *Smith v. Byrd*, 2 Gilman, 412; *Brockman v. McDonald*, 16 Ill. 112; *Swift v. Green*, 20 Ill. 173; *Williams v. Chalfant*, 82 Ill. 218. For this error the judgments of the circuit and appellate courts will be reversed, and the cause remanded to the latter court. Reversed and remanded.

(174 Ill. 379)

KINLEY MFG. CO. v. KOCHERSPERGER,
County Treasurer, et al. **SIMONDS MFG.**
CO. v. SAME. HELLYER et al. v. SAME.
RODDIN et al. v. SAME. CHICKERING-
CHASE BROS. PIANO CO. v. SAME.

(Supreme Court of Illinois. Oct. 24, 1898.)

EQUITY—ENJOINING ILLEGAL ASSESSMENTS—REMEDY AT LAW—MANDAMUS—COUNTY BOARDS—INJUNCTIONS.

1. A court of equity will not enjoin the collection of a tax on the ground that the assessment is excessive, since there is a complete remedy at law, under Hurd's St. 1897, p. 1328, which provides that a town board shall, on the application of any person considering himself aggrieved, revise the assessment; and, further, that where property is assessed after said date, and where an appeal is taken from the town board, the county board shall review and adjust the assessment.

2. Mandamus will lie to compel a town or a county board to perform the duty imposed on them by Hurd's St. 1897, p. 1328, of hearing and determining complaints of alleged overvaluation of property by the assessor.

3. A failure to bring mandamus to compel the town or county board to hear and determine complaints of alleged overvaluation of property by the assessor, as required of them by Hurd's St. 1897, p. 1328, precludes the bringing of a suit to enjoin the collection of the tax on the ground of the refusal of both boards to hear and determine such complaint, where it is not claimed that the overvaluation is fraudulent.

Error to superior court, Cook county; Farlin Q. Ball, Judge.

Bills in equity by the Kinley Manufacturing Company, the Simonds Manufacturing Company, Hellyer & Co., E. V. Roddin & Co., and the Chickering-Chase Bros. Piano Company against D. H. Kochersperger, county treasurer, and ex officio county collector, and others.

From judgments sustaining demurrers to the supplemental bills, complainants bring error. Affirmed.

These five cases involve substantially the same questions. In each case a bill was filed asking the court to revalue the property, reduce the assessment made by the assessor, enjoin the collection of the amount of taxes extended upon the assessment so made over and above the amount tendered by the complainant, and to direct the county clerk to amend the records and extend the amount so tendered as the taxes against the complainant. Demurrers to the bills were interposed by the defendants, and sustained by the court. After the demurrers were sustained, the town collectors presented to complainants the warrants in their hands, and demanded payment of the taxes as evidenced by said warrants, which taxes were paid by complainants. Thereupon complainants amended their respective bills, and demurrers were again interposed to the bills as amended, which were, in the Roddin Case and the Chickering Case, sustained, and, complainants electing to stand by their bills, the bills were dismissed for want of equity. In the other three cases, viz. the Hellyer Case, Simonds Case, and Kinley Case, the demurrers were overruled by the court below, and leave to defendants to plead or answer. Thereupon defendants filed their pleas, duly verified, in and by which they set forth that there were no taxes due from complainants, and that they had no warrants in their hands for the collection of any taxes, which pleas were set down for argument, and held by the court to be good and sufficient. Complainants in the above three cases then filed their supplemental bills, setting forth payment of the taxes under protest, and asking that defendants be decreed to refund to complainants the amounts in excess of the sums tendered by complainants in their original bills. Defendants' original demurrers then stood to supplemental bills, which demurrers the court sustained, and dismissed the supplemental bills for want of equity.

Edgar Bronson Tolman and Harvey Mitchell Harper, for plaintiffs in error. Frank L. Shepard, Asst. Co. Atty., for defendants in error Kochersperger and Knopf. J. T. Kretzinger and J. J. Rooney, for defendant in error Ernst. Robert S. Iles, Co. Atty., of counsel.

CRAIG, J. (after stating the facts). Several questions have been discussed in the arguments filed in these cases, but, in the view we take of the record, but one question need be considered, as a proper disposition of that one will be conclusive. As has been seen, the object of the bills was to enjoin the collection of a tax assessed by the local assessors, and the court is asked to revalue the property, reduce the assessment, and order the county clerk to amend the record, and extend the

proper tax against complainants' property. The court no doubt sustained the demurrer to the bills on the grounds that the complainants had a complete remedy at law, and that the allegations of the bills were not sufficient to authorize a court of equity to interfere. Section 86 of the revenue law (Hurd's St. 1897, p. 1328) provides: "In counties under township organization, the assessor, clerk and supervisor of the town shall meet on the fourth Monday of June for the purpose of revising the assessment of property in such town, and on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall revise the assessment and correct the same as shall appear to them just. * * * Any two of such officers meeting are authorized to act, and they may adjourn from day to day upon notifying those present of the date to which they adjourn, until they shall have finished the hearing of all cases presented to them." The section also provides that, where property is assessed after the fourth Monday of June, and where an appeal is taken from the action of the town board, the county board shall review and adjust the assessment. If the local assessor has assessed the property of a taxpayer higher than the same should be assessed, here is a complete remedy provided, in which he may obtain proper relief. The law makes it the imperative duty of the town board to give every taxpayer who may consider himself aggrieved a fair and impartial hearing. So, also, it is the duty of the county board to consider and determine every case brought before it. Whether the cases may be many or only a few, it is the duty of the board to consider and decide every case brought before it, and that duty cannot be disregarded. It is a familiar rule that, where there is a complete remedy at law, equity will not interfere. Unless, therefore, that rule is to be disregarded, it is apparent that the complainants had no standing in a court of equity. In *Railroad Co. v. Hodges*, 118 Ill. 323, where a bill was filed to enjoin the collection of a tax, it was held that a court of equity will not enjoin the collection of a tax unless the tax itself is unauthorized by law, or is levied upon property not subject to taxation, or the property upon which it is assessed is fraudulently valued at too high a rate. It is there said (page 325): "Where the complaint is made that the local assessor has overvalued property, the owner must resort to the tribunals provided by the statute for review in such cases. A court of equity is not empowered to value property for taxation, but these boards afford ample remedy for all errors in valuation, and they must be resorted to for relief when complaint is made in that regard. *Felsenthal v. Johnson*, 104 Ill. 21, and *Adsit v. Lieb*, 70 Ill. 198, are illustrations." It is, however, said that the complainants did apply to the town board for relief, and that the town board, after adjourning from time to time, dis-

missed the application without any consideration; that the application for relief was taken to the county board, and that tribunal refused to consider the application. In *Beldier v. Kochersperger*, 171 Ill. 563, 49 N. E. 716, and *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988, it was held that mandamus would lie to compel a county board to perform the duty imposed upon it by statute to hear and determine complaints of alleged overvaluation of property by the assessor, and one who fails to apply for mandamus cannot enjoin the collection of a tax on the ground of such refusal, where it is not claimed that the overvaluation is fraudulent. The ruling in these cases must control here. If the town or county board refused to consider the application, complainants should have compelled them to do so by mandamus. The judgment will be affirmed. Judgment affirmed.

(175 Ill. 615)

REYNOLDS v. MANDEL et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

RES JUDICATA—PLEADING—SUFFICIENCY—REVIEW.

1. Where no exceptions are taken to an order granting leave to file a plea, the question cannot be raised on appeal.
2. A demurrer to a plea admits that it was properly filed.
3. An objection to a pleading not urged in the appellate court cannot be raised in the supreme court.
4. After a seizure and sale of property under a chattel mortgage, the mortgagee sued for the expenses of the sale, and for a balance due. The mortgagor pleaded as a defense that the seizure and sale were wrongful. *Held*, that a judgment in such case was conclusive as to the lawfulness of the seizure, in an action by the mortgagor for the unlawful seizure of the property.
5. A plea of *res judicata* in an action for the wrongful seizure and sale of goods under a chattel mortgage, which alleged the seizure and sale, and that a suit had been brought to recover the costs and expenses of the custody and sale of the goods, and the balance due on the mortgage, and that a defense had been interposed that the seizure was unlawful, and judgment rendered, is sufficient, without setting out the pleadings in the former suit.

Appeal from appellate court, First district.

Action by Henry J. Reynolds against Leon Mandel and others for wrongful seizure and sale of property under a chattel mortgage. Judgment for defendants was affirmed in the appellate court (73 Ill. App. 379), and plaintiff appeals. Affirmed.

J. S. Huey and Frank J. Smith, for appellant. Tenney, McConnell, Coffeen & Harding, for appellees.

PHILLIPS, J. On August 10, 1893, the appellees took possession of certain property included in a chattel mortgage given by appellant, for an alleged breach of its conditions, and thereafter sold the same in pursuance of its provisions, crediting the proceeds thereof, which did not satisfy the debt and the expenses of the custodian for the

care of said property by \$14,234, for which judgment was obtained December 23, 1893. In the suit to recover said balance of debt and said expenses the appellant interposed a defense. Thereafter, on December 21, 1894, the appellant brought this suit in trespass for the alleged unlawful seizure of said goods, etc. The defendants (appellees) filed the general issue and certain special pleas; the special plea in controversy being filed on leave, after the conclusion of the plaintiff's evidence. That plea set up the taking of possession of said property, under and by virtue of the terms of said mortgage, for an alleged breach in not insuring the same for the mortgagees' benefit, as agreed, and because said property was about to be sold on legal process against the mortgagor, this appellant; the sale thereof, and application of the proceeds, \$5,279, as a credit on the said indebtedness; the subsequent suit, against appellant to recover the balance of said debt due, and the said expenses of the custodian's fees for the care of said property; the defense interposed to said suit, that said goods and chattels had been unlawfully taken under said chattel mortgage; that issue was joined on said defense; and that appellees recovered judgment in said causes of action for \$14,234, which judgment is alleged to be in full force and effect, etc. A general and special demurrer was interposed to the plea, which was overruled; and, the plaintiff electing to stand by the demurrer, the suit was dismissed, and judgment given for defendants for costs, which was affirmed by the appellate court.

The points made against this plea are: First, that it was an abuse of discretion in allowing the plea to be filed after the conclusion of the plaintiff's evidence; second, that it does not state the facts from which the court can determine whether the matters involved in this suit had been adjudicated; third, that it does not appear from said plea that the lawfulness, or the contrary, of the entry and seizure was adjudicated; fourth, that the plea is double. The leave to file this plea, and its sufficiency, are the only questions presented.

No exception was taken to the order of the court granting the motion for leave to file the plea. Therefore the question of the abuse of discretion cannot be raised. *Deitrich v. Waldron*, 90 Ill. 115. This is held to be the rule, also, in sustaining a motion to strike a plea. *Reed v. Horne*, 73 Ill. 598. The appellant, without excepting, promptly raised an issue of law by filing a demurrer to the plea, which was an admission that it was properly filed. *Bohe v. Frowner*, 18 Ala. 89; 6 Enc. Pl. & Prac. 335; *Caveny v. Weiller*, 90 Ill. 158. This is also the rule in chancery practice. *Griggs v. Gear*, 3 Gilman, 2.

The second and third points raise substantially the question as to whether the plea

sets up facts showing that the lawfulness of the seizure was adjudicated in the former suit. The plea avers, in substance, that one cause of action was the said expenses arising out of said seizure, or care of the property after seizure and before the sale under the mortgage, to which cause of action the defense was interposed, as alleged; that said goods and chattels were unlawfully taken under said chattel mortgage; that issue was joined, "and thereupon defendants recovered judgment against plaintiff for the causes of action aforesaid." It is urged the plea is double. That point seems not to have been made in the appellate court, and therefore should not be urged here. One of the causes of action, as alleged, was the expense attending the said seizure of said goods. One of the defenses interposed, as alleged, was that such seizure was unlawful, and therefore the expense was unauthorized. This put that matter directly in issue. But the plea is not fairly subject to that objection. The plea does not purport to set up the defense of *res judicata* by judgment (that is, that the cause of action and the thing sought to be recovered were the same in both actions), but rather *res judicata* by verdict; that is, that a specific fact or question had been adjudicated in a former suit, which was a material and controlling fact to the decision of that cause of action, and that the same fact or question is again put in issue in a subsequent suit between the same parties. *Hanna v. Read*, 102 Ill. 596. In such case a material and controlling fact in both cases, once decided, is *res judicata* as between the same parties when again brought in issue. *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732. It is said to be sufficient if that point was essential to the former judgment. *Freem. Judgm. § 257*. In fact, it is said the doctrine extends to any other matter properly involved, and which might have been raised or determined. *Bennitt v. Mining Co.*, 119 Ill. 9, 7 N. E. 498. To render a matter *res judicata*, it is not essential that it should have been distinctly and specifically put in issue by the pleadings. *Freem. Judgm. § 249*. Nor is the fact or question any less in issue because the averments of the declaration and traverse are general. *Wright v. Griffey*, *supra*. This plea set up the facts of the seizure of goods under the chattel mortgage, and the expense of the care of the property before the sale thereunder, as the ground of action for the recovery of such costs, and then followed the same with averments of a suit to recover the same, the issue formed thereon, and the judgment of recovery on such cause. This was proper pleading, especially as it is conceded the counts were common in the former suit, with a bill of particulars attached, which included such costs. The judgment is affirmed. Judgment affirmed.

(175 Ill. 473)

OFFUTT v. WORLD'S COLUMBIAN EXPOSITION CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

ACTION FOR PERSONAL INJURIES—MASTER AND SERVANT—MOTION TO INSTRUCT FOR DEFENDANT—EVIDENCE—SUFFICIENCY.

1. The rule that, where there is a scintilla of evidence tending to support the case of a party who has the burden of proof, it should be submitted to the jury, does not prevail in Illinois.

2. Where there is literally no evidence to support a necessary allegation required to be proved, or the evidence tending in some remote degree to support every allegation is too inconclusive to justify a verdict, the court may, when the question is properly raised, so determine, and direct a verdict as if there was no evidence.

3. "A mere scintilla of evidence" means the least particle of evidence,—evidence which, without further evidence, is a mere trifle.

4. Plaintiff, an experienced painter, was employed, under direction of defendant's foreman, to attach a hanging scaffold. After fastening it in a certain manner, the foreman directed him to attach it to the rafters by another method. He obeyed, after objection to such method, stating that the hooks attached to the scaffold were liable to be thrown out of the loops made by him, but was told to fasten them as directed. On attempting to use the scaffold, the hooks slipped out, and plaintiff fell and was injured. He testified that the way he first made the fastening was the usual way, and safe, and he thought the other way was dangerous. A fellow servant testified that in his opinion the method first adopted was safer. *Held*, that the evidence did not justify an instruction to find for defendant on the ground that plaintiff had assumed the risk.

Error to appellate court, First district.

Action by Charles F. Offutt against World's Columbian Exposition Company. The appellate court affirmed a judgment for defendant (78 Ill. App. 231), and plaintiff brings error. Reversed.

Henry D. Beam, William R. Rummel, and Robert W. McCulloch, for plaintiff in error. John A. Post and John B. Brady, for defendant in error.

CARTER, C. J. This was an action on the case to recover damages for personal injuries sustained by plaintiff in error while in the employ of defendant in error. At the close of the evidence for the plaintiff the court, upon motion of the defendant, instructed the jury to find the defendant not guilty. The judge who sat in the trial having become one of the judges of the appellate court, and the other two judges being divided in opinion, the judgment was by that court affirmed, and the cause was then brought to this court on a writ of error sued out by the plaintiff. The only question in the case is, did the court err in instructing the jury to find the defendant not guilty?

An instruction to find against the party upon whom rests the burden of proof, on the ground that there is no evidence legally tending to prove his cause, or, as it is now more generally stated, on the ground that the evidence, with all the inferences which the

jury could justifiably draw from it, is so insufficient to support a verdict for such party that such verdict, if returned, must for that reason be set aside, is in the nature of a demurrer to the evidence, and, except as to technical methods of procedure, is governed by the same rules. The maker of the motion to so instruct admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it. The motion does not involve a determination of the weight of the evidence, nor the credibility of witnesses. *Bartelott v. Bank*, 119 Ill. 259, 9 N. E. 898, and cases cited; *Phillips v. Dickerson*, 85 Ill. 11; *Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. It has been said in some cases that if there is any evidence, however slight, tending to prove plaintiff's cause of action, such an instruction would be erroneous, as it is the province of the jury, and not of the court, to pass upon the weight of the evidence, or its sufficiency in probative force to authorize a verdict. In *Simmons v. Railroad Co.*, 110 Ill. 340, in delivering the opinion of the court, Mr. Chief Justice Sheldon said (page 346): "There may be decisions to be found which hold that, if there is any evidence—even a scintilla—tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants v. Fant*, 22 Wall. 120; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Railway Co. v. Jackson*, L. R. 3 App. Cas. 193; *Reed v. Inhabitants of Deerfield*, 8 Allen, 524; *Skellenger v. Railway Co.*, 61 Iowa, 714, 17 N. W. 151; *Martin v. Chambers*, 84 Ill. 579; *Phillips v. Dickerson*, 85 Ill. 11. In the recent case of *Frazer v. Howe*, 106 Ill. 503, this court recognized the rule to be: 'If there is no evidence before the jury on a material issue in favor of a party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative.' This language was quoted in *Bartelott v. Bank*, supra, and Mr. Justice Schofield, in speaking for the court, said (page 272, 119 Ill., and page 898, 9 N. E.): "Since it was not intended in this case to overrule *Simmons v. Railroad Co.*, supra, it is apparent that 'evidence tending to prove' means more than a mere scintilla of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party producing it. It is not intended by this practice that

the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict and for a new trial upon the ground of the want of evidence to sustain the verdict. In neither case is the court authorized to weigh the evidence and decide where the preponderance is." See, also, *Siddall v. Jansen*, 168 Ill. 43, 48 N. E. 191, and *Rack v. Railway Co.*, 173 Ill. 289, 50 N. E. 668. It is clear, from the cases cited, and others, that what is called the "scintilla rule of evidence" is not in force in this state. Much confusion has doubtless arisen from the different meanings attached to the phrase "tending to prove," but giving it the meaning as held by this court in the *Bartelott Case*, above cited,—that it is "evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party producing it,"—most of the apparent conflict between the different cases disappears. Thus, it was said by Mr. Justice Maule in *Jewell v. Parr*, 13 C. B. 909: "Applying the maxim, '*De minimis non curat lex*,' when we say that there is no evidence to go to the jury we do not mean that there is literally none, but that there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established." It is, of course, true that there are cases where there is literally no evidence in support of some material and necessary allegation, but there are many others where there may be some evidence tending in some remote degree to support every allegation, yet of too inconclusive and unsubstantial a character to be the foundation of a verdict. In either of such cases the court may, when the question is properly raised, so determine, and direct a verdict as in cases where there is no evidence. "A mere scintilla of evidence," if it means anything, means the least particle of evidence,—evidence which, without further evidence, is a mere trifle; and, as the law does not regard trifles, we see no reason why, on such a motion, the court may not adjudge such evidence insufficient in law, and direct a verdict as in cases where there is no evidence. As was well said in *Connor v. Giles*, 76 Me. 132, "there is no practical or logical difference between no evidence and evidence without legal weight." It is true that such motions are not to be regarded with favor. The province of the jury must not be invaded (*Frazer v. Howe*, 106 Ill. 563), and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. For a comprehensive review of this question, see 6 Enc. Pl. & Prac. 667, and 2 Thomp. Trials, 1595.

In the case at bar the evidence, in substance, was: That the plaintiff in error was a painter, who had worked at his trade for upward of 16 years. That he was a first-

class workman, and thoroughly understood the hanging of ladders and the putting up of scaffolds. That he had been working in the World's Fair buildings for 10 months before the accident occurred, on February 18, 1893. At that time he was employed by the defendant in the color department, working in the Machinery Hall Annex. Thomas Hunt had charge, for the defendant, of that building, and of all the men employed there in painting, and was foreman over the plaintiff. Plaintiff was ordered by Hunt to help put up a hanging stage or scaffold close to the ceiling, about 70 feet above the floor, near the west wall of the building. After having put up and fastened to a cross beam the ropes to which was to be hooked the pulley to support the east end of the scaffold, he climbed up an upright beam, on which cleats had been nailed, to the rafter, and put a strap, or strop (which is a piece of flat rope, with the two ends spliced together, forming a loop or link) around the rafter, and put one end of the loop through the other end, forming a noose around the rafter, and hooked the pulley into the single loop, whereupon the foreman called to him from below, and directed him not to put it up that way, but, with the double rope over the rafter, to place both ends in the hook to the pulley; the object being to put up a line, so that the whole arrangement, when the work should be finished, could be jerked loose by standing on the floor. Plaintiff objected, and told Hunt that the hook was not big enough for that purpose, and that the strap, being "brand new," was "liable to come down." Hunt replied that it would not come down, and repeated his orders; and Offutt obeyed, and fastened the strap as directed. Hunt and one Wagner, who had been working with Offutt, then brought a stage or scaffold, and with the pulleys pulled it up to plaintiff, who told them at the time that it was too short for the place, and was liable to throw the loop out of the hook. The foreman told him it was all right, and to fasten it up. The plaintiff then fastened the west end, and crept on his hands and knees over the scaffold to the east end, and fastened that end; and while he was crawling back to the west end to come down for orders, and when near the center, the stage commenced to swing endways, on account of its being too short, and the ropes fastening it at each end hanging at an angle, instead of straight down; and the strap or rope slipped out of the hook at the west end, and plaintiff was precipitated to the floor below, and was seriously and permanently injured. He testified that the way he first fastened the strap and hook was the proper, usual, and customary way, and that it was safe, and that he thought that the way the foreman told him to do it was the wrong way. Wagner testified that sometimes a sling was used single, and sometimes double; that it was often used double;

that it was safer single, in his judgment, because the hook had a firmer grip on it; that it was not considered proper in the trade to have the loop double, but that straps had been put up with the hook into the double loop quite frequently there.

Counsel for defendant call our attention to a certain written statement alleged to have been signed by the plaintiff when he was under treatment in the hospital, and which it is said varies from the testimony given by him upon the trial. But that question relates only to the credibility of the witness, and the weight which should have been given to his testimony by the jury, had the issue been submitted to a jury, and does not arise in considering the alleged error of law in instructing the jury to find for the defendant.

It is also insisted that the evidence showed that, if there was any negligence of the defendant, it consisted in the negligence of the foreman, Hunt, when he was acting as a fellow servant with the plaintiff in the same line of service. This is also a question of fact, with the evidence strongly tending to prove the contrary. The evidence tends to prove that Hunt was acting as foreman, representing the common master, and in that capacity gave specific orders to the plaintiff to perform the very act which caused the injury; and, as the case is presented here, we must, of course, so assume.

The next contention is that it appears from the testimony given by plaintiff himself that he knew that it was unsafe to place the double loop through the hook, and to use the short stage or scaffold sent up to him, as he was ordered to do by the foreman, and that, having knowledge of the danger likely to result from his compliance with the foreman's demands, he should, acting prudently, have refused to obey, and that, falling in this, he was guilty of such contributory negligence as precludes recovery on his part. Under the evidence it cannot be assumed, as a matter of law, that the danger was so imminent that no man of ordinary prudence having knowledge of it would incur it. The rule is that, where the servant is injured while obeying the orders of his master to perform work in a dangerous manner, the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it. *Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876, and cases cited; *Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Railroad Co. v. Dwyer*, 162 Ill. 482, 44 N. E. 815. Under the evidence in this record, it would seem clear that it was a question of fact for the jury to determine whether the danger was of the character mentioned, and whether the plaintiff knowingly incurred it. The mere fact that he did not regard it as safe to fasten the hook over the double loop, and that the usual, customary, and safer way was to attach the hook to the single loop,

with a noose over the beam or rafter, and that he regarded the stage or scaffold as too short, but performed the work as specifically directed by the master, was not, under all of the circumstances of this case, such proof as to authorize the court to say to the jury, as a legal proposition, that the evidence, with all justifiable inferences to be drawn from it, was insufficient to authorize recovery. There was evidence that loops were sometimes hooked in that way by those engaged in similar work. The servant was, under the evidence, acting under the specific directions of the representative of the master, and was required to attach the loop in a particular way for the convenience of the master, so that the scaffold and ropes might be detached from their fastenings from below, and the necessity of climbing up and unloosing them from the rafters avoided. The plaintiff was not required by law to disobey his master, or by obeying assume the hazard of obedience, unless the danger was so imminent that an ordinarily prudent man would not incur it. Besides, the plaintiff was not injured while using the scaffold as a place upon which to stand while engaged in painting, but was injured while in the act of adjusting it in obedience to orders, and before he could leave it for a place of safety. It would be an unjustifiable inference to draw, as a legal conclusion, that the plaintiff knew or ought to have known that the danger was so imminent that the scaffold would fall before he could leave it and climb down to the floor below. These are questions of fact which should have been submitted to the jury. The judgment is reversed, and the cause remanded to the circuit court. Reversed and remanded.

(174 Ill. 605)

GALT et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

STREET IMPROVEMENTS—MUNICIPAL CORPORATIONS—AMENDMENTS—ORDINANCES—COMMISSIONERS.

1. Where objection was made to the admission of an ordinance, a copy of which was attached to plaintiff's petition, because it was never passed by the city council, it was not error to grant leave to amend the petition by attaching a correct copy of the ordinance.

2. In a proceeding for the confirmation of an assessment for the improvement of a street, defendant claimed that, after the assessment roll had been filed, the council, by an amendment to the ordinance, changed the character of the improvement. The council did pass certain orders, which were ineffectual to amend the ordinance, and were void. *Held* that, as such void orders were not followed, they could not prevent confirmation of the assessment, since they did not affect the ordinance.

3. An ordinance required a street to be paved with asphalt, which street had previously been paved with cedar blocks by a special assessment on the property, and defendant paid his proportionate part thereof; but it became necessary to pave such street with more permanent material. *Held*, that the ordinance was not oppressive in requiring the street to be paved with asphalt.

4. The report of commissioners appointed to assess the cost of a street improvement is conclusive, in so far as it fixed the relative amount of the cost of the improvement to be respectively borne by the municipality and the owners of the property.

Appeal from Cook county court; William T. Hodson, Judge.

Petition by the city of Chicago for confirmation of a special assessment for street improvement against the property of A. T. Galt and others. From a judgment confirming an assessment, defendants appeal. Affirmed.

R. S. Thompson, for appellants. Chas. S. Thornton, Corp. Counsel, and Armand F. Teefy, Asst. Corp. Counsel, for appellee.

CARTER, O. J. This is an appeal from a judgment of confirmation of a special assessment for curbing, grading, and paving a portion of North Clark street, in the city of Chicago.

It is first urged that the ordinance contained in the petition, and under which the assessment was made, was in fact never passed by the council of the city of Chicago, and that consequently all proceedings based on such supposed ordinance are void. When the objection to the admission in evidence of this ordinance was made in the county court, counsel for the city admitted that the copy of the ordinance attached to the petition was not a correct copy of the ordinance as passed by the council, and asked leave to amend the petition by inserting a correct copy, which leave was granted by the court, over the objection of the appellants, and the amendment was made instantler. The ordinance described the asphalt to be used, but in the copy attached to the petition was this clause, not contained in the original, viz.: "Or asphalt which shall be equal in quality for paving purposes to that from Pitch Lake, in the Island of Trinidad." There was no error in allowing the amendment, nor is it made to appear that any recasting of the assessment roll was necessary.

It is next urged that the city council, while this cause was pending in the county court, and after the assessment roll had been made and filed, by an amendment to the ordinance changed the character of the pavement proposed, in a most important respect,—substituting concrete for expanded metal. Counsel for appellee insist that the ordinance was not amended, but that the council passed two certain orders by resolution, which were wholly ineffectual to amend the ordinance, and were void. The certified copy introduced in evidence does not have the formal commencement prescribed by statute for ordinances, and the clerk uses the words "two orders" in his certificate relating to the action in question of the council, and the record of the council proceedings contains the following in reference thereto: "Ald. Martin presented the following orders, * * * which were, on motion, duly passed." An ordinance

cannot be amended in this way, and these orders had no effect upon it. *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354. We do not find anything in the evidence showing that the ordinance for the improvement was not-complied with; and unless these void orders were followed, instead of the ordinance, we are unable to see how they could operate to prevent the confirmation of the assessment.

It is next urged that North Clark street had theretofore been paved by special assessment, and that the property of appellants in this case had already paid its proportion for the improvement of the street. The street was paved with cedar blocks upwards of eight years before, and the evidence tended to show that it had become necessary to take up these blocks, and pave the street with a more permanent material. The cause was heard before the court without a jury, and we think the court did not err in holding that the ordinance was not unreasonable or oppressive in requiring the street to be paved with asphalt.

It is finally urged, because the commissioners, in assessing the cost of the improvement, found that the proportion of the total cost which would be of benefit to the public, and should be assessed to the city of Chicago, was "no dollars," it was therefore not a public improvement, and that the city had no power to make it by special assessment,—in other words, the city was not charged with any amount on account of the contemplated improvement. The evidence showed that it was a public improvement of a public street. In *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731, the commissioners made a similar report, and we there said (page 342, 167 Ill., and page 733, 47 N. E.): "This court has held in a number of cases that where the commissioners have acted and made their report, as was done here, their finding is conclusive, in so far as it fixes the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited,"—citing *Bigelow v. City of Chicago*, 90 Ill. 49; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; and *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556. See, also, *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053, on pages 475, 476, 153 Ill., and pages 1054, 1055, 38 N. E. Finding no errors, the judgment is affirmed. Judgment affirmed.

(175 Ill. 340)

MURRAY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — LIMITATION.

1. The act relating to cities and villages (article 9, § 46) provides that a new assessment for improvements may be made on the setting aside of a former assessment. Section 48 provides that if, from any cause, any city or village shall fail to collect the whole

or a part of any special assessment "which shall not be canceled and set aside by the order of any court," the municipal authorities may, at any time within five years, direct a new assessment. A special assessment was divided into ten installments, and a judgment for the sale of property for delinquent installments was refused on the ground that the law did not warrant the division into more than five installments. *Held*, that such judgment was equivalent to a setting aside of the assessment, within section 46, and therefore the five-year limitation prescribed in section 48 was not applicable.

2. Under City and Village Act, art. 9, § 46, providing that a new assessment for improvements may be made when the former one is set aside, the right to make a new assessment accrues only when the former one is set aside, from which time limitation runs.

Appeal from Cook county court; C. F. Wheat, Judge.

Proceeding by the city of Chicago to confirm a special assessment for improvements. From an order confirming it, George W. Murray and others, objectors, appeal. *Affirmed*.

Thomas J. Holmes (Lowenthal & Propper and Thomas Marshall, of counsel), for appellants. Charles S. Thornton, Corp. Counsel, and Armand F. Teefy, Asst. Corp. Counsel, for appellee.

CARTER, C. J. This is an appeal from a judgment of the county court of Cook county confirming a certain special assessment levied by the city of Chicago. On March 18, 1889, the village of Washington Heights passed an ordinance for the laying of water pipes in certain streets, to be paid for by special assessment. The assessment was made, and was confirmed by the county court by default. By the ordinance the assessment was divided into ten equal installments, but, after four installments had been paid, certain property owners who had been assessed failed to pay the fifth installment, and, on application by the collector for judgment of sale, interposed the objection that the ordinance was void on the ground that the statute then in force did not authorize the division of the assessment into more than five installments. The objection was sustained, and the judgment refusing an order of sale was affirmed by this court on appeal. *People v. Nelson*, 156 Ill. 364, 40 N. E. 957. Meanwhile the improvement had been completed and the work fully performed according to the ordinance. On November 12, 1890, the village of Washington Heights was annexed to the city of Chicago. On November 17, 1890, the village passed an ordinance providing for a supplemental assessment to supply the insufficiencies of the previous assessment. A petition for such assessment was filed in the county court, and an assessment roll making the same was duly confirmed except as to certain property objected for, a large portion of which is the same property here objected for in this case. On July 27, 1896, the city council of the city of Chicago passed an ordinance for a new assessment to pay the balance of the cost of the improve-

ment, which ordinance recited in the preamble the first ordinance and the proceedings thereunder, and the decision of this court holding the assessment invalid because of its division into ten installments, and then provided that the actual cost of making such improvement, excluding the cost of assessing and attempting to collect the assessment theretofore levied, should be defrayed by special assessment, and directed that the property owners who had paid on account of the assessment theretofore levied should be credited with such amounts on the new assessment, and the remainder only should be confirmed as against their property. The commissioners reported the actual cost of said improvement at \$62,829, and cost of making and levying the assessment \$3,017.73, making a total of \$65,846.73. They also reported that \$39,846.73 had been paid on the previous assessments, leaving a balance of \$26,000 unprovided for. Of this amount \$4,845.65 was assessed by the commissioners to the city as public benefit, and the remainder, amounting to \$21,154.35, was spread on the property benefited. The appellants filed 49 objections to the confirmation of the roll, which were all overruled by the court, and judgment of confirmation entered, from which they have appealed to this court.

Counsel do not contend that, where an assessment has been held invalid because of its division into installments contrary to the statute, an ordinance may not be passed for a new assessment to pay for the improvement completed under the former ordinance. *Park Com'rs v. Farber*, 171 Ill. 146, 49 N. E. 427. But their principal contention in this court is that the new assessment proceedings in this case are barred both by the general limitation act and the special limitation contained in article 9 of the act on cities and villages. The only sections of article 9 relating to new or supplemental assessments are sections 46, 47, and 48. Each one of these sections provides for a different contingency. Section 46 provides that if any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned. Section 47 provides that if, in any case, the first assessment prove insufficient, a second may be made, and so on until sufficient moneys shall have been realized to pay for the improvement; and section 48 provides that if, from any cause, any city or village shall fail to collect the whole or any portion of any special assessment which may be levied, which shall not be canceled and set aside by the order of any court, the municipal authorities may at any time within five years after the confirmation of the original assessment direct a new assessment to be made, etc. In *Pardridge v. Village of Hyde Park*, 181 Ill. 537, 23 N. E. 345, the court set aside the original assessment roll after the lapse of 12 years, and ordered a new one made, and on review of the judgment confirming the latter this court said that section 48 had no application where the original assessment was never

confirmed, and that the limitation did not apply. See, also, *Philadelphia & R. Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102. The language in section 48 is, "which shall not be canceled and set aside by the order of any court." The provision of the original ordinance dividing the assessment into 10 installments was by the judgment of this court in *People v. Nelson*, supra, declared void, and the consequence was that the judgment of confirmation was also void. *Culver v. People*, 161 Ill. 89, 43 N. E. 812.

Counsel for appellants say that section 46 does not apply, because the assessment was not set aside. We are of the opinion that the effect of the judgment of this court was to set the assessment aside, and that therefore the proceedings for the new assessment properly fall under section 46, which contains no limitation. The supplemental assessment levied in 1890, under an ordinance appearing to have been passed by the village after its annexation to the city of Chicago, was made to supply a mere deficiency in amount; and even if the alleged village could then act, as it was a proceeding based on the same identical ordinance held void in the *Nelson Case* for the reason stated, it was also unauthorized and void.

But it is urged that this proceeding is barred by section 15 of the general statute of limitations; that it is in effect an attempt by the city to sue the property owner for the cost of this improvement more than five years after the right of action accrued. That part of section 15 of chapter 83 of the Revised Statutes claimed to be applicable to this case provides that "all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued." Even if this provision of the statute had any application to proceedings of this character, the period of five years had not run. The first assessment was not set aside until 1895, and the right to make the new assessment did not accrue until then; and, as it was made in 1896, it was certainly not barred by this limitation.

Other objections of a technical character have been urged, but after a careful examination of the record we find they are untenable. The judgment is affirmed. Judgment affirmed.

(174 Ill. 510)

**BOARD OF EDUCATION OF DIST. NO. 1
v. TRUSTEES OF SCHOOLS OF
TOWNSHIP NO. 42.**

(Supreme Court of Illinois. Oct. 24, 1898.)

**SCHOOL DISTRICTS—CHANGE OF BOUNDARIES—
RECORD.**

Where school trustees, having jurisdiction, change the boundaries of school districts, but the clerk's record thereof fails to show jurisdiction, it may, after having once been approved by them, be corrected so as to show such jurisdiction; and this even after a change in the personnel of the board.

Appeal from circuit court, Cook county; *El. F. Dunne*, Judge.

Petition by the board of education of school district No. 1 of township No. 42, Cook county, for certiorari to the trustees of schools of said township. From a judgment of the appellate court (74 Ill. App. 401) affirming a judgment of dismissal, petitioner appeals. Affirmed.

Otto R. Barnett, for appellant. Charles C. Arnold, for appellees.

WILKIN, J. This proceeding is upon a common-law writ of certiorari issued out of the Cook county circuit court, directed to the trustees of schools of township No. 42, etc., in that county, commanding them to submit to the court for its inspection a transcript of the record of their proceedings at certain specified meetings. A hearing was had in the circuit court upon the return, the writ quashed, and the petition dismissed at the cost of petitioner. The appellate court, upon appeal, reversed the judgment of the circuit court in so far as it gave judgment for costs against the petitioner (appellant here), and sustained the judgment quashing the writ. From that part of the judgment of the appellate court affirming the judgment of the circuit court, appellant appeals here. A very full statement of the case is reported with the opinion of the appellate court (74 Ill. App. 401), and it is unnecessary to repeat it.

The petition attacks the record of the proceedings of the trustees on the ground that it shows upon its face that they acted without jurisdiction. The record sought to be reversed by the petition was of a proceeding to detach certain territory from one district, and add it to another, in the township of which the respondents were trustees. They acted first upon the petition asking for the change on April 6, 1896, but the only record of the proceedings at that meeting is the following: "The petition signed by O. E. Poole and others, to detach the territory [describing it] from said district No. 1, and add it to district No. 2, in township No. 42, range 13, in said county. Motion of J. J. Flanders that the petition of O. E. Poole and others be granted." At a meeting held April 13, 1896, the foregoing record was read and approved. At a meeting held July 25th following, it was voted to amend the record of the previous meeting to make it show that the motion mentioned in the record of that meeting was put and unanimously carried. The clerk thereupon made the amendment. It will be seen that neither the original nor amended record to this date recites any of the jurisdictional facts which by section 50 of article 3 of the school law (Hurd's Rev. St. 1889, p. 1224) must exist to authorize the trustees to act in such case. It was held by the appellate court (and we think properly) that, for want of such recital of the jurisdictional facts, the record, as amended July 25, 1896, was fatally defective. The complete record, however, further shows that at a subsequent meeting of the board held April 27, 1897, the

clerk was ordered to make a further amendment of the record of the proceedings had on April 6, 1896, which was done; and we think it clear that by this amendment the record is complete, showing that the trustees had jurisdiction in the premises, and that their action in granting the prayer of the petition was in all things regular.

The point most earnestly urged by counsel for appellant against the last amendment of the record is that the trustees had no power at the subsequent meeting to order the clerk to make the amendment. This point was decided adversely to appellant by the appellate court, citing the decision of this court in *Dupage Co. v. Commissioners of Highways*, 142 Ill. 607, 32 N. E. 269. That case we regard as in point, and sustaining the conclusion reached.

While the objection that the trustees had no power to order the clerk to amend the record at a subsequent meeting goes both to the amendment of July 25th and that of April 27th, it is insisted that the latter amendment is not only unauthorized, by reason of the time at which it was made, but also upon the ground that there had been a change in the personnel of the board of trustees; only one of the three members of April 6, 1896, being in office April 27, 1897. We are unable to see upon what legal principle the change in the membership of the board could affect its power to direct its clerk to make amendments of this character. The authority of the board to make such an order, if it exists, does not depend upon the personal recollection of the individual members of the board, but upon the knowledge of the clerk, or such files, minutes, or memoranda which put him in possession of knowledge of what actually transpired. The statute makes it his duty to be present at all meetings of the board, and to record in a book to be provided for the purpose all their official proceedings, and it also makes him liable to a penalty for a failure to perform that duty. The resolution at the special meeting on April 27, 1897, was but a direction to him to perform that duty; and presumably he knew what had been done, and, after the resolution of the board, did that which he should have done before. See *Dupage Co. v. Commissioners of Highways*, supra. In our view of the case, the legality of the amendment does not depend so much upon the resolution of the board of trustees as it does upon the presumption that the clerk was in possession of knowledge of the facts recited in the preamble of the resolution, and had failed to record them, and could have done so, in the discharge of his duty, as well before as after the passage of the resolution. We reach this conclusion the more readily because the jurisdictional fact as to presenting the petition to the board "twenty days before the regular meeting in April," and the delivery of a copy thereof, at least 10 days before the date at which the petition was to be considered, to the president

or clerk of the board of directors of each district whose boundaries were to be changed if the petition was granted, were matters which must have appeared from the files in the proceeding. It has not been the rule in this court to exact of public officers of these quasi municipalities the highest degree of accuracy or formality in the discharge of their duties, for the reason that to do so would result in injury to the public. If it be said that here was an unreasonable lapse of time between the proceeding and the recording thereof, it may also be said that there was unnecessary delay in the attempt on the part of the petitioner to set aside the redistricting. We regard the opinion of the appellate court in this case as fully and fairly disposing of the substantial questions involved, and while, on the question last considered, the case of *City of Covington v. Ludlow*, 1 Metc. (Ky.) 295, seems to be an authority against the view herein expressed, we are not disposed to follow it. The judgment of the appellate court will be affirmed. Judgment affirmed.

(175 Ill. 401)

BRAUN v. CRAVEN.

(Supreme Court of Illinois. Oct. 24, 1898.)

NEGLIGENCE—NERVOUS SHOCK—ANGRY WORDS—PROBABLE CONSEQUENCES—REMOTE DAMAGES.

Defendant, the landlord of plaintiff's sister, entered the house to collect the rent, and went into the room where plaintiff was packing her goods prior to removal, and stated to her, in a loud and angry tone and boisterous manner, that, if she attempted to move, he would have a constable there in five minutes. Plaintiff asked damages for a severe nervous shock claimed to have been suffered thereby, which resulted in St. Vitus' dance. The landlord had a right to enter the house. He knew nothing of plaintiff's nervous temperament. *Held*, that damages were not recoverable, since not the natural and probable consequences of defendant's acts.

Appeal from circuit court, First district; James Goggin, Judge.

Action by Emma Braun against Thomas Craven. From a judgment of the appellate court (73 Ill. App. 189) reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

The appellant sued appellee in an action on the case, and filed her declaration, which contained four counts. The first count alleges that the plaintiff was living at the home of Julia Soper, in Evanston; that the defendant then and there entered the said house, and it then and there became and was the duty of the said defendant to conduct and demean himself in an orderly and peaceable manner, and to announce or give notice and warning of his approach to and into said house, and to the presence of the plaintiff; yet the defendant, wholly disregarding his duty in that behalf, neglected and wholly failed to announce his entry to the said house to the plaintiff or any other occupant thereof, but wrongfully and willfully then and there entered therein

unbidden, and then and there stealthily, and without warning or announcement, entered the presence of the plaintiff, greatly surprising and shocking her; that the defendant then and there demeaned himself in the presence of the plaintiff in a violent and boisterous manner, using towards her violent, abusive, and threatening language, greatly frightening, terrifying, and shocking her, whereby she sustained a severe and permanent shock to her nervous system and mind, and otherwise sustained great and permanent bodily harm and injury, and became and was sick, sore, and disordered, and so remained thence hitherto, during all which time she suffered, and still does and will ever suffer, great pain. The second and third counts are substantially like the first. The fourth count alleges the plaintiff was in a bedroom in a certain dwelling, which dwelling was the home and residence of the plaintiff, and then alleges the facts substantially as set forth in the first count. A general demurrer to the declaration was interposed and overruled, and a plea of general issue was filed.

The evidence showed that appellant lived with her sister, who was a tenant of appellee. Appellee went to the house to collect rent. His conduct, actions, and language while there are alleged to have been so negligent that they caused the injury to appellant, by fright and mental shock, which resulted in serious physical impairment. The actions and language of appellee which are the basis of this suit are given by appellant and her witnesses substantially as follows: When appellee entered the house, his tenant, the sister of appellant, was having her household goods removed therefrom. Appellant testified as to what took place, as follows: "I was upstairs in my bedroom, sitting on the floor. Something made me look up, and Mr. Craven [appellee] waved his arms, and shouted. He seemed so big. I was flat on the floor. He said: 'What are you doing here? I forbid you moving. If you attempt to move I will have a constable here in five minutes. I refuse to take possession of these premises.' I was so frightened I was paralyzed with fear. I could not speak or move." The brother of appellant testified: "I remember the day that we moved from Benson avenue down to Clark and Halsted streets. I saw the defendant at our home on that day. When I first saw him, he was standing just inside the bedroom door, where my sister, Mrs. Braun, was,—on the second floor. That bedroom was the northwest room. I heard him before I saw him. I heard him say: 'Here! what are you doing? Don't you move. I refuse to take possession of these premises. I will have an officer here in five minutes to stop these goods.' These words were spoken in a very loud and angry tone of voice. I was just out of sight, at the end of the hall, when he said, 'Here! what are you doing? Don't you move;' and then I came towards him to see what was the matter, not knowing what it was, and the rest

of it I heard as he stood over her. She was sitting on the floor. As he was speaking these words, he was swinging his arms, and gesticulating very wildly. On hearing these words uttered by the defendant, I hurried to the front end of the hall, and saw him standing in the door. I went clear up to him. He was standing very close to my sister,—clear up to her, right by her side. She was sitting flat on the floor. He was close enough to have touched her with his hands if he had so desired to. I should say close up to her,—not six inches from her. Upon my going up there to where the defendant was, I said: 'Here, what is the trouble here? What do you want?' He turned to me, and said: 'I refuse to take possession of these premises. I will have an officer here in five minutes to stop these goods.' When he said these words, he was still close by my sister. I tried to stop him, and said, 'What is the matter?' and he turned around, and went downstairs as hard as he could go. He had a long, dark or black—very dark—ulster, or storm-coat ulster, I should say, and a black slouch hat, pair of overshoes or rubbers, or something of that sort. I did not hear him approach my sister's room or go up those stairs." An expressman, Steen, testified: "He [defendant] told me to stop loading the goods. He opened the middle door, and walked very fast right up the stairs. He did not ring the bell. He wore rubbers, and made no noise going up. He went into the room where the plaintiff [Mrs. Braun] was, and said: 'What are you doing here? I will have an officer here to stop these goods.' He spoke at the top of his voice. He was angry. He stood in the doorway when he did this. Plaintiff was on her knees, packing. Her brother came in the room, and asked what was the matter. Defendant threw up his hands two or three times, and then went downstairs." Another expressman, Schell, testified that he heard a little loud talking upstairs,—so loud that a man could hear it down to the first floor. No other witness for plaintiff in the trial court testified to any other acts or conduct as causing the alleged injury. Much additional evidence as to the effect of fright in causing injury was before the jury. A verdict was returned by the jury in favor of the plaintiff (appellant here) and her damage was assessed at \$9,000. A motion for a new trial and a motion in arrest of judgment were both overruled, and judgment was entered on the verdict. The defendant, the appellee here, sued out a writ of error from the appellate court for the First district to review that judgment; and by the latter court the judgment of the superior court of Cook county was reversed, without remanding the cause, the appellate court holding, under the pleading and facts appearing in the record, there was no right of recovery. From that judgment of reversal, the plaintiff in the trial court, who was defendant in error in the appellate court, prosecutes this appeal.

William Prentiss, Russell M. Wing, and James Heckman, for appellant. Pliny B. Smith and Morton V. Gilbert, for appellee.

PHILLIPS, J. (after stating the facts). The declaration in this case charges appellee with negligence in approaching the room where appellant was, and in so speaking and acting in her presence as to cause her injury. This constitutes the entire allegation on which a recovery is sought under the various counts of this declaration. In addition to the evidence above recited, it is disclosed that appellee claimed there was rent due him, and he entered the house for the purpose of collecting the same before the tenant's goods should be removed therefrom. Under this state of facts, it is necessary to determine whether the language of the appellee, his manner of entering the house, and his acts therein, are such as can be held to constitute negligence, and whether the injury sustained by appellant was such as might have been foreseen, or was such a natural and probable consequence, under the surrounding circumstances, as might reasonably have been anticipated as the probable result of such acts and language. The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable results of defendant's acts; and the consequences must be such as, in the ordinary course of things, would flow from the acts, and could be reasonably anticipated as a result thereof. Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected result; not reasonably to be anticipated from an accidental or unusual combination of circumstances,—a result beyond and over which the negligent party has no control. The law regards only the direct and proximate results of negligent acts as creating a liability against a defendant. Here, appellee approached the house, and entered the same, the door being ajar. So far as the averments of this declaration are concerned, he lawfully entered the house for the purpose of collecting rent. He passed noiselessly (because of wearing overshoes) up the stairs and along the hall, approached the door of the only room he saw occupied, and used the language and made the gestures testified to by the plaintiff's witnesses without impact with plaintiff's person. He then turned and left the room, and went hurriedly to the office of the justice of the peace. These acts could not, in the ordinary course of things, have been reasonably anticipated to cause a diseased condition of appellant,—to create in her a seriously diseased condition. Appellee might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that,

from the ordinary experience of mankind, such a result could not have been expected. The evidence for plaintiff was that, by reason of the excitement and fright, a condition of chorea, or St. Vitus' dance, was produced. This is shown to be a diseased physical condition, resulting from mental suffering, superinduced by excitement and fright, unattended by injury to the person resulting from impact. Under the pleadings in this case, mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage,—a new cause of action,—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it.

In *Wyman v. Leavitt*, 71 Me. 227, it was said: "We have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain action; and the fact that no such case exists, and that no elementary writer asserts such doctrine, is a strong argument against it. * * * If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the train's leaving a track, could maintain an action against the company."

In *Railway Co. v. Trott*, 86 Tex. 412, 25 S. W. 410, plaintiff recovered damages for negligence of the railway company, whereby his team was frightened, and broke his wagon, putting him in fear and fright as to his personal safety, and causing him great mental suffering, vexation, and anxiety of mind. The jury were instructed that if plaintiff was frightened, and put in fear of his personal safety, and was caused mental pain or anxiety, they should allow him reasonable compensation therefor. Two questions were certified to the supreme court for decision, viz.: "First. In an action for damages based upon tortious and negligent conduct of a defendant, where the wrongful act caused damages to plaintiff's property, but no physical injury to plaintiff, is mental suffering an element of actual damages? Second. Can actual damages be recovered for mental suffering where there is no physical injury, no injury to property, nor other element of actual damages?" The court said: "We are of the opinion that these questions should be answered in the negative. So far as we have been able to discover, all the cases involving the question of the right to recover for fright alone are in accordance with that holding."

In *Railroad Co. v. Stables*, 62 Ill. 313, it was said (page 320): "We cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception, not arising from the physical injury."

In *City of Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527, it was said (page 153, 133 Ill., and page 528, 24 N. E.): "Any mental anguish which may not have been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been taken into consideration by the jury."

In *Canning v. Inhabitants of Willamstown*, 1 Cush. 452, it was said: "The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact, the verdict would be contrary to law. But we must suppose that the jury, under the instructions given to them, found that the plaintiff received an injury in his person,—a bodily injury,—and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred; and, though that bodily injury may have been very small, yet it was a ground of action, within the statute, and caused mental suffering to the plaintiff. That suffering was a part of the injury, for which he was entitled to damages."

In *Keyes v. Railway Co.*, 36 Minn. 290, 30 N. W. 888, it was said: "The mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury. The mental anguish, like physical pain, to be taken into consideration in such cases is confined to such as is endured by the plaintiff in consequence of a personal injury to himself."

In *Allsop v. Allsop*, 5 Hurl. & N. 534, Pollock, C. B., said: "We are all of the opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false

characters, and for torts of all kinds, illness might be said to have arisen by the wrong sustained by the plaintiff. * * * This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action."

Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, was a case where the defendant and a companion were driving along the highway in front of plaintiff's premises when a dog belonging to plaintiff's father attacked the dog of the defendant's companion. Defendant sprang from the wagon with his gun, whereupon the dog fled towards plaintiff's premises, and, as it ran, defendant fired at and killed it. Plaintiff's wife was standing at the pump near the house, and saw the defendant shoot. She was in a delicate state of health, and, her nerves being very sensitive owing to her pregnancy, she was startled and frightened so that she suffered a miscarriage, and her health was seriously affected. Her fright was caused, or at least aggravated, by the mistaken impression that the defendant aimed his gun towards her. For the damages resulting from this injury, the plaintiff brought his action. It was said: "The court did, however, expressly instruct the jury that the shooting of this dog by defendant was unlawful. He also instructed them that a person is liable for all the consequences which flow, naturally and directly, from his acts, and then left it to them to decide, as a question of fact, whether the injuries to plaintiff's wife were the natural result of defendant's acts. From this the jury could, and naturally would, understand that the defendant might be liable in this action from the mere fact that the killing of the dog was unlawful. We think a verdict for the plaintiff could not be sustained on such theory of the case. It is elementary that a man is liable only for the proximate or immediate and direct results of his acts. In strict logic, it may be said that he who is the cause of loss should be responsible for all the losses, whether proximate or remote, which followed from his acts; but, in practical workings of society, any such rule would be impracticable and unjust, and therefore the law looks only to direct and proximate results; or, as the rule is sometimes stated, whoever does a wrongful act is answerable for the consequences that may ensue in the ordinary and natural course of events. There can be no fixed rule upon the subject that can be applied to all cases. Much must depend upon the circumstances of each particular case. But in this case it is very clear to us that the killing of this dog was in no sense the proximate cause of the injury to the plaintiff's wife. The act itself was not a tort of any kind against plaintiff, as the dog was not his property. The injury to the woman would have been

presumably the same whether the killing of the dog was lawful or unlawful, and whether the defendant had fired at the dog or at a bird in the air. If the acts of the defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate result of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates, by fright or otherwise. We are by no means prepared to say that, upon the evidence, a verdict for the plaintiff could be sustained even upon that ground."

In *Scheffer v. Railroad Co.*, 105 U. S. 249, an action was brought to recover damages for the death of Scheffer. The deceased was injured by the negligence of the railroad company, and his injuries were of so severe a character that insanity resulted, and, while in that condition, he committed suicide. It was said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was * * * a new cause, and sufficient cause, of death. The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering, and eight months of disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that great first cause, least understood, in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of the final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide; and each of these are casual or unexpected causes intervening between the act which injured him and his death."

In *Halle's Curator v. Railway Co.*, 9 C. C. A. 134, 60 Fed. 557, it was said: "According to the great current of modern medical authorities, insanity is a disease,—a disease of the mind,—the existence of which is a question of fact to be proved just as much as the possible existence of any other disease. * * * While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury, and would produce fright and excitement, it had no reason to anticipate that the latter would result in a permanent injury; as, a disease of the mind, or any other disease that might be caused by excitement, exposure, and hardship sometimes incident to travel. If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen in the light of the attending circum-

stances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Halle's mind as to produce disease,—the disease of insanity,—any more than that the exposure and hardship he suffered would produce grippe, pneumonia, or any other disease. He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and an excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity. The defendant owed him the duty to carry him safely,—not injure his person by force or violence. It owed him no duty to protect him from fright, excitement, or from any hardship that he might subsequently suffer because of the unfortunate accident."

In *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340, it was said: "It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as accident cases will be greatly enlarged; for, in every case of a collision on a railroad, the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for 'fright' to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge. Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence,—in other words, not to do that which, if committed by an individual, would amount to an assault upon her person; but it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The true rule on this subject is as follows: 'In determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence, as, under the surrounding circumstances of the case, might and ought to have been seen by the wrongdoer as likely to flow from his act,' etc. Tested by this rule, we regard the injury as too remote. We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other

way. * * * We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of or accompanied by a personal injury, and have no application to the case in hand."

In *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, it was said: "While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. [Many cases cited.] If it be admitted that no recovery can be had for the fright occasioned by the negligence of another, it is somewhat difficult to understand how the defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury; if not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for the mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be open for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may therefore be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages are too remote to justify a recovery in this

action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."

In *Railway Com'rs v. Coultas*, 13 App. Cas. 222, it was said: "The rule of English law as to the damages which are recoverable for negligence is stated by the master of the rolls in *The Notting Hill*, 9 Prob. Div. 105,—a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act,—such a consequence as in the ordinary course of things would flow from the act. * * * According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot, under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which often exists, in case of alleged physical injuries, of determining whether they were caused by the negligent act, would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. * * * It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their lordships decline to establish such precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that impact is necessary, that judgment should have been for the defendants."

In *Phillips v. Dickerson*, 85 Ill. 11, it was said (page 13): "From the evidence it must be taken that the cause of this premature birth was the fear growing out of the violence of the defendant. The question is whether such a result was such a natural and proximate consequence of defendant's conduct as to make him liable therefor. * * * The plaintiff sues here for the effect of a fright which she received by reason of a quarrel between others. It took place between the defendant and the husband and boy alone, outside of the house, upon the porch, out of the presence and out of the sight

of the plaintiff, although in her hearing, she being in bed in a room some five or six feet from where the difficulty occurred; but the evidence does not show that the defendant knew the latter fact or condition of the plaintiff. * * * The result complained of was not such a consequence as, in the ordinary course of things, would flow from defendant's conduct. He had no reason to apprehend that what took place between himself and Phillips, the husband, and the boy, alone, would occasion danger to some third person, who was not present, through fright. The injury in question not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, we cannot regard it as the natural consequence thereof, for which defendant is legally responsible."

In *Fent v. Railway Co.*, 59 Ill. 349, it was said, quoting from *Mr. Parsons* (page 351): "It is that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration." And the court continued: "We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by *Pollock, C. B.*, in *Rigby v. Hewitt*, 5 Exch. 240."

In *Derry v. Flitner*, 118 Mass. 131, it was said: "The true inquiry is whether the injury sustained was such as, according to the common experience, in the usual course of events, might reasonably be anticipated."

In *Hoag v. Railroad Co.*, 85 Pa. St. 293, it was said: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his acts."

In *Railway Co. v. Elliott*, 5 C. C. A. 349, 55 Fed. 950, it was said: "An injury that is the natural and probable consequence of an act of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable."

Appellant relies upon *Bell v. Railroad Co.*, 26 L. R. Ir. 432, and *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034. Both of these cases fully sustain the contention of appellant that where sudden terror occasions a nervous shock, resulting from a negligent act, without impact or physical contact, by which the mind is affected, which may press on the health and affect the physical organization, a cause of action for negligence results. These cases have the approval of *Mr. Bravan*, in his work on *Negligence* (volume 1, pp. 76-84),

and of *Mr. Sedgwick*, in his work on *Damages* (8th Ed. § 861). The *Purcell Case* arose on a demurrer to the complaint, and it was conceded that the effect of a wrongful act or of negligence on the mind alone will not furnish ground of action. The entire discussion was confined to the question whether the defendant's negligence was the proximate cause of the injury, and whether, if the fright was a natural consequence thereof, and caused the nervous shock and consequent illness, the negligence was actionable. While it is the duty of a carrier to anticipate that an accident or appearance of great danger will produce fright and excitement, and that an accident will cause physical injury, it could not be anticipated that a disease of the mind would result; and, unless such anticipation could be had in the light of the attending surroundings, it would not constitute the proximate cause of the injury, under the great weight of authority. In the *Purcell Case*, fright may have been the natural consequence of the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright may have caused the nervous shock and consequent illness of the plaintiff, as held by the supreme court of Minnesota; yet, if it could not have been reasonably anticipated as a result of the fright, it would not be the proximate cause of her injuries. The question of the reasonable anticipation of the injury as a result of the fright is entirely disregarded in that case, and causes it to be in conflict with the weight of authority, because it absolutely disregards this principle. In the *Bell Case*, an instruction was approved which read as follows: "That if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed Mary Bell, and she was actually put in great fright by these circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright, and was actually occasioned thereby, damages for such injury would not be too remote, and might be given for them if they found for the plaintiff." It was objected that the instruction was erroneous unless the fright was accompanied by physical injury, but it was held the objection was not well founded; that a nervous shock was to be considered as a bodily injury, and, if such bodily injury might be a natural consequence of fright, it was an element of damages for which a recovery might be had; that as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage could not be too remote. This case, like the *Purcell Case*, bases the right of recovery solely on the fact that negligence may cause physical injury, and hence the damage could not be too remote. The courts in the above cases seem to have lost sight of the only safeguard against imposition in cases arising from negligence, and that is the elemen-

tary rule that, before a plaintiff can recover, he must show a damage naturally and reasonably arising from the negligent act, and reasonably to be anticipated as a result. Two trains might be passing on a double-track road, one carrying passengers, and the other freight, and, at the moment when the engine of the freight train is immediately opposite a passenger car, it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car; and the fact that a whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the Purcell and Bell Cases, supra, would authorize a recovery. That could only be done, under the authority of those cases, by absolutely ignoring the principle that the injury might be reasonably anticipated as the result of the act, and, where it cannot be so anticipated, the result is too remote. These cases are discussed by Beavan and Sedgwick without laying sufficient stress on this principle.

In our opinion, these authorities, so much relied on by counsel for appellant, are not only against the great weight of authority, but are not sustainable on principle. Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant; and it cannot be said that his manner, language, or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence; and, if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility, passing by, to sustain a nervous shock productive of serious injury, might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability. On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock. The appellate court held the language of the appellee, as disclosed by the evidence, was not such as could be held to constitute negligence, and that the injury sustained by appellant could not, according to common experience, be reasonably anticipated to result from such ac-

tions and language. We concur in that view, and the judgment of the appellate court for the First district is affirmed. Judgment affirmed.

(175 Ill. 125)

PEOPLE ex rel. MOLONEY, Atty. Gen., v. PULLMAN'S PALACE-CAR CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

CORPORATIONS—POWERS—CHARTER—CONSTRUCTION—SALE OF INTOXICATING LIQUORS—USURPATION OF POWER—WAIVER.

1. A corporation chartered to manufacture railway cars purchased a lot in Chicago, on which it erected a building for its general offices, larger than its needs required, and rented such portions as were not then needed. The business of the company was increasing, and the building was erected to accommodate its future needs. The company was authorized by its charter to purchase and hold such real estate as might be necessary for the prosecution of its business. *Held*, that the company, having the right to erect an office building, could erect such a one as would accommodate its needs in the future, and might rent such portions not presently needed, until the future increase of business demanded them.

2. A corporation chartered to manufacture railway cars, and empowered to purchase and hold such real estate as might be necessary for the successful prosecution of its business, has no power to purchase real estate on which it lays out a town, with streets and alleys, sewerage, water, and light systems, and erects buildings for dwellings, schools, churches, and business houses, in order to furnish homes and the conveniences and necessities of life to its employees, since such scheme was not necessary for the prosecution of its business.

3. A corporation authorized to manufacture railway cars, and purchase and hold such real estate as the interests of its business may require, has no power to own and operate a farm, upon which it produces vegetables for sale to its employees.

4. A company's charter authorized it to construct and purchase railway cars, with all convenient appendages and supplies for passengers traveling therein, which it might sell or use on such terms as it deemed proper. *Held*, that such company had the right to sell to its passengers intoxicating liquors, under a proper license from the state.

5. A corporation authorized to purchase and hold such land as might be necessary for the prosecution of its business may hold vacant land which it deemed necessary for the future extension of its business, but not for the purpose of erecting thereon houses for the accommodation of its employees.

6. A company chartered for the manufacture of railway cars furnished steam power to operate the machinery of another company. The former company, in erecting its plants, constructed larger boilers for generating steam than were then necessary, but such as would be necessary to supply its needs in the future. *Held*, that it was not a usurpation of power to sell the steam generated in such boilers.

7. A corporation cannot become a stockholder in another corporation, unless such power is expressly granted or necessarily implied in its charter.

8. In quo warranto by the state against a corporation for alleged usurpations of power, the latter alleged as a defense that the usurpations complained of had continued for a number of years with the knowledge of the state, and that the state had waived and acquiesced therein. *Held*, that such defense was not avail-

able against the state, since its demands could not be defeated by imputation of laches.

8. In quo warranto against a corporation for the usurpation of authority in holding real estate on which it had laid out a town, the company alleged as a defense that the legislature had appointed a committee to investigate the property of the corporation, and ascertain if it was properly taxed, and that the committee reported all of such property properly taxed. *Held*, that such defense was not available, since such report was not a concession by the state that the corporation had power to acquire a title to such real estate.

Craig, Wilkin, and Cartwright, JJ., dissenting.

Appeal from circuit court, Cook county; Frank Baker, Judge.

Quo warranto by the people, on relation of M. T. Moloney, the attorney general, against Pullman's Palace-Car Company, to forfeit its charter. From a judgment in favor of defendant, the people appeal. Reversed.

Maurice T. Moloney, Atty. Gen., pro se (T. J. Scofield, M. L. Newell, Samuel Richolson, and George E. Bacon, of counsel), for the People. John S. Runnells and William Bury, for appellee.

BOGGS, J. This is an information in the nature of a quo warranto, filed by the attorney general in the circuit court of Cook county, in the name and on behalf of the people of the state of Illinois, against Pullman's Palace-Car Company. Said company is a corporation, organized in 1867 by a special act of the legislature of Illinois, entitled "An act to incorporate Pullman's Palace-Car Company." 2 Priv. Laws 1867, p. 337. The act is as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That George M. Pullman, John Crerar and Norman Williams, Jr., and their associates, successors and assigns, be and are hereby created a body politic and corporate, under the name and style of 'Pullman's Palace-Car Company,' with all powers, rights, privileges and immunities incident to corporations and necessary or useful for the purposes of this act: provided, that if the corporation created by this act shall not organize within one year after the passage hereof, then this act shall be null and void.

"Sec. 2. The capital stock of the said company shall be \$100,000, and be divided into shares of \$100 each, and it may be increased from time to time as a majority of the stockholders may direct, and shall be issued and transferred in such manner and under such conditions as the directors of the said company shall, by the by-laws thereof, prescribe.

"Sec. 3. The corporate powers of the said company shall be vested in and exercised by a board of directors, consisting of such number of persons, not less than three nor more than seven, as the stockholders of the said company may, from time to time, direct. The said directors shall be chosen by the stockholders at such time and place as may be

fixed by the by-laws of the said company, and shall hold their offices for one year and until their successors are elected and qualified. They shall elect one of their number president of said company, and may fill any vacancy in the said board, occasioned by death, resignation or otherwise, for the unexpired portion of the office so becoming vacant, and make such rules, by-laws and regulations, and appoint such officers and servants, as they may, from time to time, deem expedient. Until an election of directors as herein provided, the persons named as incorporators in the first section of this act shall constitute a board of directors, and shall have and may exercise all the powers of such board.

"Sec. 4. The said corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages, and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper.

"Sec. 5. The said corporation shall have power to borrow money, and may secure the payment of the same by deed of trust, mortgage or other security.

"Sec. 6. It may be lawful for the company hereby incorporated to purchase, acquire and hold such real estate as may be deemed necessary for the successful prosecution of their business, and may have power to sell and convey the same.

"Sec. 7. This act shall be deemed a public act, and shall take effect from and after its passage."

The information sets out the charter of the defendant, and then alleges certain acts which are alleged to be usurpations by the defendant of powers not conferred by its charter, and concludes with a prayer for the forfeiture of the charter of the corporation. The allegations contained in the information of the usurpations of power on the part of the defendant are, in substance, as follows: First. That it owns and controls a large ten-story business block, together with the ground on which it stands, worth \$2,000,000, in the business center of the city of Chicago; that it rents three-fourths of said block to persons, firms, and corporations, and derives a large income therefrom; that this business block is located many miles from its works, or what is called the "Town of Pullman," and a small portion of it only is occupied by the company's employes; that this business block was built as an investment, and not because it had any real necessity therefor. Second. That it owns 50 acres of ground at Pullman, Ill., which are covered with two-story brick dwelling houses and three-story apartment dwellings; that all these houses are rented by it, and it derives therefrom large rentals; that the dwellings and apartment buildings, so rented, furnish homes for 12,000 people, and are worth a large amount of money, and are usurpations of power on

its part. Third. That it owns 50 acres of ground in said town of Pullman which are used for streets, alleys, and ornamental grounds, and that the same is very valuable, and that the owning of such lands for such purposes is a usurpation of power. Fourth. That it owns 15 acres of ground on which are erected, among other buildings, the Arcade Building, the Hotel Florence, and some school houses; that the Arcade Building is a large business block, and is rented by the company to different persons, and there are carried on therein various and different kinds of business by the tenants occupying the same; and that said Arcade Building yields a rich profit to said company. Fifth. That it owns two churches in said town of Pullman, together with the ground on which they are erected, and it rents said church edifices to different congregations, and derives a large profit therefrom. Sixth. That it owns a number of school houses in said town, and the ground on which they are erected, and they are rented by it to the authorized educational authorities, and it derives a large income therefrom. Seventh. That it owns a large hotel, located in said town, and which is known as the "Hotel Florence"; that said company operates and controls said hotel, and pays for the supplies consumed therein, and for all help employed in and about said hotel; that it employs and pays a manager to look after said hotel; and, in connection with said hotel, it owns and operates a bar-room or saloon, and which saloon is located in said hotel building, and that in said saloon it sells all kinds of whiskies, intoxicating liquors, and other drinks; that a government license is annually taken out for saloon purposes; and that the keeping and maintaining said hotel and the keeping and maintaining said saloon are all done for profit, and a large income is derived therefrom. Eighth. That it owns a theater and the ground whereon it stands, and that the same is done for profit; that it employs a manager to manage the same, and plays, operas, and other attractions are performed therein. Ninth. That it owns a large hall, known as "Market Hall," and the ground whereon it stands; that said hall is rented by it for divers purposes for which large halls of the kind are rented in cities, and a large income is derived therefrom. Tenth. That it owns a large gas plant, and operates the same in said town of Pullman, and rents said gas to the 12,000 people, residents of said town, to light their homes and for purposes of consumption, as well as to light said streets, and that from all these sources a large profit is derived. Eleventh. That it owns and carries on a system of water mains and service pipes within the town of Pullman, and through these supplies, for profit, water to the different industries located in said town, as well as to the residences and apartment houses owned and rented by it; that it purchases said water from the city of Chicago and

other sources, and sells the same, as aforesaid, for a large profit. Twelfth. That it owns a plant for generating steam, and owns the pipes to convey the steam to the residences of its said tenants in the town of Pullman, and supplies said tenants in said town with such steam, together with merchants and others, for pecuniary profit, and derives a large income therefrom. Thirteenth. That it owns and operates a large brick plant at Pullman; that it manufactures and sells brick, and places upon the market, wherever purchasers can be found, brick so manufactured; that it has been for many years a competitor in the market for the sale of brick. Fourteenth. That it owns and operates a system of sewerage pipes and a pumping plant connected therewith; that through said sewerage pipes the sewerage and refuse accumulated in said town of 12,000 inhabitants is pumped onto a large farm owned by it, and spread over the same; that said company cultivates said land so manured, and raises thereon large quantities of cabbage, celery, beets, and other vegetables, and sells the same in the city of Chicago and other cities where it can find a market therefor, and makes shipments of such produce to the city of New Orleans; and that it realizes in this way large sums from operating said sewerage system and cultivating said farm. Fifteenth. That it operates, in this state and elsewhere, through leases or contracts, a number of cars, and in these, day and night, carries and sells for profit stocks of whiskies, wines, beer, and other malt and intoxicating liquors; that such whiskies, etc., are carried and sold for pecuniary gain, and, in doing so, it derives a large profit therefrom. Sixteenth. That it owns near the Belt Line road 25 acres of ground which it does not use. Seventeenth. That it owns near Lake Calumet 175 acres of vacant and unoccupied land. Eighteenth. That it owns 55 acres of land north of its shops which are vacant and unoccupied. Nineteenth. That it owns 16 acres of lots and blocks in the town of Pullman which are vacant and unoccupied. Twentieth. That a certain corporation, known as the "Union Foundry & Pullman Car-Wheel Company," was organized and existed in Cook county, and owned about 10 acres of ground purchased by it from appellee; that appellee owned its stock, and had it organized, and now, in effect, controls and operates it; that in this way, and through this corporation, it manufactures structural iron, and places the same upon the market. Twenty-First. That it furnishes to the Allen Paper Car-Wheel Company the power that operates its machinery, and receives therefrom a large income. Twenty-Second. That it owns the stock of the Pullman Iron & Steel Company, and controls, directs, and manipulates its affairs; that the said company manufactures bar iron, and for many years has manufactured railroad spikes, and sold the same upon the market wherever purchasers could

be found therefor; that such sales and the manufacturing of such products are, in effect, made by defendant. Twenty-Third. That it organized, owned, and controlled the Southern Pullman Palace-Car Company; that it owned its stock; and that the said company is now merged in defendant. Twenty-Fourth. That it manipulates and controls the affairs of the town of Pullman, and maintains therein water and gas plants, and lights the streets of said town and owns the same, and exercises privileges and powers incident to a municipal corporation. Twenty-Fifth. That it owns 110 acres of ground in Pullman, on which are erected its shops, and all that is not necessary for such purposes is a usurpation of power, and contrary to law.

To the six pleas of the defendant, as originally filed, demurrers were sustained, upon the ground that each assumed to, but did not, answer the entire information. They were amended. Each of the amended pleas sets out the charter of defendant, and then alleges certain matters as inducement, and concludes with a traverse under the *absque hoc*. The first amended plea assumes to answer the entire information, except so much thereof as charges defendant with owning and holding certain shares of the capital stock in the Union Foundry & Pullman Car-Wheel Works, in the Southern Pullman Palace-Car Company, and in the Pullman Iron & Steel Company, and with selling and furnishing, upon its sleeping cars, whiskies, wines, beer, and other malt and intoxicating liquors, to persons traveling therein. The second and third pleas assume each the same burden as that assumed by the first, but with this additional exception: that neither of them purports to answer the charge of owning a large office building in the center of the city of Chicago. The fourth plea undertakes to answer only so much of the information as charges the defendant with owning and holding certain of the capital stock of the Pullman Iron & Steel Company. The fifth plea undertakes to answer only so much of the information as charges the defendant with selling and furnishing, upon its sleeping cars, whiskies, wines, beer, and other intoxicating liquors to persons traveling therein. And the sixth plea undertakes to answer the entire information, except that part of it which charges the defendant with owning and holding shares of the capital stock of the Pullman Iron & Steel Company.

Demurrers were interposed by the attorney general to these several amended pleas. The demurrer to the fourth plea was sustained, and, the defendant electing to abide by its said plea, judgment was entered against it thereon, ousting the defendant from the liberty of owning capital stock in the Pullman Iron & Steel Company. The demurrers to the other pleas, however, were overruled, and, the attorney general electing to abide by the demurrers, judgment was entered finding the defendant not guilty as charged against

it in the information, except as to the charge of owning capital stock in said Pullman Iron & Steel Company. To the judgment of the court overruling the demurrer to the first, second, third, fifth, and sixth pleas the people duly excepted, and appealed from said judgment to this court. The defendant has assigned cross errors on the ruling and judgment of the court sustaining the demurrer to the fourth plea.

Paragraph 23 of the amended sixth plea avers as follows: "Defendant further states that heretofore in this plea it has set out all the business in which it is engaged, and all the real property which it owns in said county of Cook, and particularly it here states that it does not own any brickyard, and does not own one hundred and seventy-five acres south of Lake Calumet; that it does not own any stock in the Union Foundry & Pullman Car-Wheel Works; that said Union Foundry & Pullman Car-Wheel Company owns no property, and by action of its stockholders it has ceased to exist; and that defendant does not own any stock of the Southern Pullman Palace-Car Company, and exercises no control over it." The demurrer, of course, admits the truth of these several statements and denials, and the effect of this disclaimer is to eliminate from further consideration the charges of the information in respect to said matters.

Each of the amended pleas, as already stated, sets out the charter of the defendant, and then alleges certain matters of inducement, and concludes with a traverse under the *absque hoc*. The design of a special traverse, as distinguished from a common traverse, is to explain or qualify the denial. The essential parts of such a plea are the inducement, the denial, and the verification. The issuable part of the plea is the denial, which is under the *absque hoc*, and when the denial under the *absque hoc* is sufficient no issue of fact can be formed upon the inducement. The matter, however, set up in the inducement must be such as in itself amounts to a sufficient answer, in substance, to the declaration or information. The plaintiff may elect to either form an issue of fact by pleading to the *absque hoc*, or to form an issue of law by demurring to the plea, and thereby take exceptions, in point of law, to the explanatory matters set up in the inducement. In the several amended pleas in the case at bar the denials under the *absque hoc* are amply and necessarily sufficient; for, with the exception of the allegations of the organization and existence of the defendant corporation, they specifically deny all the averments of the information. Therefore the questions to be determined upon this appeal have reference to the sufficiency of the matters stated in the inducements to said pleas to constitute valid answers and defenses, in substance, to the several charges made in the information. As matter of course, the demurrers admit the

truth of all the statements made in the plea.

Counsel for appellee contend that full warrant and authority for the various acts which, as it appears from the pleas, the corporation has done, are to be found either in the powers expressly conferred by its charter or in the powers possessed by implication of law. In order to determine correctly the sufficiency of the pleas in the light of this contention of appellee, it is essential the rules and principles of law applicable to the matter of the express and implied powers of corporations should be ascertained and declared.

A corporation in our state has its existence by virtue of the enactment, general or special, of the lawmaking power. The appellee corporation was created by a special act of the general assembly. The only difference between a corporation organized under a general law and one created by a special statute is "that in the former we look to the certificate of the promoters, while in the latter we look to the special statute, to ascertain the scope of the powers of the corporation." The rule for construing the instruments must necessarily be the same, viz. the powers specifically enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others may be exercised by the corporation. *Rockhold v. Benefit Soc.*, 129 Ill. 440, 21 N. E. 794.

The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred, it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable, and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. *Female College v. Cooper*, 25 Ill. 137; *Caldwell v. City of Alton*, 33 Ill. 418; *Chicago, P. & S. W. R. Co. v. Town of Marselles*, 84 Ill. 643; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. 169; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798; *Railway Co. v. Worthington* (Tex. Sup.) 30 S. W. 1035; *Field, Corp.* §§ 53, 54; 4 *Thomp. Corp.* § 5638; 2 *Beach*,

Priv. Corp. § 385; *Green's Brice, Ultra Vires*, 88, 89.

Keeping these definitions as to implied powers in view, we may proceed to determine whether the acts set forth in the pleas are within or beyond the measure of power possessed by the appellee company.

The information charges that the defendant owns and controls within the city of Chicago a large 10-story business block, together with the ground on which said building stands, worth \$2,000,000; that the defendant occupies a portion only of said building for purposes of its own corporation business, and that it leases about three-fourths of the building to other persons, firms, or corporations, and receives a large consideration from the occupants thereof as rentals; that said block was built by the defendant as an investment; and charges that the said building was erected without warrant or authority of law. The defendant sets up, by way of inducement in its plea, that it has had, ever since its organization, its general offices near the business center of the city of Chicago, and that it is necessary and proper to do so; that it became impossible to rent proper general offices, and that the rentals charged for poor offices were high and exorbitant; that thereupon, in 1880, it purchased a lot of land, 75 by 170 feet, at the corner of Michigan avenue and Adams street, and erected thereon a building, in which it ever since has kept its general offices and some storerooms; that said land was valuable, and could not, without great loss, be utilized for erecting a building other than a high building, and such as is in keeping with and equal to the surrounding buildings; that thereupon the defendant erected thereon a nine-story building, of which it now uses nearly one-half; and that, if its business continues to increase as it has in the past, it will soon also use it all, for its general offices; that in the meantime it rents to different parties such offices as it is not at present using; that erecting such buildings is in keeping with the usual practice of other large corporations doing kindred business, and that it could not now rent such general offices as it requires, in the business center of Chicago, for a rental as low as 5 per centum per annum on the amount which said building and the land on which it stands cost defendant.

The defendant is authorized, by section 6 of its charter, to purchase, acquire, and hold such real estate as may be necessary for the successful prosecution of its business; but it is contended that the building in question is much larger, and contains many more rooms and offices, than the business or wants of the corporation demand; that only a small portion of it is occupied by the company's employes; that it was erected as an investment by the company, and therefore that the company owns and maintains the building without authority of law. We are concerned, how-

ever, with the averments of the plea, the truth of which is admitted by the demurrer. The plea avers it was necessary and proper the general offices of the appellee should be maintained near the business center of the city of Chicago, and that such offices have always been maintained in that locality; that it became impossible to rent suitable general offices there, and even insufficient and undesirable offices could only be obtained at high and exorbitant rentals; that the business of the company was large and rapidly increasing, and that good business judgment dictated the company should provide its own offices, and that in view of the fact that desirable ground was very valuable, and that more office room would be needed in the future to accommodate the growing business of the company, it was determined to construct a larger building than was at the time actually needed and necessary, and to rent such offices as were not at the present needed, and that, moved by such consideration, the building was erected; that, if the business of the corporation continues to increase as it has in the past, the entire building will soon be devoted to the uses of the company.

We think the plea presented a good defense to the charges preferred in the information with reference to this building. The right of the appellee to construct an office building is indisputable, as so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probable prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to, and prepare for, the future. It was but true economy to do so, and if it proceeded in good faith, as we are to assume from the conceded averments of the plea it did, no reason is perceived why it should be deemed bound by law to permit such parts of the building as are not for the present required for the accommodation of its business to remain vacant, but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices. A corporation could not be permitted, under mere color and pretense of furnishing accommodations for the transaction of its own affairs, to construct houses or rooms for the purpose of renting the same, and engage in renting such houses or rooms as a business, if such pursuit was, as it here clearly is, beyond and distinct from that it was created to pursue and accomplish. But the averments of the plea do not justify the imputation that the acts of the company under consideration are but colorable, and in this investigation the averments stand confessed by the state.

It appears from the averments of those pleas which are intended to answer the allegations of the information set forth hereinbefore as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 24 that the defendant company, about the year 1880, acquired and now holds a certain tract of land containing about 83 acres, on a portion of which, in the year 1880,—at least not later than 1882,—it caused to be constructed a large number of dwellings and tenement houses, some of the height of two stories and others three stories in height; that the total number of such buildings is 2,200, and that it has laid out and now maintains the usual and necessary streets and alleys to afford the tenants to whom it rents said dwellings and tenement houses the proper and usual means of ingress and egress to and from their homes and places of business; that it now rents said dwellings and tenements to its employes; that upon the same plat of ground upon which said dwellings and tenements stand, and where said streets and alleys are located, it caused to be erected a number of school houses, a church edifice, an hotel, a large building called "The Arcade," in which are a number of rooms, some of which were constructed to be rented for dry goods, grocery, and other retail stores, and other of the rooms were built for school, lecture and theater rooms, and for the use of religious congregations for church purposes, and that it now rents the rooms in said Arcade for the various purposes for which they were intended when built; that it has also constructed on the same plat of ground a large building called "Market Hall," the lower floor whereof it caused to be fitted up for meat and vegetable markets, and it has rented and now rents them to retail dealers in such articles of food, and the upper floor is a large hall, where concerts, dances, and other entertainments may be given, and is rented by it for such purposes; that it maintains a system of waterworks and sewers, and a gas plant, and, for a consideration, supplies those who inhabit its houses with water, light, and heat.

From these averments but one conclusion is admissible, which is, the appellee corporation became, and is now, the proprietor of the lots, streets, alleys, sewer system, dwellings, tenement houses, churches, hotel, schools, theater, and business buildings composing a town or city of more than 2,000 houses, no one of which is occupied by any other than a tenant of the corporation. The powers vested in the corporation by the words of its charter are "to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper." Manifestly, the acts of the corporation which have resulted in the creation of this town or city,

and its acts in connection with the streets, alleys, dwellings, tenements, school, church, and business houses, water system, sewerage, heat, etc., which the plea admits it was performing at the time of the filing of the information, cannot be regarded as the exercise of powers expressly given. Can they be justified as the proper exercise of powers incidental to the express powers possessed by the corporation, or by the provision in the sixth clause of the charter that it may be lawful for the corporation to acquire and hold such real estate as may be deemed necessary for the successful prosecution of its business? The declaration of the sixth clause is not that the company may acquire and hold such real estate as it or its directors may deem necessary, but such as may be deemed necessary to the successful prosecution of its business. The true meaning of this clause is not that the company or its governing body is vested with unlimited and unbridled power to acquire and hold such real estate as it may deem necessary, but with power to purchase and hold only such real estate as, under the rules of law, may be deemed necessary for the successful prosecution of its business. "The rule of construction when any doubt arises out of any language employed in such a charter is that every power that is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public." *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Illinois Health University v. People*, 166 Ill. 171, 46 N. E. 737. "Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation. These bodies, which never die, are not allowed, against the objection of the state, to take and hold land for purposes wholly foreign to the purposes for which the state endowed them with corporate existence and the power of perpetual succession." 5 *Thomp. Corp.* § 5772. This court has declared that it is against the public policy of this state to allow corporations to own real estate beyond what is necessary for the transaction of their corporate business, or such as is acquired in the collection of debts. *Carroll v. City of East St. Louis*, 67 Ill. 568; *Trust Co. v. Lee*, 73 Ill. 142. And, in furtherance of this declared public policy, statutes have been enacted by the general assembly requiring all corporations which have acquired lands in the collection of debts to sell and dispose of all that is not necessary to the purposes of the corporation, and providing remedies designed to coerce compliance with such requirements. *Rev. St. c. 32, § 5*, entitled "Corporations."

It seems perfectly clear the charter of the corporation did not clothe it with express

power to purchase the real estate upon which the town or city of Pullman is built, or to construct the buildings in said town or city, or to engage in the business of renting dwellings, storerooms, market places, etc. Nor is express power to authorize such acts relied upon, but the contention is they were fully warranted by the powers derived from the implications of the law. What powers are to be implied by law must, as a matter of course, depend largely upon the surrounding circumstances.

With a view of showing that the situation at the time justified the course pursued by the company, and was sufficient to invest it with the legal right to pursue such course, the appellee company filed pleas averring, in substance, as follows: That, after it had been for several years in the exercise of the powers conferred by its charter, its business increased to such an extent that it became necessary for it to build large and extensive shops in which to manufacture cars; that a large amount of land was necessary on which to locate such shops; that it was decided to locate and build said shops in the county of Cook, in or near the city of Chicago, where its general offices and headquarters were, and where its principal officers resided; that it found that it could not acquire a sufficient amount of land upon which to erect said shops within the city of Chicago, on account of the high price of land in said city; that, after diligent and careful inquiry as to the price of land and the means of access thereto, it decided to build its shops where they are now situated, being upon a parcel of land lying between the west bank of Lake Calumet and the Illinois Central Railroad; that it, about the year 1890, purchased a tract of about 343 acres, then of comparatively small value, being unimproved, low-lying land, held as acre or pasturage land, not included in any municipality, and not subdivided; that at the time of said purchase, and at the time of the planning and laying out of the manufacturing plant of defendant, there were not more than 25 dwelling houses within a radius of two miles of said land, all of which were fully occupied; that it was impossible to get good, skilled workmen to come and work at said manufacturing plant unless they could obtain homes in the immediate vicinity; that to get workmen and other employees, skilled and otherwise, at its said manufacturing plant, defendant was obliged to build and erect a sufficient number of houses or tenements to accommodate as many as possible of its employees, and that, in order to attract to said manufactory the best class of skill and labor, it, in or about the year 1890, and not later than 1892, erected upon a part of said lands 2,200 houses and tenements, and that the same were so built for the purpose of inducing the best class of workmen to become employed at defendant's manufactory; that the same were only built for the purpose

of so accommodating defendant's employes, were not built for any profit or income therefrom, but that the defendant might be able to obtain good, skilled labor in its manufactory; that they are not a profitable investment, and were and are only built and held by defendant because the same are "necessary for the successful prosecution of its business."

Defendant alleges also in its pleas, as inducement, that in order to obtain a better class of skilled employes, especially those with families, to work in its manufactory, it was absolutely necessary that there should be provided near their homes proper educational facilities; that to meet the said demand, and to accommodate the desire of said employes that their children should receive ordinary education, defendant erected several school houses near the said dwellings, and schools were and are held therein, and the children of such employes receive instruction therein; that said buildings are all now within the limits of the city of Chicago, and said school houses are rented to the board of education of said city, which has the sole control and charge of said buildings; that it became and was necessary that certain places for divine worship should be provided near the said dwellings of defendant's employes, and, to meet that demand, a church was erected and furnished to a congregation using it, at a purely nominal rental; that on this tract of land, and near said dwelling houses, defendant erected a building called the "Arcade Building"; that on the first floor thereof are rooms rented by defendant to storekeepers, because, when the town of Pullman was built, there were no stores within a reasonable distance at which the company's employes could buy the ordinary necessities of life; that from said stores were and are sold to said employes groceries, clothing, and all other things usually purchased by them; that defendant has not, and never has had, any interest in said stores or the profits derived therefrom; that it does not allow its employes to give orders upon it to said stores; that said stores are rented at a very low rate, and that said building was not built for profit, but only for the convenience of said employes; that on the second and third floors thereof is a public library, for the use of said employes and their families, for which no rent is charged, and two large halls used for religious worship for the use of said employes and their families, and which are furnished by defendant to congregations of its employes at a nominal rental; that in said building are also two or three rooms rented by the board of education of the city of Chicago for school purposes, and in which the children of said employes are taught; that in said building there is also a room erected as a lecture room and theater, provided only to give said employes and their families recreation; that no theatrical entertainments are given in said

building by defendant, but the same is furnished for use to said employes or associations of them, and it is largely used by them for entertainments given by themselves, and for a place in which they may practice music; that on said land, near its manufacturing plant, defendant erected a small building which was used as an hotel, for the purpose of furnishing accommodations to intending purchasers of defendant's cars, their agents and inspectors; that said hotel was and is a necessary part of defendant's manufacturing plant; that defendant built on said grounds a building known as "Market Hall," the upper story of which is a large hall furnished to employes, in which they hold entertainments, such as concerts and dancing, and on the lower floor are stores, which are rented out to persons who use the same as meat markets; that, in order to properly operate its manufacturing plant, it became and was necessary to erect a gas plant, from which it furnishes light through all its manufacturing buildings, and has, upon their request, furnished gas, at a fair and reasonable price, to certain of its employes occupying some of its houses, but that the gas so furnished said employes does not amount to 10 per cent. of the gas produced by said gas plant, and used in defendant's shops; that, at the time of the erection of said manufacturing plant, there were no waterworks at or near said lands, and defendant erected a water tower and plant upon its premises, principally for supplying water throughout its shops, and contracted with the village of Hyde Park for the furnishing to defendant of large amounts of water through the water mains of said village; that most of the water passing through said water mains and through said water tower is used in the shops of defendant, but a small percentage thereof is furnished to said employes in their homes; that said water is furnished to said employes at a very low rate, and at less than the cost thereof to defendant, and because said employes cannot in any other way procure a supply of water; that, when said manufacturing plant was built, defendant put in a very large system of boilers for generating steam; that said boilers and steam capacity probably will all be required for use in operating said shops, but up to this time there has been a surplus of steam generated, and, at the request of said employes, steam pipes have, in a few instances, been run into their said houses and dwellings, and through said steam pipes some of said houses and dwellings have been heated; that in like manner it has furnished, for a money consideration, part of its present surplus steam and engine power to the Allen Paper Car-Wheel Company, whose shops adjoin the property of defendant; that, in connection with said manufacturing plant and dwelling houses, defendant set apart 18 acres of land as recreation grounds for the use of its said employes, which in-

cludes a place for playing baseball, football, and many other kinds of athletic exercises, and for the use of said recreation grounds it charges no rental or admission fee; that said grounds are furnished with divers appliances for athletic exercises, and are free to all of said employes and their families, and are used as pleasure grounds by them; that also, in connection with said manufacturing plant and dwelling houses, it set apart about 13 acres for pleasure grounds for its said employes and their families, the said pleasure grounds including what is usually called a park, together with a greenhouse and other such accessories, and defendant has established and maintained the same only for the purpose of attracting to its works the best class of skilled workmen.

In the light of the well-settled rule, that a plea is to be construed most strongly against the pleader, the averments of appellee's pleas are to be interpreted to disclose that the measures which the appellee corporation adopted looking towards the relocation and removal of its plant included, as a fully-matured part thereof, the plan of building the residence, tenement, and business houses and constructing the streets and alleys,—in fact, providing a town or city wherein its employes might or should dwell, and of which it should be the sole owner and proprietor,—and that, in pursuance of this plan, a tract of land was acquired sufficiently large to receive and accommodate, not only the manufacturing plant of the corporation, but also to provide the necessary space for the streets, alleys, dwellings, tenements, hotel, church, opera house, and other business houses which the scheme of the corporation included; and it is to be further necessarily inferred, on a proper construction of the plea, that the work of erecting the buildings comprising the manufacturing plant proper and the buildings which compose the town or city was entered upon and carried along at the same time and together. Nor is this interpretation of the pleas at all harsh or doubtful, but is the same as that entertained by counsel for appellee who drafted the pleas. Speaking upon the point, counsel for appellee, on pages 51 and 52 of their brief filed in this court, say: "Accordingly, in the exercise of its best judgment, appellee selected and purchased about three hundred and fifty acres of land situated upon the shores of Lake Calumet, fourteen miles distant from its offices and ten miles beyond the then limits of the city of Chicago. The land at that time was practically an unoccupied waste. It was surrounded for a very considerable distance, in all directions save towards the lake, by farming and unoccupied lands. There were no convenient places where employes of the company could find homes or dwelling places. The construction of the manufactory, therefore, involved, not the expediency, simply, but the necessity, of providing places suitable for the occupancy

of those who were to do its work. The manufactory and the homes for the workmen were mutually and equally necessary to the success of the enterprise. The power to manufacture cars' was barren without the other charter power, 'to purchase, acquire, and hold such real estate as may be deemed necessary.' It was only by the combination of the two—by their exercise together, in the manner which has been described—that the object of the charter, 'the successful prosecution of their business,' could be accomplished. Accordingly, the exercise of these powers was undertaken contemporaneously. The construction of the works and the construction of the dwelling places of those who were to operate them was undertaken at the same time, and as a part of a single, harmonious scheme. Two years of time, and the labor of four thousand men transported daily to and fro between Chicago and the point of location, were devoted to the work. At the expiration of that time the result appeared in the completed structures of a manufactory giving employment to five thousand persons, and in its immediate vicinity dwelling houses sufficient in number for the comfortable occupancy of a large part of these persons with their families and those dependent upon them, with the necessary school houses for the education of their children, churches for their religious instruction, stores and shops where the necessities of life could be procured, halls suitable for lectures and social entertainments,—all so arranged, with such accessories of streets, parks, and other provisions, as to minister, not simply to the necessities, but also to the comfort and well-being, of those who might be employed."

It further appears from the plea that the corporation at once, after the buildings composing the town of Pullman and its streets and alleys were completed, rented the dwellings, tenements, business rooms, church, theater room, school rooms, etc., and for a compensation undertook to supply the inhabitants of the town with water, light, and heat, and that it has since continued to perform such acts, and was pursuing the same course when the information was filed. The location selected by the corporation for the new site of its plant was within a few miles of the populous and wealthy city of Chicago, upon a line of railway which furnished adequate and speedy means of transportation to and from the city, so that the plant and its surroundings in fact were within the suburbs of the city. There were then, it is true, only a few buildings in the vicinity of the proposed new location. The establishment of the works of the appellee corporation would make it imperative that other buildings, dwellings, and tenement houses should be constructed for the accommodation of those who should find employment in appellee's shops.

The averment of the plea, that the corporation was obliged to construct such houses

and tenements, is but the statement of a conclusion, and we find the facts pleaded do not justify such a deduction. No reason existed, nor do we find in the pleas even a suggestion that there was reason or ground, for the apprehension that individual enterprise and private capital would not at once, after the purpose and intention of the corporation became known, provide all necessary dwellings and tenements for the accommodation of the workmen, or that the wants of the community composed of such workmen would not at once be met by the location in its midst of schools, churches, dry-goods and grocery stores, meat markets, etc., or that the necessary streets, alleys, and public ways would not be provided without any intervention whatever on the part of the corporation. The public laws of the state would have supplied the requisite school houses and teachers, and the inclinations of the individual members of the community could have been safely relied upon to provide church houses and rooms for imparting religious instruction. It is idle to argue that it became, in any sense, necessary or directly appropriate to the accomplishment of the lawful and chartered purposes or objects of the corporation that it should engage its efforts or capital in the construction of dwellings, tenement houses, store houses, streets, alleys, theaters, hotel, churches, school houses, waterworks, a system of sewers, etc. Workmen, if they have families, must have homes, or, if unmarried, must be accommodated with boarding and places of lodging. Homes, groceries, vegetables, bread, meat, clothing, furniture, light, heat, water, school books, medicine, the services of physicians, dentists, and other professional men, and many other things, become necessary to the health, comfort, or convenience of such workmen and their families; but the right and power to supply such wants had, in this instance, so far as the pleas show, no direct relation or connection with the successful prosecution of the specific object of the appellee corporation. The relation was but remote, indirect, and mediate,—not direct and immediate. Implied power cannot be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interest and chartered objects cannot be justified by implication of law, but are *ultra vires*.

Cases cited holding that corporations operating mines or mills engaged in sawing lumber had implied power to construct dwellings and boarding houses for their employes can have little or no influence upon the question here presented. In those cases, the fact that the works or mills of the cor-

porations were necessarily located at mines or near large forests, and other circumstances peculiar to the respective cases, were deemed sufficient to justify the corporations in arranging for the lodging or boarding of their workmen or in building homes to shelter them and their families. The circumstances in each of such cases as can be accepted as having been well considered were such that it became, in a legal sense, necessary to the accomplishment of the chartered purposes of the corporation that it should exercise such power as was accorded it by implication of law. Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted. But in the case in hand the appellee corporation voluntarily assumed to devote its corporate capital and power to that which, to say the least, but remotely and indirectly tended to aid the accomplishment of the purposes it had the right to pursue under conditions and circumstances which were neither rare nor unusual.

The argument of counsel for appellee that the construction of the manufacturing plant involved, not the expediency simply, but the necessity, of providing places suitable for the occupancy of those who were to do its work, "and that in view of this the company determined to undertake, and did undertake, to construct its works and dwelling places for its workmen at the same time and as a part of a single harmonious plan," is fallacious. It ignores the palpable fact that no duty of providing houses for its workmen was pressed upon the company by surrounding conditions or circumstances as a necessity, but was adopted as a matter of choice, based, it may have been, upon motives which were, in part, benevolent or charitable in their nature. Had it purchased only that quantity of ground needful for its proper corporate uses, and restricted its efforts and expenditures to the construction of such buildings as would have answered its corporate wants, there appears to us no reason to believe that the question of homes for its workmen, market places or stores where such workmen could purchase supplies, or school rooms where their children could receive instruction, or the making of streets and alleys, would ever have demanded the thought or attention of its governing body. It is beyond reason to conclude that, had the way been left open, private capital and individual enterprise would have overlooked this desirable field of operations, or that merchants, tradesmen, butchers, and other classes of business men would not have appeared and entered into business rivalry for the custom of the workmen and their families, and that the prosecution of the business of the cor-

poration would have suffered because its workmen could not find homes or places where the articles necessary to supply their wants and add to their comfort could be purchased; and yet it is upon this ground it is sought to justify the acts of the corporation which are now under consideration.

The prohibition of the law against the unauthorized exercise of power by corporations is based upon grounds of public policy, and the wisdom of the rule may here find exemplification. Conceding the rectitude of the purpose which it is alleged operated to induce the acts of the corporation which resulted in the creation of the town or city of Pullman, we are constrained to declare the corporation had not lawful power to perform such acts, and that the existence of a town or city where the streets, alleys, school houses, business houses, sewerage system, hotels, churches, theaters, waterworks, market places, dwellings, and tenements are the exclusive property of a corporation is opposed to good public policy, and incompatible with the theory and spirit of our institutions. It is clearly the theory of our law that streets, alleys, and public ways, and public school buildings, should be committed to the control of the proper public authorities, and that real estate should be kept as fully as possible in the channels of trade and commerce; and good public policy demands that the number of persons who should engage in the business of selling such articles as are necessary to the support, maintenance, and comfort of the people of any community should not be restricted by the will of any person, natural or artificial, but should be left to be determined by the healthy, wholesome, and natural operations of the rules of trade and business, free from all that which tends to stifle competition and foster monopolies.

We think the averments of the plea in response to the allegations of the information under consideration were insufficient to present a legal defense. The information charges, as is shown by the fourteenth allegation, set out in the opening of this opinion, the appellee corporation has constructed, owns, and is operating a sewerage system and a sewerage farm; that it has constructed sewerage pipes so as to receive and convey to the farm the sewerage and refuse matter accumulated in and about the residences, tenement houses, and other buildings which it rents in the said city or town of Pullman, and uses said sewerage for the purpose of fertilizing the farm; that the farm consists of 154 acres, and is cultivated by the appellee corporation, and large quantities of celery, beets, and other vegetables produced thereon are by the said corporation sold in the city of Chicago, or shipped to other cities for sale. With respect to this sewerage system and the business of gardening or truck farming upon the sewerage farm, the effect of the allegations of the plea are that, having constructed the great number of dwellings, tenement

houses, and other buildings, and rented the same to its employes, it became necessary the corporation should adopt some mode or manner of disposing of the sewerage in order to render and keep the said dwellings and buildings in a healthful condition; that it purchased the 154 acres of land in order to enable it to utilize the sewerage and refuse matter as a fertilizer, whereby to render the land productive; and that the income from the farm recompenses the corporation in part, and only in part, for the expenses of the sewerage system. But, if we are right in the view hereinbefore expressed, that the action of the corporation in constructing the buildings and dwellings of which the town or city of Pullman is composed was beyond its proper corporate functions, it would necessarily follow that the operation of the sewerage system and the prosecution of the business of farming or truck gardening cannot be justified upon the ground that it was necessary the dwellings and houses of those persons living in the city or town of Pullman should be supplied with such sewerage system. One usurpation of power cannot be seized upon as a justification for the exercise of a further unlawful power.

The information charges that the defendant, in a large number of its cars, carries a stock of whiskies, wines, beers, and other malt and intoxicating liquors, for the purpose of sale to its guests and the occupants of the cars while traveling therein, and sells and disposes of the same at a large pecuniary profit. The defendant, by its plea, admits that it does provide, for people traveling in its cars, supplies of divers kinds of food and drink, including whiskies, wines, beers, and other malt and intoxicating liquors, but avers that it sells the same, under proper licenses from state and general governments, for the purpose of meeting the necessities and demands of its patrons, and contributing to their comfort, and that it makes no profit whatever therefrom, but furnishes said supplies at a pecuniary loss to itself; and claims a right to sell them by virtue of section 4 of its charter, which provides that "the said corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper." Express power to sell supplies to persons traveling on its cars must be conceded to the corporation. Are wines and liquors a part of the "supplies" for travelers? No authorities on this subject are cited in the briefs of counsel. Webster defines the word "supply" (plural, "supplies") as "that which supplies a want; sufficiency of things for use or want; especially, the food, and the like, which meets the daily necessities of an army or other large body of men." It would seem that this definition answers the question in the affirmative. Wines and liquors are a

part of the supplies which meet the wants of a portion, at least, of the traveling public. They enter into and compose in part the daily meals of many travelers, and are regarded by all such persons, and by others who use them at other times, as wholesome refreshments, contributing to relieve from the fatigue and discomforts of travel. Hence they are supplies for such persons. It is a matter of common knowledge that places for the accommodation and entertainment of travelers, such as hotels and taverns, and steamboats and ocean vessels which carry passengers, almost universally sell to their guests and patrons whiskies, wines, and liquors, and that such things are regarded by a portion of the traveling public, and by those who transport and entertain them, as part of the "supplies" for travelers. We think that the defendant, having, as the plea averred, had license to sell intoxicating liquors, was authorized by its charter to furnish such supplies to persons traveling in its cars, and that the charge in the information is sufficiently answered by the plea.

The information charges that the defendant owns 55 acres of vacant and unoccupied land north of its shops, and that it also owns other vacant and unoccupied land at Pullman to the extent of 16 acres. The defendant's plea avers, as to said 55 acres, that they are now in actual, constant, and necessary use by it for dumping thereon cluders and other refuse from its shops, and will, in the near future, be necessary for further extensions of defendant's manufacturing plant. It clearly appears, the allegations of the plea being taken as true that this tract of land of 55 acres is devoted to legitimate corporate purposes, whether so actually, constantly, and necessarily used is a question to be determined on the trial of the issue. As to the other vacant and unoccupied land, the plea admits that the defendant owns 23 acres of such land, but avers that said 23 acres are the unoccupied part of a tract of 63 acres, whereon are located its dwellings and tenements, churches, business houses, etc., which are scattered over the whole of the said tract, and in such a way that no particular part of any appreciable size is unoccupied, and that said 23 acres consist of the spaces between said houses; that the land was purchased, and has been and is held, solely to meet the necessity for additional houses and tenements, as the growth of the company's business may require, and in order that the health and comfort of its employes might be conserved by the avoidance of tenements and houses too closely crowded together. Having hereinbefore determined that the erection by the appellee corporation of the dwellings and buildings in the city or town of Pullman was beyond its corporate powers, the conclusion is inevitable that the corporation has no lawful right to hold and own this 23-acre tract "solely to meet the necessity for additional houses and tenements as the growth of its business

may require." The demurrer to the allegations of the plea with respect of this tract of land should have been sustained.

We think it clearly appears from the allegations of the plea that the corporation acquired and owns the 25 acres of land near the Belt Line Railroad for the proper purposes of its existence. It is stated in the plea that many of the cars made by the defendant, and others sent to it to be repaired, are delivered upon the Belt Line Railroad running north of its manufacturing plant; that to receive and properly store said cars while waiting their turn to be repaired, and to properly store them after being built and repaired and while awaiting inspection by railroad companies, it was and is necessary that the defendant should have storage yards or tracks near said railroad at Grand Crossing, about three miles from defendant's manufacturing plant, and it accordingly purchased about, and not to exceed, 20 acres of ground near said railroad, and now holds the same for the purpose above mentioned; that it has not, as yet, put any railroad or storage tracks upon said land, because the railroad companies owning tracks in the immediate vicinity have built so many side and storage tracks which can be used for storage purposes; but that it will be necessary, in the near future, for defendant to put tracks upon said 20 acres for storing and switching purposes, as aforesaid, and that it holds said land for such use in its manufacturing business. These averments are admitted by the demurrer, and constitute a complete answer to the charge in the information.

The allegation that the appellee company furnishes the Allen Paper Car-Wheel Company with steam power to operate the machinery of the latter company, and receives a large income therefrom, is fully met by the averments of the plea. The plea avers that when the manufacturing plant of the appellee corporation was built, with a view of anticipating its probable future wants, the company put in a very large system of boilers for generating steam; that the steam power which said boilers are capable of producing will, in the judgment of the corporation, be no more than will be required in the future for the successful operation of the machinery and appliances of the plant of the appellee company, but that up to this time more steam has been generated than the company's uses required, and that the surplus has been furnished to the said Allen Paper Car-Wheel Company, whose shops adjoin the plant of the appellee corporation. It is entirely competent and proper for a corporation to keep in view its probable future wants and necessities, and in constructing its buildings and purchasing machinery to anticipate and provide for that which sound practical judgment and wise forethought indicate will be required by the growth of its business and the extension of the volume of its operations. It being law-

ful to purchase boilers having a capacity to generate more steam than the immediate needs of the company required, the law has no rule which would require that the excess of steam so provided should not be utilized, but should be allowed to go to waste. It was but true economy, and in no sense a usurpation of power, to dispose of the excess of steam so produced to the Allen Paper Car Wheel Company.

The pleas admit the appellee company has purchased and holds a majority of the shares of the capital stock of the Pullman Iron & Steel Company, and avers further that said Pullman Iron & Steel Company was never a competitor in business with defendant; that its products constitute a necessary part of the material required in the construction of the cars manufactured by defendant; that all its product is used and consumed by said defendant; and that said corporation is, in effect, a mere department of defendant in its car-manufacturing business, although existing nominally as an independent corporation. The right and power of a corporation to become a stockholder in another corporation was presented to this court for determination in the case of *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, and the conclusion arrived at was that a corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter, or necessarily implied from it. The conclusion here announced is the prevailing doctrine in America, and we see no reason to depart from it. Such power is not specifically granted to the appellee corporation, and there is no room for the contention that it is possessed as an implied power. The decision of the circuit court ousting the appellee from the right to hold capital stock in the Pullman Iron & Steel Company was correct, and is affirmed.

The defense of acquiescence and waiver has been set up in the case, in the sixth plea. That part of the plea is as follows: "Defendant further avers that said manufacturing plant, houses, and all other improvements in the town of Pullman, and all the real estate in this plea described, were acquired by defendant, and said buildings were erected, in and about the year A. D. 1880, and not later than the year A. D. 1882, and defendant has been in continuous use thereof, in manner above described, ever since; and defendant avers that all of its said acts have been well known to plaintiff ever since said last-mentioned date, and the doings of defendant in regard thereto were a special subject of investigation, report, and approval by the legislature of the state of Illinois since said last-mentioned date, and that defendant has, during all of said time, been taxed by the municipal and state taxing authorities of Illinois, and in, to wit, A. D. 1891, the legislature of Illinois appointed a committee thereof to investigate the property of defendant, and ascertain if it was properly

taxed on all its property; that said committee examined all defendant's property, including all the property mentioned in this plea, and reported to said legislature concerning said holdings of property by defendant, and that its property was all properly taxed, which report was accepted and approved by said legislature, whereby any fault that the defendant may have committed in regard thereto has been acquiesced in or waived by the plaintiff."

It is conceded, the state, acting in its character as a sovereign, is not bound by any statute of limitations or technical estoppel. It is urged, however, that in quo warranto, under the common-law rule, the courts, in the exercise of their discretion to grant the writ or not, or upon final hearing, refused aid when the conditions complained of had existed for a number of years with knowledge on the part of the sovereign, and that the provisions of section 1 of chapter 112 of the Revised Statutes, entitled "Quo Warranto," that leave to file the information shall be given if the court or judge to whom the petition is presented shall be satisfied there is probable cause for the proceeding, leave the court still possessed of power to consider upon the hearing, and then apply, the same doctrine of waiver and acquiescence. It is the general rule that laches, acquiescence, or unreasonable delay in the performance of duty on the part of the officers of the state, is not imputable to the state when acting in its character as a sovereign. There are exceptions to this general rule, but we are unable to see that the allegations of the plea bring the case within the principles of any such exceptions. The case of *Trustees of Schools v. School Directors of Union Dist.*, 88 Ill. 100, was a writ of certiorari to test the validity of the act of detaching territory from one school district, and attaching it to another; and the case of *People v. Boyd*, 132 Ill. 60, 23 N. E. 342, to test the legality of the formation of a school district by the consolidation of two other districts. These cases are relied upon by appellee. In each of them the doctrine of acquiescence or laches was applied, upon the ground, to quote from the opinion in the former of the cases, "because these bodies [the school directors] exercise powers in which the people at large are concerned, and great detriment or inconvenience might result from interfering with their proceedings"; and the reason which operated to control the decision in the latter case is that public policy forbade that such writ should be granted to test the validity of the organization of corporations exercising governmental power, after such corporations had been acting de facto for a considerable length of time. The ground of decision is the same in each case, namely, that public policy forbids the interference upon the part of the state with corporations created for the purpose of exercising governmental functions, unless application is

made to the courts before the public interests become involved. The cases have no application here. The cases of *Rex v. Dawes* and *Rex v. Martin*, 1 W. Bl. 634, also cited in behalf of the appellee, involved the title to the offices of burgesses of the borough of Winchelsea, and the relators were private informers. The writs were refused upon the ground the informers were private individuals, and knew the alleged disqualifications of the defendants, and had long acquiesced in their official incumbency of the offices, and also upon the same grounds which found operation in the Illinois cases,—that the public consequences “to the borough” forbade the issuing of the writs upon grounds of public policy. Where the design of the writ of quo warranto is to procure a declaration of forfeiture of the charter of a corporation upon the ground it has failed to perform some act the performance of which constituted a condition precedent to its legal organization, or upon the ground the organization of the corporation was defective, or where the corporation was formed by the consolidation of two other corporations, and it was alleged the consolidation was irregular or defective in some particular, the state may be deemed to have waived the right to complain of the omission, failure, or irregularity affecting the existence of the corporation by an enactment of the legislature expressly curing or obviating the grounds of complaint, or directly recognizing the corporation as entitled to exercise corporate functions, after the failure, omission, or defect complained of had become known, or such waiver may be deemed to exist from long-continued failure of the judicial department of the government to enforce the forfeiture. The principle is the sovereign shall not be allowed to deny that a de facto corporation is a corporation de jure if the corporation has attempted to perfect a legal organization, but has failed to comply with some condition precedent, or has failed to proceed regularly and lawfully in some other respect touching its organization, if the sovereignty from which came the grant authorizing the formation of the corporation had knowledge of such failure, and, by the express act of the legislature, remits the penalty of forfeiture, or recognizes the corporation as legally organized and lawfully exercising corporate functions, or if the judicial department of such sovereign omits, for an unreasonable time, to enforce the forfeiture.

We have examined the various cases cited by counsel for appellee as in support of the defense of waiver and acquiescence in the case at bar, and do not find that in any of them the defense has been deemed available, as against the sovereign or state, except in cases where the right and title of a corporation to corporate existence was questioned because of some defect in the original charter, irregularity in the proceedings for the organization of the corporation, or its

failure to perform or fulfill some condition precedent to its legal organization. In such cases, if the conduct of the sovereign be such as to constitute an admission of knowledge of the defect or omission, and a declaration that forfeiture is not insisted upon, it will be deemed, as in other breaches of conditions, the right to declare the forfeiture for such default, omission, or breach has been waived, or, in such cases, forfeiture may be denied on the ground of acquiescence arising from long and unreasonable failure of the judicial department to test the legal organization and existence of the corporation. In the case at bar the appellee is conceded to be a corporation de jure, and the complaint is it had assumed and exercised, and is assuming and exercising, powers not granted by its charter or implied by law. We find from its pleas the corporation is without lawful authority to perform the acts complained of; that it entered upon the performance of such acts in 1880 or 1881, in pursuance of a fully matured plan; that it has since continuously engaged in this unjustifiable undertaking, and was so engaged when the information was filed; and that it owns a tract of land 23 acres in extent, which it is holding for the express purpose of building thereon other dwellings and tenement houses, opening streets, alleys, etc., and extending said town or city of Pullman over said tract of land. The usurpations of the corporation are not only those of the past, but also those of the present, and its plea admits it contemplates a repetition of the offenses in the future.

Our interpretation of the law, as applied to facts appearing from the averment of the pleas, is that the appellee corporation, at and before the time of the filing of the information, was exercising powers and performing acts not authorized either by the express grant of the charter or any implication of law; and, further, that, by some of such unauthorized acts, the corporation assumes and exercises powers and functions which the general law of the state contemplates shall be possessed and exercised only by municipal authorities of cities or towns and the public school authorities; and that other of its unauthorized acts tend to restrain competition in various branches of trade, to remove real estate from the operation of our statute of descent, and place the title thereto in a corporation having perpetual succession and unending existence, and thereby withdraw it from the channel of trade and commerce; to create monopolies in the business of selling the necessities and comforts of life; and that its acts and doings are opposed to good public policy. We do not think the demand of the sovereign that usurpations so clearly antagonistic to good public policy shall be restrained can be defeated by any imputation of laches, or upon the ground that acquiescence is to be inferred from the failure to invoke the aid of courts at an early day.

Nor do the averments of the plea with reference to the acts of the general assembly present a ground of defense. If the general assembly of the state has, by a later enactment, extended the power of the corporation, the enactment should have been pleaded as was the original charter. The averment, "The doings of the corporation in regard thereto [the acts complained of] were the special subject of investigation and report," is but pleading matter of conclusion, and availed nothing by way of defense. Whether held by virtue of its express or implied power, or by usurpation, all the real property in question was properly subject to assessment for purposes of taxation. The duties of a committee appointed by the legislature to investigate the property of the corporation, and ascertain if all of its property was properly subjected to taxation, did not involve an investigation into the title or right by which the corporation claimed to hold the real estate; and the approval by the general assembly of the report of such a committee that the property of the corporation was properly taxed would not amount to the concession on the part of the state that the corporation had a right to acquire the title to the real estate in question; nor is it sufficient to show the state had knowledge that the real estate had been acquired without lawful power, and therefore held to constitute legislative recognition and waiver of the acts of usurpation.

Our conclusion therefore is the court erred in overruling the demurrer to such of the pleas or parts of pleas as were pleaded in response to, and as in defense of, the charges in the information which are set forth in this opinion as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 19, 22, and 24, and that otherwise the ruling of the court upon the demurrer was correct. The judgment must be reversed, and the cause remanded, with directions to the circuit court to sustain the demurrer to the pleas as hereinbefore indicated, and in other respects to overrule the same, and to proceed further as may be in conformity with this opinion. Reversed and remanded.

CRAIG, WILKIN, and CARTWRIGHT, JJ. (dissenting). We do not concur in the foregoing opinion adopted by the majority of the court. The principal charges of usurpation made against appellee consist in the construction of dwelling houses sufficient for the comfortable occupancy of its employes; maintaining and furnishing, without charge to its employes, parks, flower beds, recreation grounds, and other like means of enjoyment; building and furnishing to them rooms for a public library, free of rent, and churches, a lecture room, theater, and concert hall at a nominal sum; owning rooms rented to the board of education for schools, and rooms for the sale of groceries and necessities, and furnishing heat, light, and water to some of the occupants, and providing for

proper sewerage. The extent to which these things are done, and their purpose and connection with the successful prosecution of the business which appellee was chartered to carry on, are set out in the amended pleas, and substantially stated in the foregoing opinion. The matters so alleged in the pleas are admitted by the demurrers to be true, and, if they show the acts complained of to be reasonably necessary in order to enable appellee to carry into effect the powers expressly granted to it, and to enable it to accomplish the purposes of its creation, then they are within its implied powers, and no less lawful than those expressly authorized.

By its charter the defendant is vested with all powers, rights, privileges, and immunities incident to corporations, and necessary or useful for the purposes of the incorporation; with power to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same to sell or use, or permit to be used, in such manner and upon such terms as the company may think fit and proper; and to purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of the business of the company, and to sell and convey the same. The trial court, in its opinion, quotes with approval—and we concur in such approval—the general rules and principles of law applicable to the matter of the implied powers of corporations as they are stated in the brief of counsel for appellee. That statement is as follows: "It is axiomatic that corporations have not only the powers expressly granted, but those which are necessarily implied; that, while they derive all their powers from the legislature which creates them, it is also true that what is fairly implied is as certainly granted as what is expressed; that, unless restrained by their charters, they have the power to deal precisely, in carrying out the corporate purposes, as individuals seeking to accomplish the same ends; that they may resort to any means that would be necessary and proper for an individual in executing the same, unless they be prohibited by the terms of their charters or some public law from so doing; that while, in regard to their express powers, the grants are construed most liberally in favor of the state and most strictly against the corporation, yet, in regard to incidental powers, neither strict nor liberal, but only reasonable, rules of construction are applied; that corporations may so far develop and extend their operations as to engage in matters not primarily contemplated by their founders, provided these matters be fairly within their scope, and provided, also, that in so developing and extending their undertakings they employ direct, and not indirect, means; that different rules of construction are to be applied to charters of corporations organized under special acts and those organized under a general law, the

greater strictness of interpretation being employed in dealing with the latter; that 'necessary,' when used in defining the powers of corporations, does not mean what is simply indispensable, but also what is useful, convenient, and proper to carry into effect the franchises granted. 1 *Spell. Priv. Corp.* §§ 68, 73, 75, and cases cited; *Green's Brice, Ultra Vires*, pp. 66, 71, 73, 75, 87, 91, and cases cited; *Curtis v. Leavitt*, 15 N. Y. 9; *Bank v. Jacobs*, 6 *Humph.* 525; *Railroad v. Berks Co.*, 6 Pa. St. 70; *Railroad Co. v. Lewis*, 33 Pa. St. 33; *Insurance Co. v. Robinson*, 25 Ind. 541; *Brown v. Winnismmet Co.*, 11 Allen, 326; *Railroad Corp. v. Evans*, 6 Gray, 25; *McCulloch v. State*, 4 Wheat. 316; *State v. Hancock*, 35 N. J. Law, 537; *Crawford v. Longstreet*, 43 N. J. Law, 328; *Ellerman v. Stockyards Co.*, 49 N. J. Eq. 217, 23 Atl. 287; 2 *Cook, Stockh. & Corp. Law* (3d Ed.) § 681." See also, *Madison, W. & M. P. R. Co. v. Watertown & P. P. R. Co.*, 5 Wis. 173, and *Clark v. Farrington*, 11 Wis. 321. In the case of *Curtis v. Leavitt*, 15 N. Y. 9, it was held that corporations, along with their specific powers, take all the reasonable means of execution,—all that are convenient and adapted to the end in view; that the corporation has a liberty of choice among those means; and that if, in the exercise of such liberty, an intelligent good faith is used, then the power to select the means adopted cannot be called in question. In *State v. Hancock*, 35 N. J. Law, 537, it was said by Chief Justice Beasley: "Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons; and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass, their operations. Such, in similar cases, has never been the legal acceptance of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one." And further said: "The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter." There is a substantial agreement in the authorities as to the general doctrine of the implied powers of corporations. That doctrine has been stated in various forms, but they amount, in substance, to one and the same thing. As formulated in the brief of appellant, it is as follows: "A corporation can only exercise such powers as may be conferred upon it by the legislative body creating it, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable it to carry out the express powers granted." In the case of almost every corporation its implied powers are more numerous and of greater impor-

tance than those expressly granted in its charter. No rule can be stated by which can be determined with exactness just what the limits of the implied powers of corporations are. These limits depend largely upon the nature of the corporation, its necessities, and the surrounding circumstances. While grants of power are strictly construed as to those expressly granted, yet in executing such express powers the corporation has an implied authority to carry such express powers into full effect, and for that purpose may adopt any means, not prohibited by law, that are necessary, usual, convenient, reasonable, or suitable for accomplishing the objects of the incorporation; and in respect to these implied powers the rule of strict construction that obtains in the case of an express grant of power has no application, but the rule of a reasonable construction prevails.

Principal among the express objects for which the defendant was incorporated was that of manufacturing and constructing railway cars, with all convenient appendages; and for the accomplishment of such purpose it was expressly given power to purchase, acquire, and hold "such real estate as may be deemed necessary for the successful prosecution of their business," and, along with it, "all powers, rights, privileges, and immunities incident to corporations, and necessary or useful" for the accomplishment of such purpose. We have seen that the rule is that, while a corporation can exercise no powers other than those conferred by its charter, and cannot engage in any separate and unauthorized business, yet that it has a right of selection as to the means to be used in carrying into effect the expressly delegated powers, the only restriction being that they shall be necessary, in the sense of being suitable, convenient, and reasonable, and not in contravention of any rule of law. In the leading case of *McCulloch v. State*, 4 Wheat. 413, it is said by Chief Justice Marshall, among other things, that to employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable; that it is essential to just construction that many words which import something excessive should be understood in a more mitigated sense,—in that sense which common usage justifies; that the word "necessary" is of this description; that it has not a fixed character peculiar to itself, but admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. In the case now at bar the power given the defendant by the sixth section of its charter is not simply to purchase, acquire, and hold such real estate as may be necessary for the purposes of the incorporation, but such "as may be deemed necessary for the successful prosecution of

their business." It would seem, from the rule, that it is not to be presumed that the legislature used idle and useless words, and from the reasoning of Chief Justice Marshall in the case above mentioned, that some force and effect should be given to the words "deemed" and "successful," used in said act. Without these words, the act gave to the defendant the right to purchase, acquire, and hold, not only such real estate as was absolutely indispensable for the purposes of the corporation, but also such as was useful, convenient, reasonable, and proper in the conduct of the business for which it was incorporated. The use of the words mentioned, even if it does not otherwise amplify the power, is at least an indication of an affirmative legislative intention that the corporation should have and exercise some degree of discretion in respect to the amount of real estate it should acquire and hold; the same to be, as matter of course, not an unlimited and unbridled discretion, but a discretion to be exercised in good faith and within reasonable limits.

It appears from the pleas, admitted to be true, that the work of construction was completed in the year 1881, and since that time appellee has carried on its business and exercised the powers now claimed, and the dwelling houses have been occupied by a population of about 10,000 people. It was a conspicuous movement, which attracted general attention and widespread discussion. The provision made by appellee for those in its employment and their families, both as to dwellings and surroundings contributing to their comfort and elevation, was well and generally understood. The plan was carried on for 14 years, and the powers in question were exercised without attack or question from the state. The charges now brought against it seem to be incited by its proportions and great business success, rather than because of any sound legal objection. From the fact that it satisfactorily supplied a necessity consequent upon the rapid development of a new country and the increase of commerce and travel occasioned by the building of railroads, and by means of wise and discreet management, and the adoption of economical methods of business, it has, in a comparatively few years, grown from a company with \$100,000 of capital stock to a large, wealthy, and prosperous corporation, with a capital stock of \$36,000,000, and with an amount and value of real estate and other property commensurate with the amount of capital it has invested and the extensive business in which it is engaged. If the various implied powers that it has availed of had been exercised by a less wealthy and pretentious corporation, it is hardly probable that the right to exercise such powers would ever have been called in question. In fact, it seems to us that the only difference in that regard between those used by the corporation now at bar and those which are and

long have been exercised by the numerous mining companies, lumber companies, manufacturing companies, and other companies incorporated and doing business in this state, is a difference that is not based upon any sound legal distinction, but merely one that arises from the vast amount of business done by the defendant. The difference is merely as to the extent to which it has become necessary or expedient to use such implied powers. If a lumber company, with a few thousand dollars of capital stock, may, without express power in that regard and under and by virtue of its implied powers, construct a dozen or twenty frame dwellings for the use of the employes at its sawmill, and if a coal mining company, with a comparatively small capital stock, may in like manner build fifty or a hundred houses and cottages to be occupied by the families of those who work in its mines, it is difficult to see why, upon principle, the defendant, if the nature and magnitude of its business reasonably require it, may not construct 2,200 buildings and tenements suitable for the occupancy of the class of workmen that the nature of its business requires. And if the lumber or mining company, not for the purposes of profit, but merely for the accommodation of its workmen, and for the purpose of inducing them to enter and remain in its employment, can build a log school house in which the children of its employes may be educated, or church in which such employes and their families may worship, it is not perceived why, upon principle, the defendant has not the implied power to do all that it has done or is doing in respect to the school houses and churches of which complaint is made. It is a matter of common and general knowledge that in this state, and continuously from the days of the earliest development of its resources, lumber and sawmill companies, mining companies, manufacturing companies, and other like corporations have, without question, constructed and used, not for purposes of speculation in real estate, but as a necessary and convenient means for carrying on the several kinds of business for which they were respectively incorporated, houses to be used by their servants and employes as habitations for themselves and their families; and hotels and boarding houses for the accommodation of such servants and employes as had no families, and of such other persons as were temporarily called, for the purpose of transacting business with such corporations, to the localities where their business was being carried on; and structures to be used as churches or school houses for the benefit of their employes, their families and children. There is no difference between what always has been done and is still being done by these various corporations and that which this defendant has done and is still doing, except this: that, owing to the very large and extensive proportions to which the plant and

business of the defendant have grown, a much larger number of houses and tenements is required for the accommodation of its employes, and that, owing to the fact that the best class of skill and labor is necessary in the construction of its products, and the proximity of the plant to a large city, a better class of tenements, supplied with more of the conveniences and comforts of life, is required in order to attract and obtain such better class of skilled employes.

In *Vermont Cent. R. Co. v. Town of Burlington*, 28 Vt. 193, a question of the exemption of certain property of the company from taxation was raised. The court held that only such of said property as the company was authorized to take without the consent of the owner was so exempt, but in their opinion said: "They may at the same time hold, by gift or grant, woodland for fuel, or land on which to erect tenements for those under their employment, and for various other purposes connected with the use of the road, and to which that exemption does not apply."

In *State v. Commissioners of Mansfield*, 23 N. J. Law, 513, the railroad company owned houses and lots which were let by it to its workmen and employes, and the question involved was the right of exemption from taxation. The court decided against the claimed exemption; but in its opinion recognized the right of the corporation "to purchase land and to erect houses in the right location and of the right kind for all their constant employes."

In *Crawford v. Longstreet*, 43 N. J. Law, 325, the question was as to the right of a turnpike company to lease and use premises on which was a house occupied by its servants and other conveniences used by the company. The court held that such right was one of the implied powers of the corporation, and said that, while a habitation for the company's servants and laborers was not strictly indispensable, yet "that such an arrangement was convenient, useful, and essential to the proper management of its business scarcely admits of denial."

In *Locey Coal Mines v. Chicago, W. & V. Coal Co.*, 131 Ill. 9, 22 N. E. 503, the right of the coal company to own the property there in question was not raised or specifically involved, but the court in its opinion distinctly recognizes that the 30 dwelling houses, boarding houses, storehouse, and various other buildings connected with the mines were properly a part of its property, and "desirable and necessary for carrying on its business of mining and selling coal."

In *Moss v. Mining Co.*, 5 Hill, 137, the company was incorporated "for the purpose of raising and smelting lead ore at Rossie." It first engaged only in the business of raising ore, the smelting being done by Moss & Knapp. It subsequently bought the property of Moss & Knapp, which included a house and lot, 50 acres of improved land, on

which were several houses used as residences for workmen, stoves in the houses, a building which had been occupied as a store, a school house, a threshing machine, etc. In the opinion of the court it is said: "If articles bought by a corporation cannot possibly be of any use in the line of their corporate business, but the purchase is necessarily an excess of power, a question might be raised on that ground. Yet in dealing with corporations created for manufacturing purposes, who that does not make a part of them shall be holden to penetrate the ramifications of their business so as to fix the boundary of possible utility? Such a company as the defendant's must have lands, houses, and wood, as well as mines, machinery, and utensils. They may resort to all the ordinary means of paying workmen and providing them and their families with residences; and who would deny, in this country of schools, that they may pay by providing school houses and school masters for the children of workmen?"

In the subsequent case of *Moss v. Averell*, 10 N. Y. 449, which involved the same facts as those in the case last cited, and which also involved the question of ultra vires, it was said: "The purchase of the property of Moss & Knapp, for which the notes in question were given, was within the scope of the legitimate business of the company. * * * They did not embark in any other business than that for which they were incorporated. The property they purchased had been got together by Moss & Knapp for the smelting business, and nothing else, and was necessary to carry on that business. It was situated in a new country, at a distance from any village, and required for the accommodation of their hands the erection of suitable habitations. The country was a wilderness, and had to be cleared. The men and animals employed by them had to be supported. If they raised a little grain on their clearings, it must be harvested and prepared for food, or it would be lost." And further said: "One of the shanties had been used by Moss & Knapp as a school house for the children of their men. Whether it was so used at the time of the purchase does not appear. It would have been no objection to the validity of the sale had it been at that time devoted to so laudable an object."

In *Searight v. Payne*, 6 Lea, 283, the Worley Furnace Company, an incorporated iron company, owned and operated a "supply store" in connection with its furnace, and which was not expressly authorized by the company's charter. The court held that it might be fairly included in the powers of the corporation.

In *Railroad Co. v. Robards*, 60 Tex. 546, it was held that the railroad company might, under the circumstances of that case, make a contract for the building of an hotel. Among other things the court said: "The power of a corporation to contract extends,

not merely to such subjects as are absolutely essential or indispensable to the performance of specified acts authorized by its charter, but also to such (not being prohibited by law nor against public policy) as are designed and may be useful in promoting the main enterprise."

In *Watt's Appeal*, 78 Pa. St. 370, the right of a land and improvement company, under the circumstances of that case, to erect an hotel, was sustained.

Section 362 of *Morawetz on Private Corporations* (2d Ed.) is as follows: "It is a well-established general rule that a corporation may carry on the business for which it was chartered, in the manner in which a business of that particular kind is usually carried on. What the usual manner of carrying on a business is cannot be determined by the application of purely legal principles. It is a question of fact, and not a question of law. Evidently, therefore, it is impossible to decide abstractly that acts of a particular description are within or without the chartered powers of a corporation. The right of a corporation to perform an act depends, in every case, upon all the surrounding circumstances. No act is authorized under all circumstances, and facts can be conceived which would render almost any act justifiable. Thus, a railroad company may usually buy coal and material for constructing its road; but it would have no authority to buy coal, or anything else, as a speculation, with the intention of selling it again. On the other hand, it would clearly be unauthorized, under any ordinary state of facts, to use the funds of a railroad company for building a church or a theater; yet this use of the corporate funds might be entirely justifiable if a church or a theater were required for the use of the company's workmen, in a part of the world where no church or suitable place of recreation was accessible."

Mayor of Norwich v. Norfolk Ry. Co., 4 El. & Bl. 396, was a case in which one of the pleas raised the question of the implied powers of the corporation. The question of ultra vires, however, was not decided by the court, as the decision of the case turned on another ground. The four judges delivered separate opinions, from two of which we quote, on account of the applicability of the language used to the case now at bar. Coleridge, J., said: "When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever-arising improvements in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substantial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and lib-

erally, so as not to defeat the purpose by a too narrow restriction of the means." And Erle, J., in reasoning to his conclusion that the act complained of was not ultra vires, said: "The question put in the course of the argument, 'would a contract by a railway company for a theater or chapel be void?' exemplifies the doctrine. It would or it would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation, separate from the railway, and prohibited; or, if works were wanted in a waste place, and the company found it to be for their interest to build a town, and supply it with all requisites for inhabitancy, and, in order to secure a permanent supply of workmen of skill and responsibility, added a chapel and a theater, with religious and secular instruction, it might be for the purpose of the railway, and valid; and, though distantly connected, the outlay might be found eventually to increase the profit from the traffic."

In view of these authorities and expressions of judicial opinion, and in the light of the custom that has always prevailed, and still prevails, in this state with corporations organized for mining, lumber, and manufacturing purposes, we are of the opinion that the powers now under consideration, exercised by the defendant in the prosecution of its legitimate business, while they may go to almost or quite the full extent of implied powers that it is authorized to use, still do not, under the circumstances under which it has been placed, and under which it now does business, amount to usurpations of power of which the state has the right to make complaint.

As already suggested, it is admitted by the demurrers to the pleas that the matters alleged therein are true. The statements thus admitted preclude any conclusion that defendant built the houses and tenements, church, school houses, and other structures at Pullman for purposes of speculation or investment, but, on the contrary, show that all that has been done by it in that behalf has been in furtherance of its business of manufacturing, selling, and operating railroad cars. In considering as to whether particular acts of a corporation are within its implied powers, it is necessary to consider not only the purposes for which it was chartered, but also the particular circumstances under which it is called upon to act. As said by Morawetz in the quotation above made from his work on *Private Corporations*: "The right of a corporation to perform an act depends, in every case, upon all the surrounding circumstances. No act is authorized under all circumstances, and facts can be conceived which would render almost any act justifiable." If we take the case at bar,—that of a car-manufacturing company,—and, without any explanation therefor, and as an isolated fact, find that it has erected a church, a school house, or a building to be used as a meat market or fam-

lly grocery store, it might appear that the building of such church, school house, meat market, or storehouse was not within the implied powers of the company. If, however, we take into view a large corporation, in the successful prosecution of whose business the labor of thousands of skilled workmen is required, and which is confessedly pursuing the objects of its incorporation, and then find that its plant, for reasons of such cogency as are set forth in the pleas herein, was located at a place where there were no churches, schools, or stores, and that, in order to attract to it and hold the best and most skilled class of workmen and artisans, the labor of such class of operatives being absolutely essential for the work in which it was engaged, it should erect a school house, church building, house to be used for stores and family supply shops of various kinds, and other like necessary accommodations, and that it did so, not for the purpose of speculating in real estate, or of merely making a remunerative investment of capital, but in good faith for the purpose of promoting the success of its authorized business of manufacturing and dealing in railway cars, then the erection of such structures may fairly be considered to be within the implied powers of the company.

The foregoing authorities and reasonings apply with equal force to all the various uses to which the Arcade Building and Market Hall, erected by defendant, are devoted, and to the 50 acres of land, of which a part is used by defendant's employes as recreation grounds, with their appliances for athletic exercises, a part for pleasure grounds and park, with greenhouse and other like accessories, and the remainder for streets and alleys.

There can be no question but that it was fully within the powers of the defendant to construct a gas plant for the purpose of furnishing light in the buildings which it used in its manufacturing business, a water tower and mains for supplying its various shops with water, and a plant for generating steam to be used in manufacturing its products and in heating its shops. This being so, it is difficult to perceive any sound reason why it might not use any surplus gas that was produced for the purpose of lighting its own buildings occupied by its own employes; or why a small percentage of the water that passed through its water tower and mains, that could not be utilized for strictly manufacturing purposes, might not be furnished to such employes so occupying said houses, and who could not get a supply of water in any other way; or why it might not apply any surplus steam that it generated, to heating such houses, or sell the same for a valuable consideration to some other person or corporation.

In *Brown v. Winnisimmet Co.*, 11 Allen, 326, which involved the right of a ferry company to lease a steamboat which it did not at that time require for use in its own busi-

ness, the court held that such act was not ultra vires, and said, referring to a manufacturing company by way of illustration: "But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its mill pond, or to employ that portion of its steam power which was not required for its own use." Holding the same principle are *Lafond v. Deems*, 81 N. Y. 508, and *Simpson v. Hotel Co.*, 8 H. L. Cas. 711. In *Lyde v. Railway Co.*, 36 Beav. 10, it was held that, if the use of a boat by the railway company was really to assist the traffic on the existing railway, it was lawful and proper, but that if the object was to extend the traffic to places beyond the railway, which the railway was never intended to reach, then it was illegal and beyond the powers of the company; and the court said that a railway company, for the purpose of obtaining coals cheaper than by purchase, might operate a coal mine, and that it might obtain a profit by the sale of such coals as were not required for the use of the company, provided the principal object of the colliery was to supply itself with coal, and not the selling of coals.

If the defendant, in addition to its right of constructing shops in which to conduct the business of manufacturing railway cars, had also the implied power to erect such dwelling houses as were necessary to furnish residences and homes for its employes and their families, and buildings and stores in which could be kept and sold such supplies and provisions as were necessary for their maintenance and sustenance, and halls and other places in which they might worship and their children be educated, and halls and grounds that they might use for purposes of exercise, recreation, and amusement, then, of course, from the very necessity of the case, it had and has the right to own and hold such real estate as is reasonably required for the purpose of placing thereon the various structures and other things above mentioned. And, as we have already seen, among the powers expressly granted to defendant in its charter are these: "To purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of their business," and the privilege of exercising "all powers, rights, privileges, and immunities incident to corporations and necessary or useful for the purposes of the act." When the defendant built its shops and dwelling houses at Pullman, it had the right, as incident to its right to build the same,—and, indeed, it became its duty,—to devise some means to carry off the sewage from said shops and houses, in order to insure their cleanliness, and to guard the health of the workmen and their families. It was competent for the defendant to employ the means best adapted to that purpose, and if, in carrying out the plan adopted, it became necessary to

purchase land on which to empty the sewage, it was within its power to do so. Possession of the land was essential, for it could not otherwise exercise its right to drain off the sewage in the best and most effective manner. The fact that the defendant sees fit to utilize said land by raising vegetables thereon is of little importance. At all events, it is sufficiently answered by the averment in the plea that it raises and sells the same for the purpose of helping to defray the expense of maintaining its sewerage system, which it only in part pays. This is merely the exercise of sound business judgment and economy in not letting go to waste what may be made productive.

There is nothing in these pleas which leads us to believe that public policy would be in any manner served by destroying the plan carried on without objection from the state for 14 years, resulting in no wrong or injury to any one. Appellee does not now, and never did, manage or operate the churches, schools, or stores, nor have any interest in them, and never attempted to exercise any control in public or municipal affairs. The streets are public highways, and the school buildings are under the control and management of the board of education of the city of Chicago for school purposes, under arrangements satisfactory to them. We are not prepared to condemn as usurpations of power the furnishing by appellee to its employés of comfortable and attractive homes, with the surroundings of parks, churches, and public library, not for motives of investment or gain, but, as alleged and admitted, with the object of appealing to the better and more skillful workmen, and securing and retaining them in its employment.

(175 Ill. 36)

GRAY v. SCHOFIELD et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

HOMESTEAD — CONVEYANCE — JOINDER OF WIFE — EFFECT OF ABANDONMENT.

1. A conveyance by a husband of his homestead estate, without the joinder of his wife therein, is ineffectual to pass the title thereto; and the estate remains in the grantor, unaffected by the conveyance, and is to be treated as though it were never made.

2. The subsequent abandonment of the premises as a homestead, when not pursuant to such conveyance, does not vest the homestead estate in the grantee therein, though it extinguishes the homestead right.

Appeal from circuit court, Peoria county; Nicholas E. Worthington, Judge.

Bill by William A. Gray against John A. Schofield and others. From a decree sustaining a demurrer to and dismissing the bill, plaintiff appeals. Reversed.

William S. Kellogg, for appellant. H. C. Fuller and Wm. M. Maxwell, for appellees.

CARTWRIGHT, J. Appellant filed his amended bill in the circuit court of Peoria

county against appellees for partition of certain real estate, and an accounting for rents of the same. Demurrers to this bill were sustained, and it was dismissed at appellant's cost. The following facts were alleged in the amended bill as grounds of the relief prayed for, and were admitted by the demurrers: On July 11, 1881, John Schofield was the owner in fee of lot 12, and 17 feet of even width off the northeasterly side of lot 11, in block 23, in the original town (now city) of Peoria, in Peoria county, with a frontage on Adams street of 89 feet, and extending back 171 feet on Eaton street to an alley, and occupied the same, with his wife, Marion Schofield, as his homestead. On that day he executed a quitclaim deed of all his interest in said real estate to John S. Lee, for the expressed consideration of \$100; and Lee on the same day executed a quitclaim deed, expressing a like consideration, conveying all interest in said real estate to the wife, Marion Schofield. Both deeds were recorded in the office of the recorder of Peoria county on the day of their execution. John Schofield continued to occupy the premises, with his wife, as a homestead. On October 3, 1888, said Marion Schofield, with her husband, John Schofield, for the expressed consideration of \$10,000, conveyed to James Bennett all of said premises, except a strip fronting on Eaton street, near the middle part of the tract, 37 feet wide, and running back with the same width 89 feet across the premises, upon which was the dwelling house occupied by said John Schofield as his homestead, which was retained. On November 1, 1888, A. R. Warren recovered two judgments before a justice of the peace of Peoria county against John Schofield, for \$200 each and costs, upon which executions were issued, and returned "No property found." Transcripts of said judgments were filed in the office of the clerk of the circuit court of said county, and recorded there. On September 21, 1889, executions were issued on said judgments out of the circuit court to the sheriff of said county, and were returned December 21, 1889, "No property found." On November 10, 1890, said A. R. Warren recovered another judgment in the circuit court of Peoria county against John Schofield and others for \$1,160 and costs. John Schofield continued to occupy the 37-foot strip on which was the dwelling house, with his wife, as a homestead, until November 1, 1892, when they abandoned the same and the possession thereof, and established their residence elsewhere. On September 27, 1893, Marion Schofield and John Schofield executed a mortgage to the Anthony Loan & Trust Company on the premises to secure their note for \$1,500. Afterwards, on March 23, 1895, executions were issued on all said judgments, and levied on the interest of John Schofield in the said 37-foot strip; and on May 9, 1895, the premises were sold by virtue of one of said executions to William S. Kellogg for \$1,900. Kellogg assigned the cer-

tificate of purchase to complainant; and on November 19, 1896, a sheriff's deed was executed to complainant, and duly recorded. The premises were rented to Frank McLaughlin by John Schofield and Marlon Schofield, or one of them, for \$50 per month, which they received, and refused to account for any part thereof to complainant. The bill made John Schofield, Marlon Schofield, Frank McLaughlin, and the Anthony Loan & Trust Company defendants. The prayer for partition was that the estate of complainant in the premises claimed by the bill, of the value of \$1,000, should be set off to him, or, if a partition should be impracticable, the premises should be sold, and he should receive the value of his said estate of \$1,000. Complainant also asked that the mortgage to the Anthony Loan & Trust Company should be decreed not a lien upon his interest, and that an accounting for the rents of the premises should be taken.

It is stated in the brief for all the appellees (including the unknown heirs of Marlon Schofield, now deceased, who have been made parties), except the Anthony Loan & Trust Company, as follows: "The only point in this case is, did John Schofield have any interest in the property in question, at the time of the levy and sale under the executions, that could be reached by an execution?" On behalf of the Anthony Loan & Trust Company, under the title of a brief, a number of questions are propounded, but we understand that the above is the only proposition involved.

At the time of the conveyance by John Schofield to Lee, and by Lee to Marlon Schofield, the said John Schofield had an estate of homestead in fee to the extent and value of \$1,000 in the premises attempted to be conveyed. The rights of the parties, and the power to convey this estate, were subject to the provisions of the act exempting the homestead, in force July 1, 1873, by which an estate of homestead was created. Under the previous statute there was no estate of homestead, but simply an exemption; and, if the owner of the premises conveyed them without relinquishing the exemption, the title was transferred subject only to the exemption. The operation of the deed, as against the homestead right, was stayed until the exemption was relinquished or lost, when it became effective. By the statute of 1873, creating the homestead estate, a different rule was established; and a conveyance insufficient to transfer the homestead estate transfers nothing, unless it may operate upon some excess above that estate, the title of which remains in the grantor. This estate is measured by its value, and not by an aliquot part or specific share of the title. It is an estate of \$1,000 in value, and by the statute is exempt from the laws of conveyance, except as therein provided. Where the property does not exceed in value \$1,000, the homestead estate embraces the entire title and interest of the householder, leaving no separate inter-

est. In case he owns anything beyond the homestead estate, it may be conveyed by him the same as any other property in which there is no homestead. *Eldridge v. Pierce*, 90 Ill. 474. The homestead in this case was an estate in fee in John Schofield, and a conveyance which was not sufficient to pass that estate could operate only on the excess in value above \$1,000. *Browning v. Harris*, 99 Ill. 456. Marlon Schofield did not join in the conveyance made by her husband, John Schofield, to Lee, and consequently the deed was ineffectual to pass the title to the homestead. *Kitterlin v. Insurance Co.*, 134 Ill. 647, 25 N. E. 772; *McMahill v. McMahlill*, 105 Ill. 596. If the property attempted to be conveyed was worth more than \$1,000, the conveyance would have no effect upon the estate of homestead, but would transfer the excess, and become operative only as to the remaining interest above that estate. The deed from John Schofield did not affect his title in fee to the extent and value of \$1,000, but as to that estate was a nullity, and the title remained in him. *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983. A deed embracing the homestead, which is inoperative to convey that estate, leaves it in the grantor, unaffected by the deed, and the estate is to be treated precisely as though the deed had never been executed. It may be transferred by a sufficient conveyance, or the title will descend to the heirs at law. *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306. The title may pass if the possession is abandoned or given pursuant to the conveyance, but a voluntary abandonment not pursuant to a conveyance does not pass the title, although it extinguishes the homestead right, leaving the property to be thereafter dealt with as other property. *Eldridge v. Pierce*, *supra*. Abandonment, merely, does not have the effect of vesting the estate in the grantee of an insufficient deed, and in this case there was no abandonment or surrender of possession pursuant to the conveyance of the property by John Schofield. The parties continued to occupy the premises together, and the final abandonment was by both when they secured another homestead, and not in pursuance of the conveyance. When the premises were abandoned, the exemption of the premises as a homestead ceased, but the extinguishment of the homestead did not operate to transfer the title. The estate was exempt from the judgments and the laws of conveyance, upon a condition which then ceased to exist; but that fact could not operate to carry the title to some one else from John Schofield, where it remained precisely as though the deed had never been made.

We conclude that John Schofield had title to the property in question, to the extent and value of \$1,000, subject to levy and sale under the executions. The mortgage to the loan and trust company was made after the estate had ceased to be a homestead, when the premises were subject to the prior liens of

the judgments; and its rights, if any, as against complainant, were cut off, as to that estate, by the sale of the property, and the sheriff's deed. The decree is reversed, and the cause is remanded. Reversed and remanded.

(175 Ill. 42)

**INSURANCE CO. OF NORTH AMERICA
v. BIRD et al.**

(Supreme Court of Illinois. Oct. 24, 1898.)

**INSURANCE—CONTRACTS—PLEADING—VARIANCE—
WAIVER—APPEAL—REVIEW.**

1. Insurer had for a number of years issued an annual policy on the same property through the same agents. Insured testified that shortly before the expiration of the then existing policy he told the agent it misdescribed the property, and he paid the premium for a new one, which the agent agreed to issue at once; all of which the agent denied. *Held*, that the question whether there was an oral contract of insurance, and of the period for which it was to attach, was for the jury.

2. The affirmation by the appellate court of a finding or verdict based on conflicting evidence will not be reviewed by the supreme court.

3. There is no variance where the plea is that the contract of insurance was to take effect on a certain day, and the evidence shows that a prior policy was to expire on that day, and some time before then insured paid the premium for a new one, and told the agent he wanted it written out at once; since such plea only states the effect of the words used.

4. A variance is waived by failure to object to the evidence on that ground when offered.

Appeal from appellate court, Second district.

Assumpsit by John W. Bird and others against the Insurance Company of North America. From a judgment of the appellate court (74 Ill. App. 306) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

Thomas Bates and D. R. Burke, for appellant. Lincoln & Stead and Reeves & Boys, for appellees.

CARTER, J. This was an action of assumpsit, brought in the circuit court of LaSalle county by appellees, upon an alleged parol contract of insurance, against appellant, in which appellees recovered a judgment for \$1,100, which was, on appeal to the appellate court, affirmed, and appellant has further appealed to this court.

The appellees' property had been insured in the appellant company through Baker & Williams, its agents at Streator, Ill., for a number of years, a new policy having been issued each year. While holding such a policy, expiring January 18, 1893, on their store building and furniture and organ located in Kangley, Ill., for \$1,375, the appellee Bird, about Christmas, 1892, as he testified, visited the agents' office, and told Williams that he had discovered a mistake in the description of the lot, and wanted a new policy written out at once, and that correction made; that Williams said, "All right," and made a memorandum of it, and that he (Bird) paid Wil-

liams something over \$26 as the premium, and took a receipt for it; that the policy was never delivered to him; that on November 25, 1893, the building was destroyed by fire, and also the receipt, and on application to Williams the policy could not be found, and appellant afterwards refused to pay the loss. Williams testified that he had no recollection of any such conversation, and showed that he had made no entries concerning the alleged policy, or the receipt of the premium, in his books. He denied receiving the money and the making of the alleged contract. There was thus presented a direct conflict of testimony on the vital point whether or not a parol contract of insurance had been entered into between Bird and Williams.

It is contended that the contract lacked a number of essential elements of such contracts, namely, that the time when the policy was to attach, the time it was to run, and the company in which it was to be written, could not be ascertained from the testimony with certainty. On this subject the court gave the following instruction for the appellant: "The court instructs the jury that, in order to make a valid contract of insurance, several things must concur: First, the parties must agree upon the company in which the insurance is to be placed; second, the amount of the insurance must be definitely fixed; third, the duration of the risk must be agreed upon, and the contract must be definite and certain. The absence of either or any of these requisites is fatal; and if you believe, from all the evidence in this case, that all of the above requisites were not mutually agreed upon and understood prior to the destruction of the property, then the plaintiff is not entitled to recover, and your verdict should be for the defendant." The question of fact was properly submitted to the jury under proper instructions from the court, and the judgment of the trial court and its affirmation by the appellate court are final, and not subject to review here. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Meyer v. Butterbrodt*, 146 Ill. 131, 34 N. E. 152; *Everts v. Lawther*, 165 Ill. 487, 46 N. E. 233. No question is raised as to the instructions, except error is assigned upon the refusal of the court to instruct the jury to find for the defendant; but, as there was sufficient evidence upon which to submit the case to the jury, the instruction was properly refused.

It is further insisted that there is a variance between the allegations in the declaration and the proof. The declaration alleges that the insurance was to commence on January 18, 1893, and Bird testified that he wanted a new policy written out at once, and the correction of the mistake made. We see no variance here. The jury and the circuit and appellate courts found from this testimony and the other evidence in the case that he wanted a new and correct policy written out at once, to commence when the old one expired. The declaration but states the effect:

of Bird's words. Besides, we have been unable to find in the record any objection to the evidence, made at the time, based upon an alleged variance. If such variance appeared, the record should show that it was pointed out to the trial court, and an objection urged on that ground. Failing to do this, the objection was waived. Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801. Nor do we find the point well taken that the court admitted improper evidence over the objection of the defendant. There was no error in this regard. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 307)

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS v. BRUNER.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL AND ERROR—REVIEW—STATE UNIVERSITY—LIABILITY TO SUIT.

1. Where the only written evidence of a contract of employment was a letter from defendant to plaintiff informing him of his appointment as professor, to teach for a year, whether the year was a school year, of nine months, or a calendar year, was a mixed question of law and fact, upon which the determination of the appellate court was final.

2. Where the charter of a state university provided that it might sue and be sued, it may be sued the same as an individual.

Error to appellate court, First district.

Action by James D. Bruner against the board of trustees of the University of Illinois. From a judgment for plaintiff, affirmed in the appellate court (66 Ill. App. 665), defendant brings error. Affirmed.

Cunningham & Boggs, for plaintiff in error. Newman, Northrup & Levinson, for defendant in error.

PER CURIAM. Defendant brought suit against plaintiff in error, in the superior court of Cook county, for an alleged balance due him on salary as a professor in the faculty of the university. On a trial before the court without a jury, judgment was entered for the plaintiff for \$300 and costs, which, on appeal to the appellate court, has been affirmed.

Plaintiff's case is that he was employed to teach in the university for the year 1894-95, beginning September 1, 1894, at a salary of \$1,800; that he taught during the school year ending about June 1, 1895; that he received only the sum of \$1,500 for his services, leaving a balance due him of \$300. The defense sought to be interposed to this claim is that, about the beginning of the vacation of 1895, plaintiff left the institution, and went to Chicago, where, during the months of July and August, he was in the employ of the Chicago University; and it is insisted that for these two months a pro rata amount (\$300) should be deducted from the year's salary. In other words, the controversy between the parties grows out of

the different constructions they place on the contract of employment. Plaintiff's contention is that he was employed for a school year of nine months, the understanding between him and the university trustees being that no services would be required of him during the summer vacation of three months. The defendant seems to understand that it was entitled to the time of the plaintiff for the whole year, of twelve months, whether it needed his services or not, and therefore, if he earned anything by working for others, the amount should be credited on his salary. The only written evidence of the employment, so far as shown by the abstract, is a notification addressed to plaintiff, signed, "W. L. Pillsbury, Secretary," dated July 10, 1893, saying: "The board of trustees of the University of Illinois has appointed you professor of the Romance languages in the university, at a salary of \$1,800 a year, beginning September 1, 1893. Please advise me whether or not you accept this appointment." The appointment was accepted, and it appears that the employment was continued for the next year under the same appointment. On March 16, plaintiff tendered his resignation, to take effect September 1, 1895. He then continued to teach until the beginning of the summer vacation, when he left the institution. Under these facts, we do not regard the construction of the agreement as being before us, even if propositions of law had been submitted to the trial court involving that question. The understanding of the parties was a mixed question of law and fact, to be determined by the court under all the circumstances, and is settled by the judgment of affirmance in the appellate court. The employment of one to teach in a college or university like this for a year cannot, as a matter of law, be said to mean a year of 12 months, in the absence of some showing that such was the understanding of the parties.

The legal points raised here are that the trial court erred in refusing to require the plaintiff to answer as to how much he received from the Chicago University, and in refusing to hold, as a proposition of law, that the defendant could not be sued, being a mere agency of the state. The first of these alleged errors is disposed of by what we have already said, so far as it could have any practical effect upon the judgment below. Under the contract, as construed by the appellate court, it could make no difference what the plaintiff earned or received during the three months of vacation.

The second assigned error is, in our opinion, wholly without merit. The charter of the university expressly provides that it may sue and be sued, plead and be impleaded. The provision is substantially that found in all the charters of charitable institutions of the state, boards of education, school directors, and other similar governmental agencies. It has never been doubted that these cor-

porations could be sued, the same as individuals. We cannot, if we would, disregard the plain language of the statute. The judgment here makes no provision for the issuing of execution, and therefore the question whether the trust property of the institution may be sold to satisfy the judgment is not presented. When the legislature has expressly so stated, we can see no reason why the disputes between corporations like this and others should not be adjusted in the legal tribunals. No rule of public policy prohibits it. The reasoning in the case of *Thomas v. Board*, 71 Ill. 310, is not applicable to this case. There the question was whether the property of this institution could be subjected to a mechanic's lien, and it was answered in the negative. There is a marked distinction between permitting an ordinary suit at law or in equity against this corporation, and permitting its property to be incumbered and sold under mechanic's lien proceedings. The difference is very similar to that which permits a city or county to be sued, but refuses to allow the issuing of an execution on a judgment against them. One of the reasons assigned in the above case for refusing to allow a mechanic's lien is that an adequate remedy is presented in an ordinary suit at law. The judgment of the appellate court will be affirmed. Judgment affirmed.

(174 Ill. 532)

LEONARD v. KINNARE.

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT — INSTRUCTION FOR DEFENDANT — EVIDENCE — SUFFICIENCY — FELLOW SERVANTS.

1. Deceased had been employed by defendant in erecting an iron smokestack next to an eight-story building, and between two perpendicular rows of windows protected by large double iron shutters swinging on hinges. Next to the smokestack defendant constructed a hoisting apparatus in such a way that it became entangled with a heavy iron shutter above the place where deceased was rightfully working, and while he was in the exercise of due care, it was thrown down on him, producing his death. It did not appear that deceased knew of the danger. *Held*, that an instruction for defendant was properly refused.

2. Where a master, in connection with the erection of a smokestack next to a building, erected a hoisting apparatus so near it that the rope and tackle became entangled with an iron shutter, causing it to fall and kill a servant working about the smokestack, the fact that deceased and the men operating the hoisting apparatus were fellow servants does not affect the right to recover for his death, since the negligence relied on was that the apparatus was not properly erected.

Appeal from appellate court, First district.

Action by Frank T. Kinnare, as administrator, etc., against James Leonard. A judgment for plaintiff was affirmed in the appellate court (75 Ill. App. 145), and defendant appeals. Affirmed.

Walker & Eddy, for appellant. James Maher, for appellee.

CRAIG, J. This was an action brought by Frank T. Kinnare, administrator of the estate of Michael Weir, deceased, against James Leonard, to recover for an injury received by Weir while in the employ of the defendant, resulting in his death. The declaration alleged that on the 14th day of October, 1895, defendant was engaged in the erection of a large iron smokestack at the Reaper Block, in the city of Chicago; that Michael Weir, deceased, was a minor of tender years, in the employ of the defendant at that place; that defendant then and there erected and operated a certain hoisting apparatus or tackle, composed of certain ropes and pulleys and other attachments and appurtenances, in close proximity to the said iron shaft or smokestack; that defendant "then and there carelessly, negligently, wrongfully, and improperly so placed, attached, adjusted, and operated the said hoisting apparatus or tackle, together with the ropes and tackle and appliances thereof, in such a manner as to permit the said hoisting apparatus or tackle to come in contact with, and be caught and entangled with, a certain heavy iron shutter, on or about one of the windows of said Reaper Block, said shutter then and there being over and above the place where said Michael Weir, deceased, was then and there rightfully working, and while he was using due care and diligence about his own safety, and the said iron shutter was then and there, by means of the premises aforesaid, then and there pulled and detached or precipitated down to and upon the head and body of Weir, causing his death." The defendant pleaded the general issue, and on a trial before a jury plaintiff recovered a verdict for \$1,200, upon which the court entered judgment. The defendant appealed to the appellate court, where the judgment was affirmed. To reverse the judgment of the appellate court the defendant has appealed to this court, and in the argument relies upon but one error to reverse the judgment, viz. that the trial court erred in refusing to instruct the jury to find for the defendant.

The appellate court in its opinion states the facts as they appear from the evidence, and upon examination of the record they will be found to be substantially correct. They are as follows: "On October 14, 1895, appellant, a contractor, was erecting a smokestack made of sheet iron, about five feet in diameter, against the south wall of the Reaper Block, in Chicago,—a building of eight stories in height,—and between two tiers of windows. The stack was being put up in sections, which were brought from the shop, hoisted up by a rope and tackle, and then riveted together. Two men, Kennedy and Graney, were riveting, and Weir was their helper, heating rivets,—all employés of appellant. Weir was 19 years and 11 months of age. The building was not occupied, but was undergoing repairs, a Mr. Illsly being

the contractor for the repairs, but he and his men had nothing to do with appellant or his employes. There were many windows on the south wall of the Reaper Block, and these windows were protected by large double iron shutters swinging on hinges. A shutter, when opened straight out from the wall of the building, extended 2 feet 9 inches from the wall, and it was the falling of one of these shutters which killed deceased. In order to raise the sections of the smokestack and put them in place, appellant had rigged a hoisting tackle. A piece of heavy timber had been placed on the roof of the building. It projected over the roof about 22 inches. From the end of this timber a rope and tackle hung. This dropped down so that it came about over the center of the smokestack. The rope and tackle dropped down about between two rows of windows, and was 18 to 20 inches from the wall. On the day of the accident four of appellant's men, including deceased, were working at the stack. The foreman, a man by the name of Gow, was inside the stack, in a position where he could not see what was going on outside, and he had nothing to do with what the deceased and the other two men were doing at the time of the accident. He had given them no orders or directions regarding the particular work they were doing, and that which they were doing they were doing in their own way, according to their own methods. The block and tackle had been put up under the directions of Gow, the foreman of appellant. At the time of the accident the top of the smokestack was about 30 feet from the ground. It was up to the third story of the building. Weir, the deceased, was standing inside, leaning over the top, his body projecting above the top of the stack about from his waist; in other words, his legs were inside the stack while his body was up above the top. Kennedy and Graney, the other two employes of appellant, were down below, on the ground, and they were hoisting a 'dolly-bar,' which is a big hammer with a long handle, to hold against rivets when the men were riveting. They had fastened the dolly-bar to the rope, which extended below the lowest block of the double block and tackle, and both men were hoisting away without glancing upwards. At the same time Weir, the deceased, was leaning over the top of the stack, either looking to catch the hammer or helping the men below. Kennedy says Weir was pulling on the same rope with them. The day was windy, and the shutter that fell off was open and extended out from the wall, and was about 30 feet above Weir. Owing to the lightness of the dolly-bar being lifted and the wind, the ropes were flapping, and so was the shutter. The flapping rope caught and jerked the corner of the shutter, knocking it down. The knot in the rope or the block caught the shutter and lifted it off its hinges, letting it down. It fell and struck deceased."

51 N.E.—44

There was also evidence that the shutters had been repeatedly fastened. It also appeared from the evidence that when the shutters were open they projected at least one foot beyond the beam upon which the tackle was fastened. The deceased had nothing to do with the construction of the block and tackle. Gow, who was foreman, had charge of the work for the defendant, and the block and tackle had been put up under his direction.

In a case of this character it is not the province of this court to pass upon the weight of the evidence. Where, however, the court has refused to instruct the jury, as was the case here, to find for the defendant, the question for determination is whether the evidence, with all the inferences the jury might properly draw from it, was insufficient to support the verdict. We have given the evidence a careful consideration, and do not think the court would have been justified in taking the case from the jury by an instruction to find for the defendant. The law is well settled that the master is bound to exercise reasonable and ordinary care and diligence in providing safe machinery and appliances for the use of those who are employed in his service. *Manufacturing Co. v. Erling*, 148 Ill. 521, 36 N. E. 117. Here the charge of negligence was that the defendant constructed a hoisting apparatus, or rope and tackle, in such manner that it came in contact and became entangled with a heavy iron shutter, which was over and above the place where the deceased was rightfully working in the service of the defendant, and while the deceased was in the exercise of due care the iron shutter was thrown down and upon the deceased, producing his death. As has been seen from the evidence, the iron shutters, when opened, projected much further from the side of the building than the tackle, so that it necessarily followed that the shutters, when opened, would come in contact with the tackle. Under such circumstances, we think it is apparent that the jury were justified in finding, from the evidence, that the placing of the beam and tackle in the manner in which they were placed was negligence, and likely to result in injury to those employed as was the deceased. As has been seen, it was the duty of the defendant to use reasonable care and diligence in providing appliances where the deceased was required to labor, and, while the deceased was bound to take notice of defects which were patent, he was not required to make an examination for defects, and he might properly act on the presumption that the master had used reasonable care in placing the tackle for his work so as to make it reasonably safe. *Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225. It nowhere appears that the deceased had any knowledge of the defective or dangerous construction of the tackle.

It is, however, said that the deceased and.

the two men using and operating the tackle at the same time were fellow servants. Conceding that the deceased and those with whom he was working at the time of the injury were fellow servants, including Gow, who had charge of erecting the tackle, that has no bearing on the case. Here the injury resulting in the death of the deceased did not arise from any negligent act of the men in operating the rope and tackle at the time the deceased was struck and killed by the falling shutter, but the negligence relied upon was that the block and tackle were not properly constructed by the defendant's foreman. The duty of the master to exercise reasonable care in providing safe instrumentalities where servants are required to work is a positive obligation towards the servant, and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743; *Railway Co. v. Avery*, 109 Ill. 314; *Railway Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826. The judgment of the appellate court will be affirmed. Judgment affirmed.

(175 Ill. 396)

WEST CHICAGO ST. R. CO. v. FOSTER.
(Supreme Court of Illinois. Oct. 24, 1898.)

STREET RAILROADS—COLLISION—DAMAGES—TRIAL—DIRECTING VERDICT—QUESTIONS FOR JURY.—APPEAL AND ERROR—WAIVER OF ERROR.

1. Where, at the close of plaintiff's evidence, defendant moves to take the case from the jury and direct a verdict for defendant, and the motion is renewed at the close of all the evidence, a written instruction directing the verdict must be presented with the motion.

2. A failure of defendant to present an instruction directing a verdict with his motion to direct is not supplied by his presenting such instruction with his series of general instructions.

3. Where defendant did not present a written instruction directing a verdict with his motion to direct, the error in refusing to direct was waived by his presenting such instruction with his series of general instructions.

4. It was not error to instruct that if plaintiff's intestate was injured by collision with a street car while exercising due care, and defendant omitted to do certain things, plaintiff could recover, as plaintiff was entitled to have the jury instructed on his theory of the case.

5. In determining the damages resulting from personal injuries to plaintiff's intestate, the jury should consider the nature of the injuries, his physical and mental suffering, and his loss of time.

6. Plaintiff's intestate, two years after receiving personal injuries, died of abscesses which formed on the liver, the cause of which was unknown. In an action for the injuries, *hæd*, that the question of the cause of his death was properly withheld from the jury.

Appeal from appellate court, First district.

Action by Henry A. Foster, administrator of the estate of Michael Connell, against the West Chicago Street-Railroad Company. There was a judgment for plaintiff, affirmed by the appellate court (74 Ill. App. 414), from which defendant appeals. Affirmed.

This was an action on the case, originally begun by Michael Connell, against appel-

lant, for injuries alleged to have been received by him June 29, 1894, through the negligence of defendant, as charged, in running one of its cars against his wagon, and throwing him out. Connell died November 26, 1896, and appellee, Henry A. Foster, was appointed administrator of his estate, whereupon the death of Connell was suggested, and leave given to prosecute the suit further in the name of the administrator. Upon the trial of the case in the superior court of Cook county, a jury rendered a verdict in favor of the plaintiff for \$5,000. A remittitur of \$2,000 was entered, whereupon the court overruled the motion for a new trial, and rendered judgment on the verdict for \$3,000. Upon appeal to the appellate court for the First district, this judgment was affirmed, and appellant has prosecuted this further appeal.

Alexander Sullivan (Edward J. McArdle, of counsel), for appellant. Blaisdell & McCaskill, for appellee.

PHILLIPS, J. (after stating the facts). Error is assigned by appellant on the refusal of the trial court to allow its motion, made at the close of plaintiff's evidence to take the case from the jury, which motion was renewed at the close of all the evidence. The record discloses that the motions were made as alleged, but neither of them was accompanied by an instruction. Such condition of the record presents no legal question for review in this court, as to the refusal of the trial court to grant such motion. Where a motion is made at the close of plaintiff's evidence to take a case from the jury and direct a verdict for the defendant, and is renewed at the close of all the evidence, a written instruction directing such verdict must be presented with the motion. When a written instruction is not so presented, and error is assigned on the refusal of the court to give the instruction, this court has not before it any legal question for determination. *Railway Co. v. Christenson*, 170 Ill. 383, 48 N. E. 962; *Swift & Co. v. Fue*, 167 Ill. 443, 47 N. E. 761; *Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946. In this case defendant offered a general instruction with its series directing the jury to find for the defendant, but that was not sufficient to bring it within the rule above stated. Its right to assign error upon the refusal to give such instruction at that time was waived by offering it with other instructions. *Pelce v. Walters*, 164 Ill. 560, 45 N. E. 1068; *Railroad Co. v. Yund*, 169 Ill. 47, 48 N. E. 208; *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430; *Railway Co. v. Delaney*, 169 Ill. 581, 48 N. E. 476. The motion, therefore, to take the case from the jury not being accompanied by an instruction so directing the jury, no discussion of the facts in the case is necessary.

It is urged by appellant that the trial court erred in giving to the jury the second

and third instructions for plaintiff. The second instruction complained of is as follows: "The court further instructs the jury that if they believe from the evidence that the said Michael Connell, deceased, attempted to cross over the defendant's tracks at or near 1280 Milwaukee avenue, in the city of Chicago, on or about the 29th of June, 1894, as alleged in the plaintiff's declaration, or some count thereof, and that while crossing over the same he was struck by one of the defendant's cars, and was injured thereby, and that at the time he attempted to cross the same he saw defendant's car coming along said tracks, and that a reasonably prudent man would have reason to believe, from the distance said car was away, there was sufficient time to cross over said tracks safely before said car would reach the place where the deceased was attempting to cross; and if they further believe from the evidence that the said Michael Connell, deceased, acted upon that belief, and was using due diligence and care to cross over the defendant's said tracks, and get off the same, so as to avoid a collision; and if they further believe from the evidence that the defendant's servants and agents who were managing said car saw the said Michael Connell, or by the exercise of ordinary care could have seen him, in time, after he started to cross said tracks, to have slowed up its said car and have prevented said collision, then it was their duty to have done so, and a failure to perform such duty would be such negligence upon the part of defendant's agents as would render the defendant liable, provided they further believe from the evidence that a failure to check the speed of said car was the proximate cause of said injury, and that the plaintiff's intestate was in the exercise of due care for his own safety at and before the time of collision." This instruction is objectionable, in some respects, in form, but not seriously so. In substance it tells the jury that if they believe the plaintiff's intestate was injured in a certain manner while he was himself in the exercise of due care and caution, and if they believe the defendant's servants did or omitted to do certain things, the plaintiff is entitled to recover. Either party has the right to have the jury instructed as to his theory of the case.

The third instruction of plaintiff objected to by appellant is on the measure of damages. It tells the jury that, if they find the defendant guilty, then, in assessing plaintiff's damages, they should, from the evidence, take into consideration the nature and extent of the injuries of the deceased, his suffering in body and mind, if any, resulting therefrom, and loss of time, if any has been proven. This instruction stated the correct rules which should govern a jury in assessing damages where the plaintiff is entitled to recover. This suit was prosecuted under the act of 1872, and not under the

act of 1853. There was no error in the trial court giving to the jury this instruction.

It is also urged that the trial court erred in refusing to submit to the jury the question of the cause of death of plaintiff's intestate. Connell, as before stated, died about two years and four months after the injuries complained of. Counsel for appellant, in their brief filed in the appellate court and refiled in this court, say: "It appears that he died from cancer of the liver, or because of abscesses forming on the liver; the doctors not agreeing as to what it was, and also being entirely unable to state what caused the abscesses or cancer of the liver, and hence unable, as they both admit, to tell the cause of his death. In other words, they admitted that they could not say whether the fall caused the death of Connell or not." It was not necessary for the trial court, under the circumstances, as this case was tried, to present such an issue to the jury. Under the admission of counsel, and the instructions given to the jury, it is apparent the case was tried on the theory that, if the verdict should be for the plaintiff, he would be entitled to recover for bodily pain, suffering, and loss of time of the deceased, occasioned by the injuries.

We are precluded from any discussion as to contributory negligence on the part of the intestate, or the question of appellant's negligence, for the reason that they are questions of fact, and, in the condition of this record, cannot be inquired into.

Upon the trial of the cause, appellant offered 23 instructions, only two of which were refused, one being the general instruction to find for the defendant. The record shows the jury to have been fully and properly instructed. An examination of this record discloses no errors of law, and, the facts having been settled by the judgment of the appellate court, that judgment, affirming the judgment of the superior court of Cook county, is affirmed. Judgment affirmed.

(174 Ill. 371)

MARTIN et al. v. MARTIN.

(Supreme Court of Illinois. Oct. 24, 1898.)

NOTES — POSSESSION — OWNERSHIP — GIFT INTER VIVOS — EVIDENCE — DECLARATIONS.

1. The possession of undorsed negotiable notes is prima facie evidence of ownership in the holder.

2. Possession of undorsed negotiable notes, in the absence of evidence to disprove that they were delivered to the holder by the payee, is presumed to be rightful.

3. Testator had given indorsed securities to his niece, prior to his final illness, which she kept in a cloth case. He kept certain of his securities in a tin box. Two legatees testified that during testator's final illness they saw him bolstered up in bed, with the tin box opened, and some of the papers on the bed, talking and looking at his niece, and that both were handling papers at the time. One testified that shortly afterwards the niece showed the witness one of the two notes in controversy, saying that testator had given it to her. Testator's bed was

about nine feet away, and there was nothing to prevent him hearing the niece's remark, and he made no reply. A few days before his final illness, testator came to the niece's room, where she and witness were, and asked the niece for her papers. She gave him the cloth-covered package, and he returned shortly afterwards with the package, saying, "Here are your papers." The niece opened the package, and witness saw the other note in controversy, which the niece stated belonged to her. A few hours after testator's death she stated to other witnesses that the notes in the cloth-covered package, including the two notes in controversy, were given to her by testator. The niece testified that on the morning of her uncle's death she took the bundle of securities, and showed them to said witnesses; that the two notes in controversy were then in her possession in the package; that she had not put anything in the package after the death of her uncle; that from the time of his death until then she had not seen the notes, and had not touched the package. The only possible contradictory evidence was that one of the witnesses had testified at a former hearing that testator seemed to be in his right mind during his last illness, and was able to write his name, and that, when he came into the niece's room, he had said that he wanted the papers for the purpose of indorsing some interest, and that he put the interest down on them, and returned them to her. The witness denied making such statements. *Held* sufficient to show that the niece came into possession of the two notes as owner by the acts of testator.

4. In an action to determine the ownership of notes claimed to have been given to defendant by testator in his lifetime, declarations of ownership by defendant while in possession of the notes, both before and immediately after testator's death, are admissible in evidence.

Error to appellate court, Second district.

Petition by Serena M. Martin as executrix and by others as executors of the estate of Edward Martin, deceased, against Serena M. Martin individually, to determine the ownership of certain notes. From a decree of the appellate court (74 Ill. App. 215) reversing a decree for petitioners, they bring error. Affirmed.

Henry W. Wolseley, for plaintiffs in error. Robert L. Tatham and Henry S. Wilcox, for defendant in error. Hopkins, Thatcher & Dolph and N. J. Aldrich, for interested legatees.

BOGGS, J. The parties hereto are executors and executrix of the last will and testament of Edward Martin, deceased. They filed a joint petition in the county court of Kendall county, in which they represented that the executrix, Serena M. Martin, had in her possession, as an individual, a note executed by the Catholic bishop of Chicago to the decedent for the sum of \$5,500, and also another note executed by the Catholic bishop of St. Joseph, Mo., to the said decedent, for the sum of \$15,000, and that she claimed the notes as her individual property, and that the executors of the deceased claimed the notes in question constituted a part of the assets of the estate. The prayer of the petition was that the court should hear and determine the question as to the ownership of the notes. The court heard the controversy, and decided it adversely to the defendant in

error. She appealed to the circuit court of Kendall county, and a hearing was had in that court, with like result as in the county court. She prosecuted an appeal to the appellate court for the Second district. The cause was submitted in the appellate court, and an order or decree entered reversing the decree of the circuit court, and remanding the cause, with directions to the circuit court to enter a decree or order declaring the notes in controversy to be the property of the defendant in error, Serena M. Martin. This is a writ of error brought to reverse the judgment of the appellate court. On the hearing in the circuit court, the executors, Beers and O'Connor, voluntarily, and properly, as we think, assumed the position of petitioners or complainants, and the defendant in error the position of defendant. The petition averred that the notes in question were in the possession of the defendant in error under the claim they were her private property. The law will not require one in the possession of a chattel or security, negotiable or otherwise, under claim of ownership, to deliver the same over upon the mere adverse claim of another; but will only disturb such possession upon proof of the right of such adverse claimant; that is to say, the presumption of the law is that one so in possession is *prima facie* entitled to remain in possession until the contrary is made to appear by proof. Any other rule would require every citizen to yield to the mere assertion of another. It therefore became incumbent upon the petitioning executors, in order to obtain favorable action upon the part of the court, to introduce such proof as would warrant an order that the defendant in error should deliver up possession of said notes. This they essayed to do. The only proof presented in that behalf was to the effect that the consideration of each of the two notes in question was money loaned by the testator in his lifetime to the respective makers of the notes; that the notes were executed by the makers, and made payable to the testator or his order, and were delivered to him during his lifetime, and had not been assigned. This proof was not sufficient to warrant the court to make an order that the notes should be surrendered by the defendant in error to the representatives of the deceased. The possession of an unindorsed note is *prima facie* evidence of ownership in the holder. *Ransom v. Jones*, 1 Scam. 291; *Curtiss v. Martin*, 20 Ill. 557; 2 Pars. Notes & B. pp. 52, 53, 444. The right to the possession and full beneficial interest in an unindorsed negotiable paper may pass by manual delivery of the paper, and, in the absence of testimony tending to disprove that the notes were delivered, the presumption will obtain that one in the possession of such paper came rightfully into possession. Hence, this evidence alone considered, it seems clear the finding and order of the court should have been for the defendant in error. But the defendant in error proceeded to produce testimony

in her own behalf to sustain her claim of ownership to the notes, and this testimony must be considered to determine whether it disclosed facts and circumstances adverse to her claim upon which the judgment of the trial court can be sustained.

It appeared from the testimony that Edward Martin was a man well along in years at the time of his death. He resided at Red Hook, N. Y., which place had long been his home. The defendant in error was his niece, and had lived with him since she reached the age of 9 years,—a period of more than 40 years,—and for 14 years before his death had the full charge and care of his home. It was admitted by the parties that some time prior to his final illness he gave to the defendant in error other notes and securities of the aggregate amount of \$50,200, all of which he duly indorsed and assigned to her in writing. She kept these securities in a bundle or package enveloped in a wrapper of "curtain calico," and this package or bundle she kept in a cupboard in the room occupied by her in the house of the deceased. It appeared the deceased was possessed of certain securities which he kept in a tin box having a combination lock, called by him the "rat-proof box." He kept this box in a clothes press in the room which he occupied and where he slept. It was stipulated the notes in controversy have been in the possession of the defendant in error and her attorneys ever since the death of the testator. The final illness of the testator began on Saturday, November 25, 1893, and terminated fatally on the morning of Sunday, December 3, 1893. Elizabeth H. Martin, who was a niece and member of the family of the deceased, and is a legatee under the will, testified that on either Tuesday or Wednesday prior to his death, and while he was confined to his bed in his last sickness, she passed through his room, and saw him "bolstered" up in his bed; that the defendant in error was standing near the bed; that the "rat-proof box" was lying open upon the bed, and the deceased and the defendant in error were engaged in looking at and handling some papers which were in the box; that some of the papers were lying on the bed, and that the deceased was looking at the defendant in error, and talking to her. Margaret J. Martin, a sister of the defendant in error, and niece and legatee of the testator, testified she was standing near the door which opened from an adjoining room into the room where the testator was lying on his bed on the occasion testified to by Elizabeth H. Martin, and that she saw the deceased sitting up in bed, supported by pillows, with his "rat-proof box" on the bed before him; that the defendant in error was near his bed, and they were engaged in talking; that she saw the defendant in error take the box from the bed of the testator, and put it in the place where it was kept in the clothes press, and that the defendant in error came directly to the witness, and showed her one of the notes

in controversy,—the \$15,000 note given by the Catholic bishop of St. Joseph,—and made a remark to her in an ordinary tone of voice; that the bed of the deceased was about nine feet away, and that there was nothing that the witness knew of to prevent him hearing, but that he made no reply. This remark was that the deceased had given the note to her, and told her to put it with her other papers. It was objected to, but was heard by the court, and the determination of its competency reserved. This same witness testified that she first saw the other note—that for \$5,500, given by the Catholic bishop of Chicago—about two weeks before the death of the testator, and prior to his last sickness; that she (the witness) and the defendant in error were at the time in the room occupied by the defendant in error in the house of the testator; that the said testator came to the door of the room, and asked the defendant in error for her papers; that she went to the closet, unlocked it, took out a package of papers which were done up in a piece of "curtain calico," and handed it to him, and he went away with it; that he soon afterwards returned, brought back the package, and said to the defendant in error, "Serena, here are your papers," and went away; that the defendant in error opened the package, and showed the contents to her (the witness), and that she (the witness) saw there, among other papers, the note for \$5,500 given by the Catholic bishop of Chicago, and here in controversy. The witness testified that the defendant in error made a remark to her at the time she saw the note, but the court held the remark was not competent to be considered in evidence, and refused to allow the witness to give the remark. Counsel on behalf of the defendant in error then offered to prove by the witness that the defendant in error, at the time in question, stated that the note she (the witness) was looking at—the \$5,500 note—was hers; that Martin had given them (the notes in the package) to her; but the court refused to allow the proof to be made. This witness and one Jackson Jaques testified that on Sunday morning—the same day and a few hours after the death of the testator—they saw both the notes in controversy; that the defendant in error went to a cupboard in the room occupied by her in the house of the deceased, unlocked the door of the cupboard, and took out a bundle wrapped in "curtain calico"; that the defendant in error opened the bundle, and that the witnesses examined the contents thereof; that the bundle contained eleven notes and some trust deeds, among the notes being the two in controversy, which, as both witnesses testify, they saw and identified. The defendant in error offered to prove by these witnesses that at the time the defendant in error exhibited the notes to them she told them the notes were hers; that her uncle, Edward Martin, had given them to her. The court refused to hear the proffered proof, but on a later day, while the cause was still on

hearing, allowed the witness Margaret J. Martin to testify the defendant in error stated to her and Jaques at the time in question that the notes in the package, including those in controversy, belonged to her, and that the deceased uncle had given them to her. The court, however, reserved decision as to the competency of the testimony, and subsequently sustained the objection to all the declarations and statements of the defendant in error about the notes in controversy as being incompetent, immaterial, and self-serving. The defendant in error testified that on Sunday morning after the death of her uncle, the decedent, she took the bundle of securities from her closet, and showed them to her sister Margaret and Jackson Jaques; that the two notes in controversy were then in her possession in the package; that she had not put anything in the package after the death of her uncle; that from the time of his death until she went to the closet with her sister and Jaques she had not seen the notes, and had not touched the package. This was, in substance and materiality, all the evidence produced in behalf of the defendant in error. The testimony of one of the solicitors for the legatees under the will of the deceased, who acted as stenographer on the hearing of the cause in the county court, which was produced in rebuttal, tended to show that the said witness Margaret J. Martin testified on that occasion that the deceased seemed to be in his right mind during his last illness, and was able to write his name; and that the deceased, when he came into the room, and asked the defendant in error for her bundle of papers, said that he wanted the papers for the purpose of indorsing some interest, and that he put the interest down on them, and returned them to her. The witness Margaret J. Martin denied that she made such statements as a witness on the former hearing.

We find nothing in this testimony which can fairly be deemed to militate against the presumption of ownership arising from the possession of the defendant in error, or otherwise to operate adversely to her cause. Upon the contrary, we think a fair and impartial consideration of the testimony sufficiently establishes that the defendant in error came into possession of the notes by acts of the decedent done for the purpose of constituting her the owner thereof. The suggestion that she held them for safe-keeping, or otherwise, as a mere bailee, cannot be reconciled with the evidence. We think the court erred in excluding from consideration such of the declarations of the defendant in error as amounted to a statement or claim of ownership in her. *Rigg v. Cook*, 4 Gilman, 336; *Yates v. Shaw*, 24 Ill. 368; *Rowley v. Hughes*, 40 Ill. 316; *Amick v. Young*, 69 Ill. 542; *Whitaker v. Wheeler*, 44 Ill. 440; *Thomas v. Town of Butler* (Ind. Sup.) 38 N. E. 808. The other of her declarations sought to be proven related to past transactions, and were,

for that reason, incompetent. We concur in the conclusion reached by the appellate court that the defendant in error should have prevailed in the circuit court. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 383)

GROSSMAN et al. v. COSGROVE.

(Supreme Court of Illinois. Oct. 24, 1898.)

EXCESSIVE JUDGMENT—REVIEW—APPEAL FOR DELAY.

1. The judgment of the appellate court as to whether or not a judgment for damages for personal injuries was excessive is conclusive.

2. Where an appeal is taken from a judgment of the appellate court on the only question raised in such court, that the damages were excessive, as the decision of the appellate court was conclusive it will be presumed that the appeal was for delay, authorizing damages therefor.

Appeal from appellate court, First district. Action by William S. Cosgrove against Herman Grossman and others for personal injuries. The appellate court affirmed a judgment (75 Ill. App. 385) in favor of plaintiff, and defendants appeal. Affirmed.

Hofheimer & Pfau, for appellants. James J. Barbour and Alfred E. McCordic, for appellee.

CARTER, C. J. This is an appeal from a judgment of the appellate court affirming a judgment of the superior court of Cook county in favor of appellee. William S. Cosgrove, the appellee, was permanently injured in an elevator through the negligence of appellants' servant, and was awarded \$5,000 damages. The only question argued in the appellate court was that the damages were excessive. That court found against appellants' contention, and they have refiled their appellate court brief in this court, raising the same question here. As this is a question of fact, it is settled by the judgment of the appellate court, and there is therefore no question presented of which we have jurisdiction. In this state of the case, we think the request of appellee, that appellants be adjudged to pay damages for the delay, should be granted. It is impossible that a reversal of the judgment of the appellate court should have been hoped for on this appeal. It must therefore have been prosecuted merely for delay, and appellants should pay damages for such delay, under the statute. *Railway Co. v. Lewis*, 168 Ill. 249, 48 N. E. 153. The judgment of the appellate court will accordingly be affirmed, and judgment will be entered in this court against appellants, and in favor of appellee, for 5 per cent. of the judgment so sought to be reversed,—that is, for \$250,—for such delay, in addition to costs of the appeal, and execution will be awarded therefor. Judgment affirmed.

(175 Ill. 45)

JUSTEN v. SCHAAF.

(Supreme Court of Illinois. Oct. 24, 1898.)

BOUNDARIES—EVIDENCE.

1. A plat of a survey of an addition made by a private surveyor is admissible to prove the boundary between two lots thereof without proof of its execution, authentication, and record.

2. Where a surveyor has testified fully as to making a survey, a plat thereof made by him from notes of the survey, and evidence of its correctness, is admissible as explanatory of his testimony; and this, even when made at a later time.

Appeal from circuit court, Cook county; Abner Smith, Judge.

Ejectment by Matthias Justen against George SchAAF. From a judgment for defendant, plaintiff appeals. Reversed.

Chytraus & Deneen and Edwin White Moore, for appellant. Moran, Kraus & Mayer, for appellee.

BOGGS, J. Appellant is the owner of lot 20, and appellee of lot 19, both in block 1, in Goodspeed's subdivision of part of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 39, township 38 N., range 14 E., in the city of Chicago. Lot 19 adjoins lot 20 on the south. Appellee maintained a fence which he claimed stood upon the north line of his lot, while the appellant claimed the fence stood 1.6 feet north of the said line. Appellant brought ejectment to recover the disputed strip of ground, and the cause was submitted to a jury for trial. The parties stipulated that appellant was the owner of said lot 20, and appellee of said lot 19, and that the only matter to be determined was the true location of the line between the said lots. At the close of the evidence introduced on behalf of the plaintiff below, the court, on motion of the defendant below, granted a peremptory instruction to the jury to find the defendant not guilty. Verdict and judgment for the defendant were accordingly entered, and this is an appeal brought to reverse the judgment.

It is assigned as for error the court improperly excluded evidence offered in behalf of the appellant, and erroneously directed a verdict for the appellee. The appellant produced as a witness one J. Q. Baird, a civil engineer and surveyor. He testified that he surveyed and located the boundary lines of said lot 20, and in order to do so surveyed the whole of said N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and when he had completed his survey he ascertained the corners of said lot 20, and at each corner placed a stake in which a nail had been driven, and that he pointed out such stakes to the appellant. The witness, the surveyor, stated in detail the manner in which he made the survey and ascertained the various corners and street lines, the points to and from which he made measurements, and that he found a number of stakes, evidently placed there by other surveyors at former times, and also the remains of some old cedar stakes, which he found below the surface of the ground, the

upper parts of the stakes having rotted away. He further testified that at the time of making the survey he made memoranda thereof, including memoranda as to the location of such stakes and parts of stakes, and that he afterwards, and within a month or two, made a plat of his survey, including said Goodspeed's subdivision, and noted on the said plat the places where he found such stakes. He further stated that the notes or memoranda made by him at the time he made the survey "had fallen into the water and was destroyed," and that he had "a part of it, but not the main part of it." Counsel for appellant (plaintiff below) offered in evidence the plat which the surveyor had prepared from said memoranda before destruction or partial destruction, and on which, as the surveyor testified, the location of the stakes and parts of stakes before mentioned was noted. The court ruled the plat was not competent to be received in evidence. Appellant testified the surveyor showed him the stakes placed by said surveyor at the corners of said lot 20, and that the stakes so located by the surveyor at the southwest corner of lot 20 and at the southeast corner of lot 20 were 1 foot and 6 inches south of appellee's fence.

We think the court erred in refusing to submit the case to the jury. The evidence not only tended to support the contention of the appellant, but, in our view, in the absence of countervailing testimony, was sufficient to support a finding in his favor. It was the duty and province of the jury to investigate the facts in dispute and weigh the force of the testimony. The effect of the motion to withdraw the case from the jury was to admit the truth of the testimony produced, and the truth of all conclusions of fact which a jury might fairly draw from such testimony, and to ask the court to apply the law to this admitted state of case. A defendant cannot, by such a motion, compel the plaintiff to submit a controversy as to the facts to the court; for that would be to deprive the plaintiff of the right guaranteed by the constitution to have his cause, upon its facts, tried by a jury. Accepting the testimony of the surveyor and of appellant as being true, and giving to the appellant the benefit of all inferences reasonably to be drawn therefrom, we think a case was presented which should have been submitted to a jury.

The plat offered in evidence has been preserved by the bill of exceptions. It purports to be a diagram of a survey of said lot 20 made by the said J. Q. Baird, and includes a plat of said Goodspeed's subdivision, and of one or more adjoining subdivisions, showing the streets, alleys, lots, and blocks, with figures indicating the widths and lengths of lots and the widths of streets and alleys. We observe noted upon it seven points, being lot corners in block 2, in said Goodspeed's subdivision, as the points where the stakes mentioned by the surveyor were found, and also points in other parts of the subdivision

where other stakes were found. One of such points was directly across the street from the northwest corner of said lot 20. This plat was not authenticated as is required by the statute with reference to a plat laying out a city or town or making additions to a town or city. But it was not offered for the purpose of proving the laying out of a city or town or of any addition to a town or city. The parties had admitted that they were, respectively, the owners of the lots in the subdivision named, and that the only dispute between them was as to the location of the boundary line between the lots. This obviated the necessity of proof upon the part of the plaintiff that the subdivision had been made, and a plat thereof duly executed, authenticated, and recorded.

Maps, plats, and diagrams explanatory of locations may be introduced in evidence in connection with the testimony of a witness and as explanatory thereof. Such documents often conduce to clear and comprehensive views of testimony relative to places, points, and localities, and the respective positions thereof, and either party may produce in evidence maps, plats, or diagrams for that purpose. It is the duty of the court to require, as preliminary to the admission of such documents in proof, that evidence be produced tending to show them to be correct, and the court may also see the plat or map does not contain any written statements which may be taken by the jury as proof as to disputed facts. Such drawings are not produced as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony in the case. The surveyor had testified fully as to the manner in which he made the survey, and that while doing so he found certain old stakes, and stated to the jury where some of such stakes were found. It was therefore competent for the appellant to offer to produce before the jury, in connection with the testimony of the surveyor, and for the purpose of enabling him to point out such places to the jury, a map or plan of such subdivision, and of the adjoining subdivisions, so marked as to indicate the places where the stakes in question were found; and evidence tending to show that such map or plat was a correct representation of the subdivision, and correctly indicated the points where such stakes were found, was proper for the consideration of the jury, together with such map or plat. It was no objection to the admission of the map or plat offered in evidence, as explanatory of the testimony, that it was not made at the time of the survey, or by the county surveyor, or that it was not authenticated as required by the statute.

Cases cited by counsel for appellee justifying the exclusion of plats offered for the purpose of establishing the laying out of a city or town, or an addition thereto, and the dedication of the streets, alleys, and public ground therein by the proprietor, have no application

to the question here presented. The diagram or plat offered in evidence contained written statements not proper to go to the jury, but appellant's proposition to expunge the same, and produce in evidence the diagram alone, the writing or printing expunged, obviated that difficulty. We think the map or diagram proposed to be produced, the said written or printed matter having been removed, competent to be received in evidence for the inspection of the jury, in connection with, and as explanatory of, the testimony of the surveyor, and to enable the jury to understand more clearly his testimony and give it proper application. The judgment is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 348)

HEWES et al. v. VILLAGE OF CRETE.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—ABANDONMENT OF STREET.

A village was platted in 1848, but not incorporated as such until 1880, at which time the plat was accepted. From the time the village was platted, defendants and their grantors were in possession of a strip of land belonging to a street as platted, as part of their lands, which abutted thereto, and fenced the same in 1858, which fence was regularly repaired and maintained. In 1863 a sidewalk was built along the outside of the fence, and a part of the way a new walk was built in 1891, by order of the village authorities, and trees and shrubbery were planted on the strip. In 1873 the highway commissioners granted a petition laying out a new road, 50 feet wide, with its line coincident with defendant's fence, which order was afterwards declared void so far as it authorized the opening of the road through land north of the street in question without providing compensation for the owner. In 1894 the village claimed the strip as part of the street, and commenced proceedings for the possession thereof. *Held*, that all public rights to the strip as being part of the street had been abandoned, and the village lost all right thereto.

Error to Will county court; Charles Blanchard, Judge.

A submission of controversy between the village of Crete and Fidelity L. Hewes and another to determine the ownership of a strip of land fenced from a street. There was a decree for the village, and the other parties bring error. Reversed.

Hill, Haven & Hill, for plaintiffs in error.
C. W. Brown, for defendant in error.

CARTER, J. This was an agreed case, submitting certain questions of law and fact to the court without a jury, reserving all rights of appeal and writ of error. The court found in favor of the defendant in error, and entered a decree accordingly. An appeal was taken to the appellate court by plaintiffs in error, and the defendant in error moved to dismiss the appeal, which motion was overruled, and the cause was submitted, and the decree of the circuit court reversed, with directions to find for plaintiffs in error. *Hewes v. Village of Crete*, 68 Ill. App. 305. A writ of er-

ror was then sued out to this court by the village of Crete, and this court reversed the judgment of the appellate court, and remanded the cause, with directions to dismiss the appeal, on the ground that such court was without jurisdiction, as the decision of the case necessarily involved a freehold. *Village of Crete v. Hewes*, 168 Ill. 330, 48 N. E. 36. Thereupon plaintiffs in error sued out this writ of error to the trial court, and the case is now before us for determination upon the merits.

The matters submitted to the circuit court were as follows: First, whether or not the fences on or near the west line of Benton street, in the village of Crete, extending from the north line of North street south along the front or near the front of the properties then owned by the plaintiffs in error, are upon the true west line of Benton street in front of their properties; second, if said fences are not upon the true west line of Benton street in front of said properties, then how far to the east or west of where they then stood said true west line was or should be; third, if said fences should be found not to be upon the true west line of Benton street in front of said properties, then whether or not, as against the village of Crete, the owners of the said properties were or were not entitled to have and maintain said fences as they then stood. The court found that the fences in question were not upon the true west line of Benton street; that the true width of Benton street was 66 feet; that the said fences were 12.2 feet east of the west line of said street at the north line of said properties, and 10.7 feet east at the south line, encroaching by that much on said street; that, as against the village of Crete, the owners did not have the right to have said fences maintained where they stood within the limits of the street, but that they constituted an unlawful obstruction, and ordered them removed. On the 5th day of October, 1848, one Willard Wood caused a plat and survey of the town of Crete to be made, and said plat was duly acknowledged and recorded. One of the streets bore the name of "Benton." The town of Crete was never incorporated. The village of Crete, the defendant in error, was incorporated in 1880, and included the territory platted as the town of Crete, and its plat adopted the streets, alleys, lots, and blocks of that town, and also the names given to such streets. The plaintiffs in error claimed and introduced testimony tending to show that they or their grantors were the owners of the property in question, abutting on the west side of Benton street, long before the incorporation of the village, and more than 30 years before the institution of this proceeding, and that the fences in question had been maintained where they now stand for the same period of time, and that the strip of ground within the fences, and claimed to be a part of Benton street, had been in the actual, open, and adverse possession of them-

selves or their grantors for the same period of time. They further claimed that the dedication of the street or highway was never accepted in any way by the public authorities. They also offered in evidence a petition, dated May 6, 1873, claiming to be signed by 75 legal voters, asking the highway commissioners of the town of Crete to lay out a certain road, and cause it to be opened according to law, described as "commencing at the Joliet and Crown Point road, at a point between block 4 and lot owned by George Smith, in the village of Crete; running thence, along Benton street, to the north end thereof; thence north, to a point east of the road and street between F. Edgerly and depot building; thence west, to railroad track at said Edgerly,—and, should said commissioners deem it advisable and proper, to vacate so much of Benton street on the west side as is now inclosed, and to lay new road not to exceed fifty feet, that being about the width now used as a road. It is understood that D. E. Hewes, owner of the land through which said road passes, makes no claim for damages," etc. The Joliet and Crown Point road was the street running east and west on the south of block 4, and the property of plaintiffs in error is the east half of that block, except the south 57 feet, and fronts on Benton street. The commissioners made a preliminary order determining to grant the prayer of the petition, and on September 5, 1873, entered a final order laying out said road as a public highway 50 feet wide, which order describes the starting point as being "at a point 0.40 links west of the east side of Benton street as now traveled and fenced, on north side of Joliet and Crown Point road," and contains the following statement: "Passing on and over Benton street, and of the land of D. E. Hewes." The fences which were alleged to be an obstruction in Benton street were first erected in 1858 by the then owner of the property, and since then have been repaired from time to time, and maintained on the same line by him and his successors in interest. A sidewalk was built along and outside of this fence in 1863, and a part of the way, on the same line, a new walk was built by the property owner, by order of the village authorities, in 1891. Trees and shrubbery had been planted on the strip in controversy, and the former, with other native trees, had grown to large size, and the opening of the street as decreed below would bring the line very near, if not quite up to, the house of plaintiff in error Doescher.

It is the settled doctrine in this state that, notwithstanding the making, acknowledging, and recording of a plat showing the streets thereon intended to be dedicated, as required by the statute, the fee of the streets does not vest in the municipality until the acceptance thereof. *Hamilton v. Railroad Co.*, 124 Ill. 235, 15 N. E. 854; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191. There was never any acceptance of this plat, nor the street in

question, by the public authorities, until the incorporation of the village, in 1880, unless the action of the commissioners of highways upon the petition, in 1873, can be treated as an acceptance. From the time of the recording of the plat, in 1849, until the making of the preliminary order by the commissioners of highways granting the prayer of the petition, in 1873,—a period of 24 years,—there was no action whatever by the public authorities indicating that the said proffered dedication had been or would be accepted. The property owners retained possession of the strip, and treated it as a part of their property. The final order of the commissioners laying out the new road in Benton street 50 feet wide, with its western line coincident with the fences in question, cannot be construed as an acceptance of the dedication of so much of Benton street as was inclosed by these fences, but, on the contrary, implied a refusal to accept such dedication. As this final order was silent on the question of vacating the street so far as it included the strip inside of the fences, it could not, under the statute, have that effect; but we are of the opinion that the action taken by the commissioners, in view of the fact that there had never been any acceptance of the dedication of the street or highway, and that the strip in controversy had remained in the possession and exclusive control of the property owners, and was claimed by them as their property, indicates an acquiescence in such claim on the part of the only public authorities then in existence having any power over public streets or highways, and a refusal to accept the dedication so far as it had included the strip in controversy. This action of the commissioners we regard as strong evidence, in connection with other circumstances, of an abandonment of so much of said alleged street as included this strip lying inside of the fences. This view is not affected by the fact that, after this final action taken by the commissioners, the order was, in a proper judicial proceeding, declared void so far as it authorized the opening of the road which it laid out through land north of the property in question, on the ground that it made no provision for compensation for land taken. There was no village of Crete till seven years later, and even after its organization it made no claim to this strip as a part of the street until the year 1894, but, on the contrary, had ordered the repair and building of sidewalks with reference to the street as it had for so many years been open, which order or orders had been complied with by the property owners. We are of the opinion that all public rights in or to the strip in controversy as a part of Benton street had been abandoned long before the beginning of this suit, and that the property owners had acted upon such abandonment, and that, by abandonment, the public and the village of Crete have lost all right to said strip. *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975.

Other questions have been raised and discussed, but, in view of what has been said above, their decision is unnecessary. The judgment is reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with the views we have expressed. Reversed and remanded.

(175 Ill. 72)

KING et al. v. RADEKE et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

CONTRACTS—ENTIRETY—TIME—WAIVER—FORFEITURE.

1. A contract was conditioned that if the first parties failed to secure a manufacturing plant it was to be void, and all moneys paid thereunder by the second parties (which were to be paid on certain dates) were to be refunded to them, the "location to be secured within 60 days, time to be of the essence thereof." *Held*, that time was not of the essence of the payments, but of the location.

2. A contract was conditioned that, if the first parties failed to secure a manufacturing plant, all moneys paid thereunder by the second parties (which were to be paid on certain dates) were to be refunded to them. None of the payments were made within the time limited, and some were never made. *Held*, that the first parties, having accepted the payments after the time therefor, cannot say that time was of the essence of the contract of payment, and insist on a forfeiture of the payments made.

3. An agreement was that the first parties were to apply the proceeds of lots to be sold to the repayment of a sum to be advanced by the second parties for the purpose of securing a manufacturing plant. *Held*, that the relation of debtor and creditor resulted as to such sums actually advanced, for which there could be recovery, and this though the entire sum was not advanced, where the nonsuccess of the enterprise was not caused by the failure to advance the whole sum.

Appeal from appellate court, Second district.

Bill by M. C. King and others against F. D. Radeke and others. A decree for defendants was affirmed by the appellate court (74 Ill. App. 369), and complainants appeal. Affirmed.

Paddock & Cooper and Granger & Davidson, for appellants. H. K. Wheeler, for appellees.

PHILLIPS, J. (after stating the facts). The appellants are co-partners under the name and style of "North Kankakee Improvement Association," a firm organized for the purpose of buying and platting land and selling town lots. They acquired several hundred acres of land, which they divided into blocks and lots, some of which were sold, and a large number remained unsold. The association was formed in 1892, and in 1895 the partnership entered into a contract with the David Bradley Manufacturing Company, by which it agreed to donate the sum of \$100,000 to said manufacturing company if it would locate its plant on a part of the land of said association. Of this sum \$50,000 was to be paid by the citizens of Kankakee, who expected to derive a benefit from the loca-

tion of the manufacturing plant within the limits of the city. A number of citizens entered into an agreement by which they were to advance to the David Bradley Manufacturing Company \$50,000. This agreement on the part of the citizens was made with the North Kankakee Improvement Association, at the request of the latter, who, in consideration of the agreement of the citizens to subscribe and pay the said sum of \$50,000, contracted with the citizens, jointly and severally, by an agreement under seal, as follows: "That the parties of the first part, in the name of the said North Kankakee Improvement Association, and also individually, covenant and agree that, if the parties of the second part shall first make the payment and perform the covenants hereinafter mentioned on their respective parts to be made and performed, the said parties of the first part will perform the covenants on their part herein agreed by them to be done and performed. The parties of the second part agree to and with the parties of the first part that they will pay to J. Herman Hardebeck, trustee of the North Kankakee Improvement Association, for the use of the said association, \$50,000, to be paid as follows: One-fourth, March 5, 1895; one-fourth, May 1, 1895; one-fourth, June 1, 1895; one-fourth, July 1, 1895: providing, no person signing as second party shall pay other than as follows: The parties of the second part hereunto subscribing their names do not in this agreement promise jointly, but severally, and each of the parties of the second part promises hereby to pay only that amount which is the quotient of the sum of \$50,000 divided by the number of names signed hereunto as parties of the second part: provided, however, this agreement will be of no binding force whatever on the parties of the second part unless fifty names of responsible parties shall be hereunto subscribed as parties of the second part: and provided, further, that this contract is signed upon the express agreement that the parties of the first part shall secure the location of the David Bradley Manufacturing Works at North Kankakee, and, if said plant and works be not secured and located, then this obligation shall be void, and all moneys paid hereunder shall be refunded by parties of the first part to parties of the second part, said location to be secured within the next sixty days, time to be of the essence hereof. The parties of the first part jointly and severally agree that all sales of lots hereinafter made by the North Kankakee Improvement Association, or any of its agents, the amount which shall be received in cash therefor, or which shall be received from time to time on the deferred payments, shall be applied to the repayment of the said sum of \$50,000, and interest from the time of its payment, or any portion thereof, until the same is fully repaid to the parties of the second part. And the parties of the first part covenant and agree that the

North Kankakee Improvement Association shall repay to the parties of the second part said sum of \$50,000, and shall apply to the payment of said sum of \$50,000 all the moneys arising from the sale of lots in North Kankakee from the present date until such time as the said sum of \$50,000 is fully paid, with the interest thereon, as aforesaid. It is further covenanted and agreed by the parties hereto that the persons who shall sign this agreement as parties of the second part shall designate a committee of not less than one or more than three, which committee shall be designated in writing, whose duty it shall be to receive and apply the payments from time to time made by the party of the first part to the parties of the second part, and to settle and adjust all accounts with said North Kankakee Improvement Association."

This contract was entered into by the association with the expectation that the location of the plant of the manufacturing company would facilitate the sale of the lots of the association, and with this object in view it undertook to repay the persons who advanced to the association the money which they contracted to pay. The 50 subscribers to this agreement who advanced the \$50,000, which was to be paid \$1,000 by each, stipulated their payments should be made, one-fourth on March 5, 1895, one-fourth on May 1, 1895, one-fourth on June 1, 1895, and one-fourth on July 1, 1895. Those parties who signed the agreement May 1, 1895, paid \$500, and the association advanced to the Bradley Manufacturing Company \$25,000, the residue which was to have been paid by the citizens who each subscribed \$1,000. The appellants filed this bill in equity to settle and dissolve this partnership, and in the bill it is averred that the appellees each paid \$500 of their subscription and defaulted as to the residue. The bill alleges the indebtedness of the corporation is about \$80,000, a large part of which resulted from the donation made by the association to the manufacturing company; that owing to the depreciation in value of the real estate, combined with the amount donated, the insolvency of the association resulted; and it asked to have the partnership affairs wound up and the partnership dissolved. The bill sets forth that appellees each paid \$500 of their subscription, but, owing to their default in paying the residue, the association had to advance the sum; and the theory of the bill is that, by reason of their default in paying the sum of \$1,000 each, all rights or interests acquired by virtue of the contract, the clauses of which are above set forth, are barred, and no right of action exists against the association, or the individual members thereof, for any sum paid on the subscription, and alleges that the appellees threaten to bring a suit at law to recover the amount paid by them, and prays a cancellation of the contract and a decree bar-

ring the right of recovery. Appellees answered and filed a cross bill, severally claiming the right to recover the money so paid by them under the agreement. Issues having been formed on the original and cross bills, the cause was referred to a master, who made his report. On hearing, a decree was entered in accordance with the prayer of the cross bill, and the lands were ordered to be sold, and from the proceeds thereof appellees were to be paid, severally, the respective amounts advanced by them to appellants under the agreement. A personal decree against appellants was also entered. From that decree an appeal was prosecuted to the appellate court for the Second district, where it was affirmed, and this appeal is prosecuted.

The question presented on this appeal must be determined from the construction to be given to the agreement of the parties under the contract above quoted. By the contract of subscription the date of payment was fixed, but time was not made the essence of the contract. The contract of subscription was signed upon the express agreement that the improvement association was to secure the location of the manufacturing works at North Kankakee, and, if the plant and the works were not secured and located, then the contract of subscription was to be void, and the moneys paid refunded by the association to the subscribers. Immediately following that provision the contract provided: "Said location to be secured within the next sixty days, time to be of the essence hereof." The clause with reference to time being the essence of the contract only refers to the time within which the association must secure the location of the plant, and in no way refers to the time of the payment of the subscriptions. It appears from the evidence that the parties treated the payments as not being made within the time limited. All payments were made and received after the whole amount had become due under the contract. The parties having made the payments and received the same after they had become due, appellants cannot be heard to say that time was the essence of the contract. Even if it is so stipulated, the parties by a mutual course of conduct may treat such clause as waived, and, where they have done so, one of the parties cannot suddenly insist upon a forfeiture, but must, in order to avail himself of such a clause, give reasonable, definite, and specific notice of such intention. Forfeiture is a harsh remedy, not favored in equity, and must yield to the principle of compensation where fair dealing and good conscience seem to so demand. *Watson v. White*, 152 Ill. 364, 38 N. E. 902. Unless a clear intention to forfeit the property right or interest is shown and expressed, it will not be ingrafted on a contract by a court of equity. *Association v. Tucker*, 157 Ill. 194, 42 N. E. 398, and 44 N. E. 286.

Appellees were in no way responsible for the depreciation of the real estate or the want of success of the enterprise. Their failure to pay \$25,000 did not create a liability for \$80,000, which is alleged to be the amount owing by the association. The agreement provides: "The parties of the first part jointly and severally agree that all sales of lots hereafter made by the North Kankakee Improvement Association, or any of its agents, the amount which shall be received in cash therefor, or which shall be received from time to time on the deferred payments, shall be applied to the repayment of the said sum of \$50,000, and interest from the time of its payment, or any portion thereof, until the same is fully repaid to the parties of the second part." This clause creates a liability on the part of the association to the subscribers, and by the contract entered into between the latter and the association the relation of debtor and creditor was created, under which appellants were to pay appellees, respectively, the sums advanced by them. Appellees were not insurers of the success of the business enterprise entered into by appellants. At the request of the latter, the former agreed to advance \$50,000, which was to be repaid, with interest. They did advance \$25,000 of this sum.

The clause in the agreement, "that the parties of the first part, in the name of the said North Kankakee Improvement Association, and also individually, covenant and agree that, if the parties of the second part shall first make the payment and perform the covenants hereinafter mentioned on their respective parts to be made and performed, the said parties of the first part will perform the covenants on their part herein agreed by them to be done and performed," is a condition precedent, which must be complied with by the subscribers before the association is bound to do anything. The performance of a condition precedent must be averred and proven before a liability exists on the part of a defendant, or there must be something to discharge him or prevent a compliance,—something that would relieve a party undertaking to do an act from its performance. The subscription and payment of money in this case were, under this contract, no more than a loan by the subscribers to the association for the purpose of advancing the interests of the association by facilitating its sale of lots, and in part to be advantageous to the city of Kankakee in establishing an important manufacturing plant at that point. The money paid by the subscribers was not a "donation" in any sense of the term, but by the entire contract a loan was constituted, with interest. It was not requisite, under the terms of this contract, that each subscriber should pay the full sum of \$1,000 before the relation of debtor and creditor was established between such subscriber and the association. The relation was established on the payment of any part of the sum subscribed. By the terms of the contract, appellees did not agree to forfeit a

right to recover against appellants for a failure to pay the residue, nor does such right of forfeiture exist upon any equitable theory.

The bill of appellants asking to bar a right of recovery and declare a forfeiture could not be sustained, and it was not error to enter a decree on the cross bill of appellees. The judgment of the appellate court for the Second district affirming the decree of the circuit court of Kankakee county is affirmed. Judgment affirmed.

(174 Ill. 330)

CHICAGO, P. & ST. L. R. CO. v. WOOLRIDGE.

(Supreme Court of Illinois. Oct. 24, 1898.)

DEATH BY WRONGFUL ACT—DAMAGES—EVIDENCE—SUFFICIENCY OF EVIDENCE—WAIVER.

1. Defendant, having neither at end of plaintiff's evidence nor its own moved to have the jury instructed to find for it, but having, in connection with a series of instructions, offered one requiring the finding of a verdict for it, waived its right thereto.

2. Damages recoverable for death by wrongful act being limited (Rev. St. c. 70, § 2) to "the pecuniary injuries resulting from such to the wife and next of kin," the poverty, helplessness, or dependence of a son cannot be shown, though he be of age.

Appeal from appellate court, Third district.

Action by Charlotte Woolridge, administratrix of John A. Woolridge, deceased, against the Chicago, Peoria & St. Louis Railroad Company. Judgment for plaintiff was affirmed by the appellate court (72 Ill. App. 551), and defendant again appeals. Reversed.

Bluford Wilson and Philip Barton Warren, for appellant. S. H. Cummins, Clinton L. Conkling, and Joseph M. Grout, for appellee.

PHILLIPS, J. This action was brought by Charlotte Woolridge, as administratrix, to recover damages, under the statute, for the death of her intestate, John A. Woolridge, occasioned, as alleged, by the negligence of the defendant in the operation of its train of cars. A summary of the main facts is: The deceased was a flagman for the Chicago & Alton Railroad Company. That road and the defendant road had constructed extra tracks from their main lines to the state fair grounds at Springfield, Ill.; both entering such grounds at the southeast corner. The tracks were parallel, on a curve, for a short distance before reaching such grounds; the curve of the defendant's track being continuous from the point at which it left the main track until it reached such entrance. The tracks of both roads, a short distance from the fair grounds, crossed, paralleled with each other, on a curve from about the southeast to the northwest, two public highways, at their right-angle intersections, called "Sangamon Avenue" and "Peoria Road," and then extended nearly due north into such grounds. The track of the defendant was east of the Chicago & Al-

ton track, and at the place of the accident there was a distance of 9 feet and 4 inches between the inside rails of the two roads. The business of the deceased was to flag the Chicago & Alton trains, and to assist in guarding such highway crossings. His station was on the west side of the Chicago & Alton track, which was west of the defendant's track. The defendant also had a flagman, whose location was on the east side of its track. A train on the Chicago & Alton track was at the time of the accident coming out of the fair grounds, and the deceased was warning people who were about to pass over such highways, and while doing so, for some purpose unexplained, got between the two tracks where they were 9 feet and 4 inches apart, over which rails of each track a car would project some 18 inches, thus leaving 6 feet and 4 inches between the cars of trains passing each other at that point. As the Chicago & Alton train approached deceased, leaving the grounds, he stepped backward on the track of the defendant, when its train, backing down, with trainmen on the rear end, running at a speed of from probably 8 to 12 miles an hour, struck him, and thereby caused his death. The plaintiff obtained a verdict and judgment, which were affirmed by the appellate court.

The deceased left surviving him the plaintiff, his widow, and seven children, three of whom lived with their father, and four had their own homes. All of the children were of age. Clarence Woolridge, who lived with his father, was so crippled by rheumatism that he was unable to work. The admission of proof of this fact, and of his dependence on his father for support, over the objection of the defendant, is one of the errors assigned, and of which serious complaint is made. Other errors assigned relate to the giving and refusing of instructions, especially No. 29, which, in a series of 46 offered by the defendant, required the jury to find a verdict for the defendant. There was no motion or instruction offered at the close of the plaintiff's evidence, or renewed at the conclusion of defendant's evidence, to have the jury instructed to find defendant not guilty; but, as stated, instruction No. 29 was offered in connection with a series which submitted all the facts to the determination of the jury, whereby the defendant waived its right to ask such an instruction as No. 29, and therefore no error was committed in refusing it. *Pelce v. Walters*, 164 Ill. 560, 45 N. E. 1068; *Vallette v. Bilinski*, 167 Ill. 564, 47 N. E. 770; *Street Ry. Co. v. Christenson*, 170 Ill. 383, 48 N. E. 962. Hence the sufficiency of the evidence to support the verdict and judgment is not raised by this record as a proposition of law.

The most serious question is that relating to the admission of the following evidence of Clarence Woolridge: "Q. If you have any bodily infirmity, tell the jury what it is. (The objection by defendant to this question

was sustained, but the court remarked: 'You may ask him if he was dependent on his father for support.' Q. Now, Clarence, if you were dependent upon your father for support, you may tell the jury. (This question was objected to, overruled, and exceptions taken.) A. Yes; I am not able to do no hard work,—no work of any kind. Q. If you are crippled, tell the jury how. A. I am crippled here,—rheumatism in my right hip. (To which objection was made by defendant, overruled by the court, and exceptions taken.) Q. Unable to work, are you, and earn a living? A. Yes, sir." That such evidence would have a very strong tendency to enlist the sympathy of the jury, and thereby tend to affect not only the amount of the verdict, but also to affect the judgment of the jurors as to a liability, is very clear. This evidence was admitted on the theory that under the law this crippled son was in need of help on account of his helpless condition, and therefore had been supported, and was legally entitled to be supported, by his father, because of such condition.

It is said in support of this position that in order to recover more than nominal damages the proof must show the next of kin were supported in whole or in part by the deceased, or that the deceased was bound by law to support them because they were in a state of dependence. As to Clarence Woolridge, it is further said, without this state of dependency his father would not have been bound by law to support him, as he was over 21 years of age, and therefore this evidence is said to be material to enhance the damages. This view of the law is not in accord with the rule laid down by this court in relation to a recovery by lineal next of kin. This action is based on chapter 70 of the Revised Statutes. Section 1 gives an action for a wrongful act causing death, while section 2 prescribes in whose name the action shall be brought, and for whose benefit, and limits the damages "to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." The personal representative brings the action as trustee for those who have such pecuniary interest in the continuance of the life of the deceased, and not in right of the estate (*City of Chicago v. Major*, 18 Ill. 349; *Holton v. Daly*, 106 Ill. 131); and, as provided by section 2, "the amount recovered * * * shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." This act has been construed: (1) That "next of kin" means those standing in that relation in a technical sense. *Railroad Co. v. Shannon*, 43 Ill. 338. (2) That, if the next of kin are collateral, it is a material question whether they were in the habit of claiming and receiving pecuniary assistance from the deceased. If they were

not, they can only recover nominal damages. If they were lineal, the law presumes pecuniary loss from the fact of death. *City of Chicago v. Scholten*, 75 Ill. 468; *Railroad Co. v. Swett*, 45 Ill. 197. (3) That the amount of the recovery is limited to the "pecuniary loss." *Railroad Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942, where cases on this point are reviewed, and where, on page 320, 156 Ill., and page 943, 40 N. E., quoting from *Conant v. Griffin*, 48 Ill. 410, it is said: "This action is the creature of the statutes, * * * and, as they only provide for compensation for the pecuniary loss, the evidence should be confined exclusively to that." (4) "Pecuniary loss" is held, as to lineal kindred, to mean what the life of the deceased was worth, in a pecuniary sense, to them (*Railroad Co. v. Shannon*, supra; *Coal Co. v. Hood*, 77 Ill. 68), which pecuniary loss, it is said in the *Brodie Case*, "can be easily determined," in case of lineal kindred, as said in *City of Chicago v. Scholten*, supra, "by proof of the personal characteristics of the deceased," his mental and physical capacity, his habits of industry and sobriety, the amount of his usual earnings, by proof of "what he might in all probability earn for the future support of his wife and children. In this consists essentially the loss to the family" (*Railroad Co. v. Weldon*, 52 Ill. 290, at p. 296),—or, as put in *Jury v. Ogden*, 56 Ill. App. 100, on page 104: "The amount to be recovered is what the statute regards as the pecuniary value of the addition to such estate left as the deceased, in reasonable probability, would have made to it, and left, if his death had not been so wrongfully caused. It is to be estimated by the jury from all the facts and circumstances proved,—his prospect of life, and his means, opportunities, ability, and habits with reference to the making and saving of money or money's worth." The poverty, wealth, helplessness, or dependence of the lineal next of kin is immaterial on the question of the amount of the recovery, under this statute. That feature is not at all to be considered in measuring or estimating the loss sustained, or in determining the liability, in case of lineal kindred, when there is death caused by a wrongful act. In *Railroad Co. v. Moranda*, 93 Ill. 802, it is said (page 304): "It was wholly immaterial whether such next of kin had or had not other pecuniary resources after his death. Such evidence was held incompetent in *O'Brennan's Case*, 85 Ill. 160, and in *Powers' Case*, 74 Ill. 343." In the *O'Brennan Case*, supra, it will be found that *O'Brennan* was seeking to recover damages for a personal injury, and he was permitted to testify that he was a supporter of his family as a lecturer. This was held to be immaterial, and the court, in commenting on such evidence, say (page 163): "If it was admissible, then it would have been competent to have gone further, and shown all the circumstances of the family,—such as that the mother was an invalid, that one of the daughters was blind,

that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support as a lecturer; for, as the evidence had no place in the case but as a stimulant to the sympathy of the jury, it would be just as competent to make the stimulant strong as weak." See, also, *Railway Co. v. Powers*, supra. In *Railroad Co. v. Baches*, 55 Ill. 379, it is said: "The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages." The number and ages of the family are not material, as has been held, where the relation is lineal, as the sole measure of damages is pecuniary loss; that is, how much would the deceased, in all probability, have added to the estate, had he lived, which amount would not be affected by the number or ages of such kindred, as each would only get his proportionate share as provided by law for the distribution of the personal property of an intestate, without being increased or diminished, as to any one of them, on account of poverty, age, or physical condition. As to lineal heirs, as in this case, the authorities above clearly show the injury for the wrongful death is limited to the pecuniary or property interest of such kin in the life destroyed. It cannot be enhanced or diminished by showing the poverty, wealth, or physical helplessness of any of such kindred. To permit that to be done would be to make this defendant, for illustration, assume the burden of such conditions, if unfortunate, which is not contemplated by the statute. *Railway Co. v. Powers*, supra, cited in *Moranda Case*, supra. For these reasons it was material error to admit evidence that Clarence Woolridge was a cripple, unable to work, and that he depended on his father for support. The question is not, under this statute, as to lineal kindred, how many there were, or their mental or physical condition, but is solely how much would the deceased have been worth to them, in all reasonable probability, had he continued to live, which fact, as said in the *Brodie Case*, supra, is easily ascertainable by proof as above indicated.

The first instruction given for the plaintiff is subject to criticism because it did not limit the amount of recovery to the pecuniary injury sustained. *City of Chicago v. Scholten*, supra. The error is not deemed to be harmless by reason of the reference to such pecuniary injury in the second instruction, especially in view of the improper evidence admitted, heretofore referred to, and the proof as to care on the part of the deceased, which makes the case very close, if not in fact doubtful.

It is not deemed necessary to review the numerous instructions offered by the defendant and refused. Counsel well understand this court has never approved the practice of burdening the trial court with so many instructions. The court gave 18 of the 46 instructions offered, which substantially cover the

law of the case. For the errors indicated the judgments of the circuit and appellate courts are reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 484)

LOEBER et al. v. LEININGER.

(Supreme Court of Illinois. Oct. 24, 1898.)

TAXATION—PERSONAL PROPERTY—ERRORS—EVIDENCE—SUFFICIENCY.

1. In a proceeding against the assignee of the Y. Co., an insolvent corporation, to collect a tax on its personal property, the tax collector claimed that, by mistake, the personal property of the company was erroneously assessed on his books in the name of Y. individually. The books showed a tax against the company paid by Y., and the location of the company at a certain number and street, and, in the next line of the book, a tax against Y. individually, whose street residence was given as covering several numbers. The only evidence to support the collector's contention was of a deputy who testified that, before the assignment, he called on Y. to collect the tax at his place of business, the street and number appearing in the book as the residence of Y., and that the two places were some two miles apart. Rev. St. c. 120, § 73, provides that the property owner must make out and sign a sworn statement of the amount of his personal property, which shall be delivered to the county clerk, and preserved in his office for two years. The two years had not elapsed, and no list of the property was introduced in evidence. Held insufficient to establish the collector's claim.

2. Where there is no showing that the assignee of an insolvent corporation has any personal property in his hands subject to a tax warrant for an assessment on personal property, an order in favor of the tax collector requiring the assignee to pay him the amount of the taxes is error.

Appeal from Cook county court; John H. Batten, Judge.

Petition by George Leininger, collector of the town of West Chicago, against Isaac G. Loeber, assignee of the John York Company, insolvent. From a decree for petitioner, defendant and the John V. Farwell Company appeal. Reversed.

The John York Company, a corporation, on its voluntary petition, was adjudged an insolvent debtor, under the statute, and Isaac G. Loeber was appointed its assignee on the 21st day of February, 1898. On the 19th day of March, 1898, George Leininger, the appellee, collector of taxes in and for the town of West Chicago, filed a petition in the county court of Cook county, wherein the matter of the assignment of the said corporation was pending, alleging that on the 10th day of December, 1897, he received his collector's book, accompanied by a tax warrant authorizing the collection of the taxes in and for the said town for the year 1897; that it appeared from said books that the personal property of the insolvent corporation was erroneously assessed in the name of John York for the year 1897, in the sum of \$6,000, and that taxes were lawfully extended upon said books against the said property of said corporation (erroneously in the name of the

said John York, as aforesaid) in a total sum of \$736.59; that the same were unpaid, and were a lien on all the property of the said corporation at the time of the assignment; and praying that an order be entered by the said court allowing a claim against said assignee, and in favor of said petitioner, as collector, for the amount of the said taxes as a senior lien, and for an order requiring the assignee to make payment of the said sum as a preferred claim. The assignee denied that the petitioner was entitled to the relief claimed, and demanded that strict proof be required, and that the prayer of the petition be denied. The cause was heard, and an order entered finding the allegations of the collector's petition to be true, and directing that the amount of his claim be allowed and paid as a preferred claim. This is an appeal prosecuted by the said assignee, and by the John V. Farwell Company, as a creditor of the insolvent corporation, to reverse the order and decree of the county court.

Kerr & Barr, for appellant Loeber. Tenney, McConnell, Coffeen & Harding, for appellant John V. Farwell Co. Will F. A. Bernamer, for appellee.

BOGGS, J. (after stating the facts). The taxes assessed upon personal property constitute a lien upon the personal property of the person assessed from and after the time the tax books and warrant are received by the collector. Rev. St. c. 120, § 254, entitled "Revenue." The section cited must be construed in connection with section 137 of the same chapter, which invests the collector with authority to levy the warrant by distress and sale of the "goods and chattels" of the tax debtor in order to secure payment of personal property tax. The words "personal property," employed in section 254, and the words "goods and chattels," in section 137, are to be construed as having the same meaning, and as comprehending every species of personalty which may, under the statute, be made the subject of levy and sale under an execution issued upon a judgment at law. The lien is in the nature of that of an execution on a judgment at law, and, if existing at the time a tax debtor becomes an insolvent debtor by assignment, may be enforced against all the property of such insolvent debtor in the hands of an assignee to which it attached; or, if such assignee has disposed of property against which the lien attached, we perceive no reason why the court should not direct the assignee to pay to the lienholder, the collector, the amount realized by the disposition of such property. The lien, however, extends only to personal property of the tax debtor of the character subject to be levied on and sold under an ordinary execution, but does extend to all personal property of that character, though such property be not the same property possessed at the time of the assessment. *Hill v. Fig-*

ley, 23 Ill. 364; *Binkert v. Railway Co.*, 98 Ill. 205.

But the judgment must be reversed for the reason the allegations of the petition were not supported by the proofs. The collector's book was introduced in evidence. The only assessment against the said insolvent corporation there appearing is on line 28, page 18, of said book, from which it appeared that personal property belonging to said insolvent corporation, of the value of \$100, was assessed for taxation, and that the total tax thereon was \$12.31, and that the same had been paid by John York. The address of the said company is given on said line as number "43 S. Center avenue." On the next line on the same page, to wit, line 29, appears an assessment of property of the assessed value of \$6,000, upon which taxes to the amount of \$736.59 were extended and unpaid; but this assessment appeared, as set forth in the book, to have been made upon the property of one John York. The address of the said John York is given in said line as follows: "773 to 781 S. Halsted street." The contention of the collector was that an error was made in entering said assessments on the collector's book, whereby the property of John York was made to appear to have been assessed to the John York Company, and the property of the said company assessed to said John York. The only proof relied upon to support that contention was the testimony of one Luke Wheeler, who was acting as a deputy collector under the appellee collector. This witness identified the collector's book and warrant, and read from the book what appeared on the said two lines on said page 18. The witness testified: "I called on Mr. York at the place of business, 773 South Halsted street, before the assignment was made, but did not get the money;" and being asked, "Are you acquainted with the relative location of the two places with reference to which you have read from the tax collector's warrant, and, if so, how far are they apart?" replied, "I am so acquainted, and they are about two and a half miles apart." No other testimony was produced.

It is argued it was established by this testimony that the name of the John York Company was erroneously inserted on said line 28, and that the property shown to have been assessed in that line was not the property of the John York Company, and that the name of the John York Company should have been written in on line 29, instead of the name John York, which appears on said line. We regard the evidence as wholly insufficient to support this contention. Section 78 of said chapter 120, entitled "Revenue," provides that the assessor of personal property for taxation shall require the property owner to make a true and correct statement of his taxable property on a form prescribed by the statute for that purpose, and that the form shall be signed and sworn to by the owner of the property; and section 91 of the same chapter requires that such statements or forms so

signed by property owners shall be delivered by the assessor to the county clerk, and that such clerk shall preserve the same in his office for two years thereafter. It is to be presumed these requirements of the statute were observed, and that the form or list of property returned by the John York Company for assessment could readily have been produced. It constituted primary evidence of the fact sought to be established, and, unless its absence was properly accounted for, should have been deemed the only competent evidence upon that issue. But, aside from this, the mere fact that the localities named upon the two lines of the collector's book in question were $2\frac{1}{2}$ miles apart had no tendency to show that one given as the address of the corporation was in fact that of the said John York, or that the assessment of the property of the corporation had been extended upon the line upon which the name of John York appeared.

The judgment is erroneous in another respect. It establishes the demand as a preferred claim against all of the assets of the insolvent corporation in the hands of the assignee. It incidentally appeared the assignee had funds of the insolvent corporation in his possession; but it did not appear that said assignee had any property in his hands of the character that would have been subject to the lien of the warrant, or that he had funds in his hands received from the disposition of property which was subject to the lien of the warrant. If the insolvent corporation, at the date of the assignment, had no property which the collector could have legally seized by virtue of his warrant, the claim of the collector would not only have no preference over the claims of creditors, but could not be legally enforced as a claim of any class or rank. A tax is not a "debt," in the ordinary sense of that term. It is an exaction or forced contribution from property demanded by the taxing power or sovereignty for the purpose of enabling the government to execute and discharge its functions. It is to be collected in Illinois, not by the ordinary actions at law, but by remedies specifically provided by the statute. The power of the appellee collector, under the statute, is to demand and receive payment or enforce the lien of his warrant. If payment is not voluntarily made to him, and there is no property upon which the lien of the warrant attaches, we know of no authority resting in the town collector to institute an action in any court to recover the amount of the taxes. No such power is given by any section of the statute, but, on the contrary, other modes of procedure are provided. Section 230 of chapter 120, entitled "Revenue" (Hurd's Rev. St. 1889, p. 1147), provides: "The county board may also, at any time, institute suit in an action of debt in the name of the people of the state of Illinois, in any court of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due," etc. The

power to institute an action to recover any personal property tax therefore rests in the county board, who are required to proceed in the name of the people. Therefore, unless a lien against property which came to the assignee existed by virtue of the warrant held by the appellee collector, that officer had no legal right to a judgment for said taxes against the assignee, or to an order requiring the assignee to pay him the amount of the taxes. The judgment or order of the county court must be and is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 56)

HYNES v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL IMPROVEMENTS—VALIDITY OF ORDINANCE.

1. An ordinance providing for a sewer from a fixed point to another established point, of a certain shape and an established diameter, constructed of sewer brick, in a particular manner, with a tile-pipe sewer 12 inches in diameter, sufficiently describes the nature, character, locality, and description of the proposed improvement.

2. An ordinance providing that a sewer shall be constructed of vitrified tile pipe, a certain number of inches in diameter, is not objectionable as not designating the thickness of the tile pipe.

Appeal from Cook county court; William T. Hodson, Judge.

Action by William J. Hynes against the city of Chicago. There was a judgment for defendant, and plaintiff appeals. Affirmed.

George Gillette (E. R. Bliss, of counsel), for appellant. Charles S. Thornton, Corp. Counsel, and John A. May, for appellee.

PHILLIPS, J. This is an appeal from a judgment of the county court of Cook county rendered on the 14th day of April, 1898, confirming a special assessment for the construction of a brick and vitrified tile-pipe sewer in Madison avenue from Sixty-Third to Sixtieth street, and in an alley north of and adjoining the right of way of the Illinois Central Railroad Company, from Madison avenue to Washington avenue. Proceedings were instituted under an act concerning local improvements, approved June 14, 1897. Objections to the confirmation of the assessment were filed, and a jury was waived, and the cause submitted to the court. No evidence was offered on behalf of appellant in support of objections triable by a jury. The legal objections were overruled, and the court entered a judgment of confirmation. The contention of the appellant here is that the court erred in overruling legal objections; that the ordinance providing for the making of the improvement does not specify the nature, character, locality, and description of the proposed improvement, as required by law, in this: that the ordinance

does not designate or specify the thickness of the vitrified tile pipe.

The ordinance provides that the sewer, from its connection with the sewer in Sixty-Third street to a point 140 feet north of the north line of that street, shall be constructed of vitrified tile pipe, of 18 inches internal diameter, and thence to its terminus, at a point 8 feet south of the south line of Sixtieth street, shall be cylindrical in shape, and shall be 2 feet internal diameter, and constructed of sewer brick, with a double ring invert and a single arch; that a vitrified tile-pipe sewer, 12 inches internal diameter, shall be constructed in the alley, etc. This ordinance describes the nature, character, locality, and description of the proposed improvement with reasonable certainty, and is valid. *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. 444; *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901; *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Adams Co. v. City of Quincy*, 130 Ill. 566, 22 N. E. 624; *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608; *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723; *Otis v. City of Chicago*, 161 Ill. 199, 43 N. E. 715; *Cass v. People*, 166 Ill. 126, 46 N. E. 729; *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824.

The objection most seriously insisted upon is that the ordinance does not describe the thickness of the vitrified tile pipe to be used. It is a well-known fact that factories manufacturing that character of tile pipe manufacture a standard thickness of sewer pipe. If the size were changed by every ordinance, requiring new models or plans for the making of the tile, it would greatly add to its cost, and subserve no good purpose. The ordinary and usual tile pipe, as used in commerce and trade, of a standard thickness, as recognized by manufacturers, would be included in the term "vitrified tile pipe," as its thickness is usually determined by its internal dimensions. It would be wholly unnecessary to give the external dimensions of the tile pipe, as insisted upon by appellant, as well as the internal diameter. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 442)

TORMOHLEN et al. v. WALTER et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL AND ERROR — DISMISSAL — FREEHOLD INVOLVED.

1. If the trial court had jurisdiction of a suit in foreclosure, proceedings in error, based on errors in allowing attorney's fees, failure of a guardian ad litem to attend, incompetency of witnesses, and in approving the master's report of sale, will be dismissed on the motion of defendant in error, who purchased at the sale, and was not a party below, but was made a party by motion in supreme court, as his interest could not be affected by such irregularities.

2. A writ of error to reverse decree of foreclosure and sale, which cannot affect title to

the property, which was in the hands of a bona fide purchaser, does not involve a freehold, so as to give the supreme court jurisdiction.

Error to circuit court, Cook county; Murray F. Tuley, Judge.

Suit by Otho C. Butz against Caspar Tormohlen, Elizabeth Tormohlen, and Frank Tormohlen. There was a decree for complainant, and defendants, after bringing proceedings in error, filed an affidavit showing that complainant, Butz, had died, and that Jacob Walter and Caroline Walter purchased at foreclosure sale, whereupon they were made defendants in error. Proceedings in error dismissed.

P. J. O'Shea, for plaintiffs in error. Jesse Holdom and Joseph Kohn, for defendants in error.

CARTER, C. J. This is a writ of error sued out by plaintiffs in error to reverse a decree of the circuit court of Cook county, entered May 6, 1882, directing the sale of certain premises on a bill to foreclose a trust deed. The bill was filed by Otho C. Butz against William Tormohlen and plaintiffs in error and others to foreclose a trust deed executed by William Tormohlen and his wife, given to secure a promissory note executed by said William for \$1,000, with interest at 8 per cent. The bill alleged that before suit was brought the title to the premises had been conveyed to the wife of William, who had since died intestate, and that plaintiffs in error and the others named were her heirs at law. The defendants, with the exception of the surviving husband, were all infants, and a guardian ad litem was appointed by the court for them. The cause was referred to a master, who made his report finding that the complainant was the owner of the note, and that there was due him from William Tormohlen on the same the sum of \$1,186.89, as principal, interest, and foreclosure fees. A decree was entered accordingly, the land sold, and the master's report of sale confirmed. Herman Eschenberg became the purchaser at the master's sale. After suing out the writ of error, counsel for plaintiffs in error made an affidavit stating that Butz, the original complainant, had long since been dead, and that the title to the premises was now vested in Jacob Walter and Caroline Walter, to whom the premises had been deeded by the master in chancery, and praying that they be made defendants in error. A scire facias to make them parties was issued, and they submitted themselves to the jurisdiction of this court without service. They have filed their motion to dismiss the writ of error on the ground that they were not parties to the original suit, and that, as the court below had jurisdiction of the subject-matter and of all the parties to the cause, their title as purchasers at such sale could not be affected by mere irregularities or errors in the proceedings before the decree, and that no relief can be had against

them on this writ of error, and, because no freehold is involved, this court has no jurisdiction.

Among the errors assigned to reverse the decree are that \$50 foreclosure fees were improperly included in the amount found due in the decree of sale; that the guardian ad litem did not personally attend the hearing before the master; that the proof was insufficient; and made by an incompetent witness; and that the court erred in approving the master's report of sale, and allowing certain of the payments he had made. The motion of defendants in error to dismiss must be sustained, for the following reasons: The defendants in error Jacob and Caroline Walter were not parties below, but obtained title to the property by the master's deed as the assignees of the certificate of purchase from the purchaser at the master's sale, who also was not a party, and their interests cannot be affected by the above-mentioned errors assigned, even if the decree were reversed. Where there is no lack of jurisdiction, the title of a bona fide purchaser, who is not a party, or chargeable as such, obtained by judicial sale, cannot be affected by mere errors in the proceedings in the suit, even though the judgment or decree may afterwards be reversed on account of such errors. *Guiteau v. Wisely*, 47 Ill. 433; *Goudy v. Hall*, 36 Ill. 813; *Fergus v. Woodworth*, 44 Ill. 374. The same principle extends to the assignee of such a purchaser. *Roberts v. Clelland*, 82 Ill. 538. As this writ of error is brought simply to reverse a decree of foreclosure and sale, and cannot affect the title to the property, there is no freehold involved, and the writ must be dismissed. Writ dismissed.

(175 Ill. 354)

WAHLS v. BRANDT.

(Supreme Court of Illinois. Oct. 24, 1898.)

COST IN EQUITY—REVIEW—EASEMENT BY PRESCRIPTION.

1. In chancery the apportionment of costs is discretionary with the trial court, and will not be disturbed, in the absence of a clear showing of unfairness or injustice.

2. In order to acquire an easement by prescription in a ditch cut through the land of another, an open, adverse, and uninterrupted use of the ditch under a claim of right for more than 20 years must be shown.

Appeal from circuit court, Kankakee county; John Small, Judge.

Bill by John Brandt against Fred Wahls. From a decree for complainant, defendant appeals. Affirmed.

O. G. Bartlett and T. F. Donovan, for appellant. W. H. Savary and Harrison Loring, for appellee.

WILKIN, J. This was a proceeding in chancery, whereby appellee, John Brandt, sought to compel appellant, Fred Wahls, to

take up and remove a tile drain on the latter's farm, and to enjoin him from thereafter tilling, ditching, or cutting through a natural ridge or divide on his farm, thereby diverting waters from a pond on his land from their natural course, which is towards the north, and causing them to overflow the land of appellee, which lies immediately south. Appellee also asks that damages be awarded to him for the injury to his crops by reason of such overflow. The answer of appellant sets up two principal defenses. The first of these is that the natural course of drainage from the pond in question is not to the north, as alleged in appellee's bill, but, on the contrary, is to the west and south. On this point the evidence adduced at the hearing is quite voluminous, and relates mainly to the topography of the land of the appellant, and is in some respects contradictory and uncertain. We have given all the evidence a careful consideration, and we think the finding of the circuit court, that the natural course of drainage from the pond referred to is towards the north, as alleged in the bill, is fully sustained by the evidence.

As a second defense to appellee's bill, appellant asserts that by long user, in himself and former owners of his land, of an open ditch, which, as the evidence discloses, was cut through the ridge or divide on the west side of the pond by the owner of the land about the year 1861 or 1862, he has acquired an easement by prescription, and so has the right to put in and maintain a tile drain through the ridge, regardless of the natural course of drainage, and regardless of the effect such a drain may have upon the land of appellee. Without entering into a discussion of the details of the evidence, we think a careful study of the facts, as shown by the evidence, does not show that appellant and those under whom he claims title have enjoyed for a period of more than 20 years prior to May, 1896, when this cause of action accrued, such an open, adverse, and uninterrupted use of the ditch referred to, under claim of right, as to raise a technical easement. We are of the opinion that the circuit court committed no error in its decree of injunction against the appellant, as therein stated.

While it appears from the evidence that appellee has sustained some damage by reason of the overflow of his land having destroyed his crops, yet we are compelled to agree with the circuit court that the evidence is so uncertain as to the extent of such damage that we cannot fix the amount he should be compensated therefor.

The apportionment of the costs in a proceeding in chancery, as we have frequently stated, is a matter within the discretion of the trial court, and, in the absence of a clear showing of unfairness or injustice, will not be disturbed. The decree of the circuit court will be affirmed. Decree affirmed.

(174 Ill. 495)

CHICAGO, B. & Q. R. CO. v. GUNDERSON.

(Supreme Court of Illinois. Oct. 24, 1898.)

RAILROADS—ACCIDENT AT CROSSING—NEGLIGENCE—QUESTION FOR JURY—EVIDENCE—INSTRUCTION—REVIEW.

1. Where there is any evidence of facts tending to support an issue, the findings of the trial and appellate courts as to its sufficiency to support the verdict are conclusive on the supreme court.

2. Deceased was seen at the only public railroad crossing in a village, waiting for a freight train to pass. A passenger train passed the freight, at this point, going west, at about 30 miles per hour. No other train passed over the road before deceased's body was found, a half hour afterwards, 80 feet west of the crossing, with marks indicating that death was caused by the collision. *Held* to justify finding that deceased was struck by the passenger train at the crossing.

3. Whether one killed at a railroad crossing exercised due care is a question for the jury.

4. Direct evidence is not necessary to prove that one killed at a railroad crossing exercised due care.

5. Deceased, a steady, industrious man, in good health, while waiting at night at a public crossing for a freight train to pass, was struck by an extra passenger train going in the opposite direction at the rate of 30 miles per hour. There was evidence that the view up the track was obstructed, and that the approaching train gave no signals. *Held* sufficient to sustain a finding that deceased exercised due care.

6. One waiting at a railroad crossing has a right to rely upon the presumption that any approaching train will obey the city ordinances by ringing its bell and reducing its speed.

7. On the question whether deceased exercised due care, the jury may consider that he was steady, sober, industrious, in good health, and in such circumstances that it is inferable that the instinct of self-preservation was strong in him.

8. Evidence that the company kept a flagman at the crossing where the accident occurred from 7 a. m. to 6 p. m., but that there was none there at the time of the accident, at 8 p. m., is admissible on the question of negligence.

9. Evidence as to how much the railroad crossing was used, at which the accident occurred, and at which there was no flagman, is admissible on the question of negligence.

10. One familiar with trains need not be an expert in order to testify as to rate of speed.

11. In an action for damages for the death of decedent, who was a shoemaker, evidence as to the condition of the shoemaker business is not admissible.

12. An instruction as to what acts or omissions constitute negligence is improper.

Appeal from appellate court, Second district.

Action by Anna M. Gunderson, administratrix, against the Chicago, Burlington & Quincy Railroad Company. A judgment for plaintiff was affirmed by the appellate court (74 Ill. App. 356), and defendant appeals. Affirmed.

Samuel Richolson, for appellant. Henry W. Johnson and McDougall & Chapman, for appellee.

PHILLIPS, J. The judgment in this case was obtained for damages for the benefit of the widow and children of appellee's inter-

tate, whose death was alleged to have been caused by the negligence of the appellant in the operation of its passenger train known as "Second 55" at the incorporated village of Leland. The errors assigned here relate to the sufficiency of the evidence as tending to support the verdict, and the rulings and holdings of the court below on the evidence and instructions.

It is said the evidence does not tend to show that the deceased was struck at the crossing in the village by the said train, or that he was using due care, or that the appellant was negligent, as alleged in the declaration. The law is, with reference to such findings of facts, that, if there is evidence legally tending to sustain the issues in plaintiff's behalf, these errors are not well assigned in this court. *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 235, and cases cited; *Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358. The evidence has been carefully examined, and the conclusion reached is adverse to the appellant's claim. While no person saw the accident, yet the evidence is that deceased was seen at the only public crossing in the village, about 8 o'clock in the evening, waiting for a long freight train that was rapidly going east to pass by, so that he could proceed on his way to his home; that the appellant's road was double-tracked, and the engine of this Second 55 train, going west, passed the caboose of the freight train at about that point at a speed of at least 30 miles an hour, in violation of a village ordinance duly adopted and properly admitted in evidence; and that no other train passed over the road before the dead body was found, nearly 80 feet west of the crossing, about one-half hour thereafter, with marks and bruises clearly indicating that death was caused by the collision. There is no evidence to show the body was in a state of rigor mortis, as claimed. The conclusion from this state of facts reasonably follows that the deceased was on that crossing and was struck there by that engine, which was being operated at an unlawful rate of speed.

Whether the deceased exercised due care, under all the facts and circumstances shown by the evidence, was a fact to be determined by the jury, within the limitations of the law. It is not the law that such fact must be proven by direct evidence. *Railroad Co. v. Then*, 159 Ill. 535, 42 N. E. 971. Some of the circumstances as shown by the evidence are that the deceased at the time of the accident was waiting for the freight train to pass by, and naturally his attention would be somewhat attracted by it, as he was momentarily expecting to move on. There is evidence tending to show that from the north side of the track he could not see very far to the east; also, evidence tending to show no signal was given of the approach of the train. There is no evidence that he knew this extra train was running at that time, or that it ran with such speed through the village. In view of this condition of things, even if he had previ-

ously been looking for the approach of a train from the east, had his mind been diverted therefrom for but a few moments, with the rate of speed at which the train was running, if without signals, it would have been on him unawares, especially as the long freight train, in moving right near him at a speed of from 12 to 15 miles an hour, would necessarily make considerable noise. As is held in the *Then Case*, supra, he had a right also to rely upon the performance of the duty imposed upon the defendant by the village ordinances, to warn him of the approach of the train by continuously ringing the bell upon the engine, and not to run the said train faster than 10 miles per hour within the village. In addition to these circumstances, there is full proof that he was a steady, sober, and industrious man, in good health, and so situated that it is fairly inferable the instinct of self-preservation was as strong in him as in other men, which facts, of themselves, may be considered on the question whether he exercised due care, and legally tend to prove the fact. See *Nowicki Case*, supra, which in its main features is much like this case.

Complaint is made that it was improper to admit evidence that the flagman was absent at the time of the accident; to prove how much this crossing was used; to admit evidence of the speed of the train to be given by persons not experienced, etc. The company kept a flagman at the crossing from 7 o'clock a. m. to 6 o'clock p. m., but had none at the time of the accident. It was the only public crossing in the village. There was proof as to the extent of its use. Trains ran through at the usual speed between stations. These were facts proper to be submitted to the jury on the question of negligence. Those who testified to the speed were familiar with trains, and were competent to testify. It was not a matter for expert evidence. The evidence offered by defendant as to the condition of the shoemaker business at Ottawa was not competent, and no error was committed in rejecting such evidence.

No error was committed in the instructions given for plaintiff. They do not assume, as stated, that the deceased exercised due care, or that he was killed by the passenger train at the crossing. They submit these facts for the determination of the jury. Neither was there error in the instructions relating to the measure of damages, or the right of the widow and children to damages on the hypothesis presented. The right of lineal kindred to at least nominal damages, without proof of support, is given by the statute, where death is caused by negligence. There must be proof of damages as to collateral kindred. *City of Chicago v. Scholten*, 75 Ill. 468; *Railroad Co. v. Swett*, 45 Ill. 197; *Railroad Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942. The instructions properly limited the damages to the pecuniary loss sustained by such death. There is no other reasonable inter-

pretation to be given them. There was no error in refusing instructions asked by defendant. It is not proper to tell the jury what acts or omissions will constitute negligence, that it was the duty of the deceased to have looked and listened, etc. There being no substantial error in the record, the judgment is affirmed. Judgment affirmed.

(175 Ill. 325)

UNION SHOW-CASE CO. v. BLINDAUER.

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—ASSUMED RISKS—DEFECTIVE APPLIANCES—KNOWLEDGE OF DANGER—EXPERT TESTIMONY—APPEAL—VARIANCE.

1. A variance cannot be assigned as error unless the question was presented at trial, and the alleged variance specifically pointed out, so that the adverse party might have amended.

2. A servant operating an elevator according to instructions given by his master is not bound to know that it is dangerous, merely because he knows that the brake on it is out of order.

3. Recovery by a servant for injuries from a falling elevator will not be defeated by his knowledge of defects therein, regardless of whether he knew that they made it unsafe.

4. A servant operating an elevator with knowledge of defects does not assume the risk arising from the master's negligence in repairing it, or in informing the servant of dangers known to the master.

5. In an action for injury sustained by the falling of an alleged defective elevator, an expert on the construction and operation of elevators may properly testify.

Appeal from appellate court, First district.

Action by Adam Blindauer against the Union Show-Case Company. A judgment for plaintiff was affirmed by the appellate court (75 Ill. App. 358), and plaintiff appeals. Affirmed.

Bulkley, Gray & More, for appellant. Burton & Reichmann, for appellee.

WILKIN, J. Appellee brought an action on the case against appellant, in the circuit court of Cook county, to recover damages for a personal injury alleged to have been caused through the negligence of the defendant. A plea of not guilty being filed, a trial was had by jury, resulting in a verdict of \$2,500 for plaintiff. Motions for new trial and in arrest of judgment were overruled, and judgment rendered on the verdict. That judgment has been affirmed in the appellate court for the First district.

The declaration averred that the defendant used and occupied a certain building for manufacturing purposes, in connection with which it had an elevator for conveying materials and employes from one story to another; that the plaintiff was in the employ of the defendant, and, in the discharge of his duty, it became necessary for him to use such elevator; that he was injured owing to a defect in an appliance, by which it was stopped and prevented from descending, which defect rendered the elevator dangerous to passengers, and which defect was known to the defendant, but of

which the plaintiff was ignorant, the elevator, by reason of the defect, falling to the bottom of the shaft. A full statement of the facts is reported with the opinion of the appellate court. See 75 Ill. App. 358.

A great deal of space is occupied in the argument of counsel on either side in the discussion of the facts of the case, notwithstanding it is conceded that all controverted questions of fact must be treated as settled in favor of the plaintiff by the decision below.

The first question of law discussed is that there is a variance between the evidence and the allegations of the declaration. That question was not raised upon the trial of the case in such a manner as to entitle the appellant to have it passed upon now. It has been uniformly held by this court that, if a party seeks to take advantage of a variance between the evidence and the allegation, he must do so at the trial by specifically pointing out wherein the variance exists, so that, if deemed necessary, the other party may amend his pleadings to avoid the variance. In *Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520, at the close of the evidence, the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant, upon the ground, among others, that the proof varied from the declaration, and we said (page 516, 135 Ill., and page 521, 26 N. E.): "This was the only attempt to point out a variance, and it was clearly insufficient. It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to so amend her pleading as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim. Under our statute, the amendment might have been instantly made, subject only to such terms as the court might have seen fit to impose, and the cause might then have proceeded as though no variance had ever existed,"—citing *Benevolent Soc. v. Fietsam*, 97 Ill. 474. We are unable to discover wherein there is any failure in this declaration to state a good cause of action, nor that the proof is in any material respect variant from the allegations. But, if it were otherwise, it is clear that the objection comes too late.

The refusal of the trial court to give the fifth, tenth, eleventh, and twelfth instructions, and the modifying of the ninth, asked by the defendant, are assigned for error. The fifth instruction did not correctly state the law. It states, in substance, that it was the duty of the plaintiff, as a matter of law, when he discovered that the brake was out of order, to stop using the elevator, and report the same to his employer. It wholly ignores his testimony to the effect that he had instructions from the president of the defendant company as to how he should use the elevator, and assumes that, merely because he knew the appliance was out of re-

pair, he therefore knew that the elevator was thereby rendered unsafe. "It is only when the servant works with defective machinery, knowing it to be defective or dangerous, that he assumes the risk incident to its use. Not only the defects, but the dangers, must be known to him." *Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162. The eleventh instruction, in so far as it announced the correct rule of law, was substantially given in the eighth asked by the defendant. The tenth instruction was incorrect in that it assumed that because the elevator was defective, and known to be so by appellee, he could not recover, notwithstanding he was ignorant of the fact that the defects rendered it unsafe. The twelfth instruction is open to the same objection, and also that it assumes, because plaintiff knew or had notice of a defect in the elevator, although also known to the appellant, that he took all the risk which might arise from appellant's negligence in not repairing the defect, or in not warning him of dangers which were known to the defendant. What we have here said sufficiently disposes of the objection urged to the modification of the ninth instruction asked by the defendant.

The contention that the testimony of the witness Jallings, as an expert in the construction and operation of elevators, was improperly admitted, is, we think, without force. The only objection made to his evidence is that the case is not one calling for the opinions of expert witnesses. We think otherwise, and that the purpose for which he was called was proper. There are no substantial errors of law in this record. The judgment of the appellate court will be affirmed. Judgment affirmed.

(175 Ill. 278)

DEMPSTER et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONFIRMATION—WITHDRAWAL OF OBJECTIONS—RESTORATION OF RIGHTS.

A city passed an ordinance for a sewer in West Eighteenth street between certain avenues, to be paid for by special assessment. There was no such street as West Eighteenth street, but the entire property between the two avenues named belonged to complainants, and the ordinance was consequently insufficient as a basis of assessment. Complainants filed objections to the confirmation of the assessment of their lands, when the city entered into an agreement with them, to induce the withdrawal of the objections, that a street should be opened where it was proposed to lay the sewer, and the city condemn that part of complainants' premises taken for the street, and pay them therefor, and that the warrant for the collection of the assessment should be stayed, so that complainants could use the condemnation money to pay the assessment. The city passed an ordinance opening the street, commenced condemnation proceedings, and the amount of compensation to be paid was agreed on, and judgment entered accordingly. Afterwards complainants withdrew their objections to the confirmation of the assessment, and judgment was entered staying the warrant as

agreed. Subsequently the sewer was laid across complainants' lands, but, before the stay expired, the city repealed the ordinance laying out the street, dismissed the condemnation proceedings, and proceeded to enforce the judgment of confirmation and collect the assessment. *Held*, that complainants were entitled to a decree setting aside the judgment of confirmation, and restoring them to their original rights, unless the agreement was carried out by the city, since they had no legal remedy to recover compensation for the land included in the street.

Appeal from superior court, Cook county; F. Q. Ball, Judge.

Bill by Clancey J. Dempster and others against the city of Chicago. From a decree sustaining a demurrer and dismissing the bill, complainants appeal. Reversed.

H. S. & F. S. Osborne and R. F. Pettibone, for appellants. Charles S. Thornton, Corp. Counsel, and William H. Sexton, Asst. Corp. Counsel, for appellee.

CARTWRIGHT, J. Appellants filed their bill in the superior court of Cook county, asking for relief against a special assessment alleged to have been vitiated by fraud, or for a performance of the agreement upon which the judgment confirming the assessment was entered. Appellee demurred to the bill generally for want of equity on its face, and the demurrer was sustained, and the bill dismissed.

The facts as stated in the bill, and admitted by the demurrer, are as follows: Complainants are owners, as tenants in common, of premises lying between Central Park avenue on the east and Lawndale avenue on the west, in the city of Chicago. On November 30, 1891, the city council of the defendant, the city of Chicago, passed an ordinance entitled "An ordinance for a connected system of sewers, as follows: In West Eighteenth street from Central Park avenue to Lawndale avenue, and in Millard avenue and Lawndale avenue from West Sixteenth street to Ogden avenue," to be paid for by special assessment. This ordinance was insufficient as a basis for a special assessment, for the reason that there was no such street as West Eighteenth street between Central Park avenue and Lawndale avenue, but the entire premises between said avenues from Sixteenth street to Nineteenth street were private property of the complainants, in their sole and exclusive possession, and had been in such possession and that of their grantors for more than 40 years. The ordinance did not, therefore, specify the locality of the proposed sewer, but, while regular and sufficient upon its face, it contained an impossible description of the same. Thereafter the defendant filed its petition in the county court of Cook county to have the cost of the proposed sewer assessed upon property benefited. Commissioners were appointed, and an assessment roll was returned, assessing complainants' premises for benefits to the amount, in the

aggregate, of \$4,470.75. Complainants appeared and filed objections to the assessment, including, with others, the objection above set forth. Thereupon the defendant, by its officers duly authorized, for the purpose of inducing complainants to withdraw their objections, entered into an agreement with them that a street should be laid out and opened where it was proposed to lay the sewer; that the city would proceed immediately to condemn that part of complainants' premises taken for a street, and pay complainants for the land taken, the value to be ascertained by condemnation proceedings; that complainants should have the use of the condemnation money to pay the special assessment, and, in order to allow them to receive the condemnation money for that use, the warrant for the collection of the assessment should be stayed until February 1, 1893; and that, in consideration of this agreement, complainants should withdraw their objections. On December 21, 1891, the city council passed an ordinance to lay out and open West Eighteenth street from Central Park avenue to Lawndale avenue, and on March 26, 1892, filed its petition for the condemnation of complainants' property to be taken for the proposed street. Complainants entered their appearance, and paid or incurred large expenses for expert witnesses and attorney's fees, and attended in court for two days while the case was on call for trial. Before the jury was impaneled, an agreement was reached between them and the city on the amount of compensation to be paid. Thereupon the jury was impaneled and sworn, and the city produced and swore one of its expert witnesses, who testified that the land was worth \$45 per front foot. Judgment was entered in accordance with this testimony and the agreement, May 25, 1892, for \$5,940, for the land to be taken. On May 26, 1892,—the next day after the entry of the judgment,—complainants, relying upon said agreement, withdrew their objections to the confirmation of the assessment, and judgment of confirmation was entered staying the warrant, according to the agreement, to February 1, 1893. The defendant entered upon the land of complainants, and laid the sewer across it. Afterwards, on January 23, 1893, shortly before the warrant was to issue for the collection of the special assessment, the city council repealed the ordinance laying out the street, and the corporation counsel of the city thereupon dismissed the condemnation proceedings. The defendant then proceeded to enforce the judgment of condemnation, and collect the special assessment. The prayer of the bill is that the defendant be restrained from carrying out the judgment confirming the special assessment, and that the same be declared no charge upon complainants' premises, or, in the alternative, that the defendant carry out its agreement under which the judgment was entered, and the complainants offer to the city a conveyance of the

title which it would have acquired under the condemnation proceedings.

If a transaction such as is here detailed in the bill and admitted by the demurrer to be truly stated had taken place between two individuals, there could be but one voice concerning its character as a flagrant fraud, and equity would promptly afford relief to the injured party against any attempt to enforce the judgment. It is contended, however, that relief against the wrong inflicted must be denied in this case, because the claim is for a tax, and because defendant is authorized by law to make a special assessment before condemning the land for public use, and complainants have a legal remedy to recover compensation for their land which has been taken. It has been settled by repeated decisions that the objection that a city has not acquired title to the land in which it proposes to put a sewer cannot be made in the assessment proceedings in the county court. *Village of Hyde Park v. Borden*, 94 Ill. 26; *Holmes v. Village of Hyde Park*, 121 Ill. 123, 13 N. E. 540; *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704. The presumption of good faith on the part of a municipal corporation obtains, and it is presumed that it will proceed and obtain the property by condemnation. It is equally true that, where the objection is that title to the property where the improvement is constructed has not been acquired, and there is no complaint further than mere delay in acquiring it, the objection cannot be made upon an application for judgment of sale. *Boynton v. People*, 159 Ill. 553, 42 N. E. 842. But while it is true that an objection that title has not been obtained cannot be interposed in the assessment proceeding, it was said in the case of *Holmes v. Village of Hyde Park*, supra, if it were made to appear that there was a probability that the village would not acquire title, a bill in chancery would lie to enjoin the assessment proceedings until such title should be acquired; and in the case of *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15, the court said that, if it was apprehended that the city could not or would not acquire title, it would not be doubted that a court of equity would afford adequate relief. An objection that the city had not acquired title to the property could not be made in the assessment proceedings, but in this case the objection was not merely of that nature. It was to the sufficiency of the ordinance,—that there was no such place as was named in it. While the ordinance purported to give the location of the improvement, it was an impossible one, because there was nothing which answered the description of the ordinance. There was no place known as "West Eighteenth street between Central Park avenue and Lawndale avenue," but the premises were in the exclusive possession of the complainants as their property, and there was nothing in the nature of a street there. This

was a good objection to the application for confirmation of the assessment. Although the ordinance, on its face, specified the locality of the improvement, it could be shown by extraneous evidence that there was no such street as was named. In *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970, it was held that where the ordinance was fair and legal on its face, giving a full and sufficient description of the locality of an improvement, although it could be shown that the description was a false one, the objection must be made on the application for confirmation, and could not be made on application for judgment of sale. This assessment could not be enforced, and, by withdrawing their objections, complainants, through the agreement and representations of defendant or its officials, lost a substantial right. The law secures to them, as property owners, this important and substantial right of objection to the proposed assessment, and to a hearing of the objection. This understanding was entered into by complainants, so far as appears, in good faith on their part; and after the defendant had obtained all the benefits of the agreement, and had laid the sewer across their property, the ordinance for laying out a street was repealed. This conduct, in violation of the agreement, warrants the inference that, having acquired possession, there is no intention of laying out a street, but a fraudulent design to disregard the agreement and enforce the assessment. The assessment is not a tax in the ordinary sense, but, if it were, the rule is that a tax in which the party is deprived, by fraudulent practices of the officers, of important rights which the law intends to secure to him, may be enjoined. *Cooley, Tax'n*, 547.

The complainants have no legal remedy to recover compensation for the land included in the street, which was abandoned, and the ordinance repealed. The locality which is described in the ordinance as a street is not a street. The assessment could not be enforced against complainants under the ordinance, and the proceeding is shown by the bill to be vitiated by fraud, against which a court of equity should give relief. The bill showed good ground for setting aside the judgment of confirmation, and restoring the parties to their original rights, unless the agreement should be carried out by the defendant. It was error to sustain the demurrer and dismiss the bill. The decree is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 85)

TOWN v. HOWIESON.

(Supreme Court of Illinois. Oct. 24, 1898.)

ORDER FOR APPEAL—PARTIES—DISMISSAL—WRIT OF ERROR.

1. Where the following minute of an order for appeal was indorsed on the back of the draft of a decree for plaintiff: "Appl. by def'ts, T. and S., to Appl. Ct.—Bd. \$300—20

ds."—an order permitting defendants a joint appeal on condition that they filed a \$300 bond within 20 days, approved by the chancellor, conforms to the minute of the order of appeal indorsed on the decree.

2. Where an order for an appeal to the appellate court permitted defendants to appeal jointly, an appeal by one defendant was properly dismissed, since a party desiring to sever should obtain an order therefor.

3. A motion will not lie in the supreme court by an appellant, who has appealed from the dismissal of his appeal to the appellate court, to allow him a writ of error and supersedeas on the record, and on his printed abstracts and briefs.

Appeal from appellate court, First district.

Bill by Jeanette Howleson against David E. Town and another to foreclose a deed of trust. From a decree for complainant, defendant Town appealed to the appellate court. His appeal was dismissed, and he appeals. **Affirmed.**

Charles Pickler, for appellant. James A. Peterson, for appellee.

CARTER, C. J. The question here is whether or not the appellate court erred in dismissing the appellant's appeal to that court. There was a decree of foreclosure of a deed of trust on real estate against appellant and Nathan Silverman at the October term, 1897, of the circuit court of Cook county. Upon the back of the draft of the decree the following minute of an order for appeal was indorsed: "Appl. by def'ts David E. Town and Nathan Silverman to Appl. Ct.—Bd. \$300.—20ds." In entering the decree, the clerk wrote up the order for appeal thus: "And thereupon said defendants, David E. Town and Nathan Silverman, pray an appeal from this decree to the appellate court in and for the First district of Illinois, which is granted on condition that said defendants do file herein a good and sufficient bond, in the penal sum of \$300, within twenty days, with sureties to be approved by the clerk of this court." Within the time, Town presented his separate appeal bond, had it approved by the chancellor and filed it with the clerk, and the transcript was duly filed in the appellate court. Afterwards appellant moved the appellate court for leave to amend the appeal bond,—in what respect, the record does not show, but shows only the motion, and that it was denied. Afterwards, on the same day, on suggestion of a diminution of the record, appellant's motion for leave to supply the same instantan and to assign additional errors was allowed, and the order was complied with. Thereupon, on motion of the appellee, the appeal was dismissed. The supplemental record, upon which error was also assigned, shows that at the April term, 1898, of the circuit court, appellant moved to amend the order for appeal of that court to conform to the minute on the draft of the decree; appellant contending it allowed an appeal by him on filing his separate bond, approved by the chan-

cellor. The chancellor entered an order amending the order previously entered in no respect, except that the appeal bond should be approved by the chancellor. When this supplemental record was filed, the only effect it had was to cure the defect in the approval of the bond; it having been approved by the chancellor, instead of the clerk. The motion to amend had been denied, and was not thereafter renewed, and leave was not asked to file a new or sufficient bond conforming to the order. The record does not show, beyond the prayer for appeal, any attempt whatever by the defendant Silverman, or on his behalf, to take or to join in an appeal, but, on the contrary, an attempt by Town, only, to perfect his separate appeal. Upon this state of the record, we are not called upon to decide whether or not it would have been error, had the appellate court refused leave to file a good and sufficient bond on behalf of both defendants below, under section 69 of the practice act, which provides that "no appeal to the supreme or appellate court shall be dismissed by reason of any informality or insufficiency of the appeal bond, if the party taking such appeal shall, within a reasonable time to be fixed by the court, file a good and sufficient bond in such cause, to be approved by the said court." No such leave was asked, or bond offered. There was therefore no error in denying appellant's motion to amend the bond.

The only remaining questions are: Did the circuit court err in refusing to amend the order of appeal so as to permit appellant to take his separate appeal? And did the appellate court err in dismissing the appeal, as the record then stood? At the subsequent term at which the motion to amend was made, the amendment could be made only from some minute or memorial paper from which it could be determined what the order made by the court really was. *Gebble v. Mooney*, 121 Ill. 255, 12 N. E. 472; *Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242. The court observed this rule in making the amendment, and the amended order conformed to the minute of the order of appeal indorsed on the decree as filed. The meaning of this minute or memorandum was that the defendants jointly prayed an appeal. Nor was there any showing made for an appeal by Town alone, but the court was only asked to interpret the minutes as allowing such severance. The court did not err in refusing to amend the order so as to allow appellant to appeal separately. Such an order would have been a different one from the order actually made by the court as shown by the minute, and the statute does not authorize appeals by piecemeal. The appellate court then properly dismissed the appeal. As said in *Hileman v. Beale*, 115 Ill. 355, 5 N. E. 108, "The right to an appeal is strictly statutory, and a party, to avail himself of this privilege, must conform to the order of the court which the statute author-

izes it to prescribe." And, as there further said, the section of the practice act allowing one of several parties to appeal and to use the names of the other parties does not authorize the party appealing to sign the names of the other parties to the appeal bond, and a party desiring to sever should obtain an order to that effect. See, also, among others, *Tedrick v. Wells*, 152 Ill. 214, 38 N. E. 625, and *Hammond v. People*, 164 Ill. 455, 46 N. E. 796. In the latter case the decree provided for a severance, the appeal by one purported to be on behalf of all, and a motion for leave to file a sufficient bond was allowed.

Appellant has made a motion to allow a writ of error and supersedeas upon the record and supplemental record, and upon his printed abstracts and briefs. This motion is addressed to the wrong court (*Holden v. Herkimer*, 53 Ill. 258; *Haines v. People*, 97 Ill. 161), and must be denied. The judgment of the appellate court will be affirmed. Judgment affirmed.

(174 Ill. 582)

DONLEY v. DOUGHERTY.

(Supreme Court of Illinois. Oct. 24, 1898.)

MASTER AND SERVANT—PERSONAL INJURIES—
PROOF—ASSUMPTION OF RISK—CREDI-
BILITY OF WITNESS.

1. In an action by a servant for injuries caused by defective machinery, he is only required to prove his cause of action by a slight preponderance of the evidence.

2. Where the master promised to repair defective machinery complained of by the servant, the servant could rely thereon, and continue using the machinery, without assuming the risk of the defect, for a time reasonably sufficient to enable the master to do so.

3. In determining the credibility of a witness, it is proper for the jury to consider his interest in the suit, as shown by the evidence.

4. In an action by a servant for injuries sustained through defective machinery, he must prove by a preponderance of the evidence that he was exercising that degree of care and caution which a reasonably prudent and cautious man would exercise under like circumstances in the situation that he was placed, as shown by the evidence.

Appeal from appellate court, First district. Action by John Dougherty against William E. Donley. From a judgment for plaintiff affirmed in the appellate court (75 Ill. App. 379), defendant appeals. Affirmed.

This was an action on the case, brought by appellee, to recover damages for injuries claimed to have been received by him while using a broken and defective hay-cutter belonging to his employer, the appellant. The declaration proceeds upon the theory that such defect or imperfection was known to the defendant and also to the plaintiff, but that the plaintiff was ordered to use said machine, and did so use it for a short time, under the promise of his employer that it would be repaired soon; and, while so using it, his hand was caught and mangled, resulting in serious injury. A jury in the trial

court returned a verdict of \$2,500. Upon a motion for a new trial, a remittitur of \$700 was entered, whereupon a motion for a new trial was overruled, and judgment for \$1,800 was entered. On appeal to the appellate court for the First district, this judgment was affirmed, and thereupon this appeal was prosecuted to this court.

L. C. Cooper and S. S. Jonas, for appellant. Edward Maher and Charles C. Gilbert, for appellee.

PHILLIPS, J. (after stating the facts). The only error assigned and argued by appellant is that the court erred in giving instructions for appellee, and in modifying an instruction asked by appellant. The first instruction given for plaintiff below was as follows: "The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, Dougherty, and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor, and to find a verdict against the defendant, Donley." This form of instruction was given by the trial court, and approved by this court, in the case of *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161.

The fourth instruction was that if the jury believe, from the evidence, the hay-cutter was defective, as charged, and the plaintiff notified the defendant of such defect, and that such defect rendered plaintiff's services dangerous, whereupon the defendant promised to have the hay-cutter repaired, then "If you further believe, from the evidence, that the plaintiff thereupon relied upon the said promise of the said defendant to repair said hay-cutter, and that the said plaintiff continued in his said employment a reasonable time to permit the defendant to repair said hay-cutter, the plaintiff was not then guilty of negligence in continuing to use said hay-cutter for a reasonable time." It would have been more proper, perhaps, to have told the jury that under such circumstances the plaintiff had a right, under the law, to continue in the employ of the master, relying upon such promise; but the effect of the instruction was in substance the same. This rule is approved in the cases of *Furnace Co. v. Abend*, 107 Ill. 44, *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979, and *Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417.

The eighth instruction given on behalf of the plaintiff told the jury, in substance, that, if any witness was in the employ of either plaintiff or defendant, such relation might be considered, together with any other relation which existed between such witness and such party to the suit, and that such interest, if any is shown by the evidence, might be considered by the jury in determining the

weight to be given the testimony of such witness, taking the same in connection with all other evidence in the case and the facts and circumstances proven. There was no substantial or reversible error in this instruction. It is always proper for the jury to consider the interest, if any is shown by the evidence, which a witness has in the result of the suit, in determining his credibility.

In the first instruction offered by defendant, which was modified and appears as the ninth instruction, the jury were told that, to authorize a recovery, the plaintiff must prove, by a preponderance of the evidence, that he was exercising that degree of care and caution at the time of the injury which a reasonably prudent and cautious man would have exercised under like circumstances, and the court added thereto, "and in the situation that plaintiff was placed, as shown by the evidence." There was no substantial error in this modification. Whatever situation the evidence showed the plaintiff was in at the time he received the injury was the position in which he must necessarily have been expected to exercise such care and caution. There was no reversible error in the giving or modifying of instructions, and the judgment of the appellate court for the First district affirming the judgment of the superior court of Cook county is affirmed. Judgment affirmed.

(175 Ill. 79)

CRANE CO. v. TIERNEY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

PARTNERSHIP—SCOPE OF BUSINESS—AUTHORITY OF PARTNERS—CONTRACTS—INSTRUCTIONS—EVIDENCE—BILL OF EXCEPTIONS.

1. An abstract of a copy of a record in another case, which was a copy of a copy of an alleged document which the person copying did not know to be an original paper, and which was not proved to have been executed, is inadmissible as secondary evidence.

2. A bill of exceptions is to be construed most strongly against the party preparing it.

3. When the principle contained in a requested instruction is contained in another already given, the request may be refused.

4. An instruction in an action against a partnership to recover for goods sold, which assumes that the goods were within the apparent scope of the firm business, is erroneous.

5. An instruction which merely states an abstract rule of law, not applicable to the facts in the case, is properly refused.

6. The power of a partner to bind the firm extends to the apparent scope of the business actually transacted by the firm, and persons dealing with him are not bound by limitations contained in the partnership articles.

7. Where goods within the apparent scope of a firm business are purchased by one partner, ostensibly for the firm, but really for another firm, in which the member making the purchase is also a partner, the firm will be bound, unless the seller was aware of the real nature of the transaction.

Appeal from appellate court, First district.

Action by the Crane Company against Michael J. Tierney and another. Judgment for defendants, and plaintiff appeals. Reversed.

James H. Barnard and Ashcraft & Gordon, for appellant. Edward Maher (A. B. Jenks, of counsel), for appellee M. C. McDonald.

CARTWRIGHT, J. Appellant, the Crane Company, brought this suit in assumpsit for goods sold to the appellees, Michael J. Tierney and Michael C. McDonald, as partners composing the firm of M. J. Tierney & Co. Tierney was defaulted, and the case was tried upon the issue whether McDonald was jointly liable as a partner with Tierney for the goods sold. Appellant sought a judgment against both, but there was a verdict for McDonald, and, failing to recover against him, there was judgment for both appellees, which has been affirmed by the appellate court.

The case is argued here on behalf of Michael C. McDonald only. He was a partner with Michael J. Tierney, under the name of M. J. Tierney & Co., in the machine supply business, and his counsel says that his claim at the trial was that the goods in question were in fact bought for and used by the Globe Steam-Heating Company, another firm engaged in the steam-heating business, in which he was not a partner, and not for M. J. Tierney & Co., in which he was a partner, and that plaintiff had notice of these facts. On the trial the defendant McDonald offered to read in evidence from the abstract of the record in the case of McDonald v. Fairbanks, 161 Ill. 124, 43 N. E. 783, what purported to be a copy of an agreement of Bernard B. McGinn, Michael J. Tierney, and Edward S. McDonald dissolving their partnership under the name of the Globe Steam-Heating Company. Plaintiff objected, but the objection was overruled, and that part of the abstract of the record was read in evidence. The evidence as to the abstract was substantially as follows: It was made by McDonald's attorney, with the aid of a stenographer, from the record in the other suit referred to. That record contained a copy of a paper read in evidence in that suit, and this part of the abstract was a copy from that record. The paper which was so read in the other case, and copied in the record, was produced in court in this case; and it was shown that it was not an original document, but a copy of a paper presented to an attorney in the other case by Bernard B. McGinn at his office. The attorney to whom the paper was presented by McGinn made the copy which was read in the other case, and it went into the record, but he had no knowledge whether the paper he copied was an original paper, and there was no evidence that it had ever been executed by the parties. There was no evidence that there ever was an original executed or what had become of it, and there had been no reasonable effort to procure the original, if there ever was any. The abstract admitted was a copy of a record which was a copy of a copy of an alleged document not proved. Following the evidence showing these facts in the bill of exceptions is this statement: "The

foregoing was all the evidence introduced by either party as to the admissibility of the paper referred to,"—and this is followed by the ruling of the court admitting the evidence. Following the evidence objected to, the bill of exceptions contains the following: "Which evidence, with other evidence introduced, and because of the introduction of other evidence, tended to prove the issues in the case, and which evidence was made material and admissible by and because of other evidence introduced in the case."

The bill of exceptions is the pleading of the party preparing it, and is to be construed most strongly against him. But this bill shows that the evidence recited in it was the only evidence introduced as to the admissibility of this secondary evidence. If the further statement was intended to apply to its admissibility as secondary evidence, it amounts merely to saying that evidence which had no reference to its admissibility rendered it admissible. The entire evidence before the court when the paper was admitted and read to the jury is contained in the bill of exceptions, and is certified to be all the evidence on that subject. The further statement appears to have been with reference to the admissibility of the evidence as tending to prove the issue, and not as to its character as secondary evidence. Every rule of law governing the introduction of secondary evidence was disregarded, and it was error to admit the abstract.

Objection is made to the refusal of the court to give certain instructions asked by plaintiff, and to the modification of the twelfth instruction which was given, but we think there was no error in such action. The principle stated in the second instruction was contained in the first, which was given in simpler and better form. The fourth assumed that the goods sold, or some part of them, were within the apparent scope of the business transacted by the defendants as partners, and it was properly refused. The sixth merely stated a rule of law in an abstract form not applied to the facts of the case, and it is not error to refuse such an instruction. The object of instructions is to inform the jury what rules of law they must apply to certain conditions of fact in reaching a conclusion as to their verdict, and, if counsel fails to draw them in such form as to apply them to conditions of fact which the evidence tends to prove, it is not error for the court to refuse to give them. What was good in the other instruction refused was included, in substance, in those which were given, and we think there was no error in the modification of the twelfth.

Complaint is also made of the giving of certain instructions on the part of the defendant McDonald. The third was as follows: "You are instructed that while in the partnership relation there is an implied authority given to each member of the firm, and an implied assent from each member

that each may act for all the members of the partnership as the agent of the partnership, yet this authority and assent applies only to the partnership business which is authorized by the articles of co-partnership, or that within the apparent scope of the business actually warranted by the partnership, and any act beyond this scope will not be binding upon the member of the firm who did not authorize such act or did not ratify it."

An important question in the case was whether the business transacted by the firm of M. J. Tierney & Co., in which McDonald was a partner, embraced the class of goods sold by plaintiff and bought by Tierney in the name of the firm, and this instruction limited the power of Tierney to bind McDonald to the business authorized by the articles of co-partnership or within the apparent scope of the business "actually warranted" thereby. It stated that any act beyond such scope would not be binding upon McDonald if he did not authorize the act or ratify it. It confined the power of a partner to the articles themselves or to the apparent scope of the business provided for therein, while as to third persons the power of a partner is not so limited, but extends to the apparent scope of the business actually transacted by the firm. If a partner professes to act for the firm in the business actually carried on by it, third parties with whom he deals are not bound by limitations contained in the articles between the partners of which they have no notice. The instruction was wrong.

The sixth instruction given at the request of McDonald was as follows: "The jury are instructed that one partner is in no case bound by the acts of his co-partner done without his assent, and, although this assent may be implied from their partnership relation in regard to all acts within the scope of their partnership transactions, it cannot be in reference to one co-partner pledging co-partnership credit for purchase made on his own individual account or for another firm in which he was interested. In such case there must be extraneous evidence to prove such assent, and, in the absence of such evidence, it will be wholly immaterial whether the one dealing with the individual partner knew it was a misappropriation of the partnership funds or credit; for the very nature of the transaction ought to put him on inquiry, and, however bona fide his conduct may be, it is a case of negligence on his part, and the burden of proof is on him to repel every presumption of fraud, collusion, or negligence as against him." This instruction, like the third, is abstract in form, and, although it is not error to give an instruction in that form if the rule of law stated is correct, it is not an approved method of instructing a jury. This instruction is also argumentative and wrong in principle. Under it, if the purchase from plaintiff was in fact for the

Globe Steam-Heating Company, as claimed, McDonald could not be held, in the absence of extraneous evidence of his assent, although the purchase was ostensibly for the firm of M. J. Tierney & Co., and within the scope of the business actually transacted by that firm, but such a purchase must be treated as an exception to the rule that assent may be implied from the partnership relation and the business carried on by the firm. In such a case there would be nothing in the nature of the transaction to put the plaintiff upon inquiry, and the firm would be held. For the errors pointed out the judgments of the appellate court and circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

(175 Ill. 115)

QUEEN INS. CO. v. DEARBORN SAVINGS, LOAN & BUILDING ASS'N.

(Supreme Court of Illinois. Oct. 24, 1898.)

INSURANCE — "MORTGAGEE CLAUSE" — CONSTRUCTION OF CONDITIONS — INTEREST ON LOSS — EVIDENCE — ERROR WITHOUT PREJUDICE.

1. Conditions, in an insurance policy, limiting the time within which proof of loss must be made and action brought, are applicable solely to the owner of the property insured, as distinguished from the mortgagee, where such conditions are contained in the body of the policy, but are not set out in the "mortgagee clause" attached thereto, and are preceded by a clause providing that "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto."

2. In the absence of a provision in the contract, as between the insurance company and a mortgagee, extending the time for the payment of a loss, interest was properly allowed from the date of the loss, in an action on the policy by such mortgagee.

3. The admission of testimony as to the amount of plaintiff's interest in the property insured, without requiring proof of the items making up the total amount, in an action on the policy by a mortgagee, was not prejudicial to defendant, if erroneous, where the bond showing the indebtedness was in evidence, and it was not claimed that plaintiff's interest in the property was less than the face of the policy.

Magruder, J., dissenting.

Appeal from appellate court, First district.

Action by the Dearborn Savings, Loan & Building Association against the Queen Insurance Company, on a policy issued to Ellie L. Graham, and made payable to plaintiff by virtue of one of its provisions. From a judgment of the appellate court (75 Ill. App. 371) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

A fire insurance policy was issued by the appellant to Ellie L. Graham, to which was attached a mortgagee slip making the loss payable to the appellee, as its interest might appear. This slip was printed and contained a number of conditions, and seems to have been what is known as the "New York

Standard Mortgagee Clause." A loss occurred, and appellee brought suit in its own name. The defenses against a recovery were that proof of loss was not made within 60 days, and that suit was not brought within 12 months, after the fire. There was no dispute as to the facts. A jury was waived. At the close of the plaintiff's evidence, a motion was made to find for the defendant, which was overruled. Appellant also submitted appropriate propositions of law, which raised the said defenses. The trial court found in favor of the appellee, and the appellate court affirmed that finding. The errors assigned raise the points whether the defenses should not have been sustained, and also whether the amount of interest included in the judgment is excessive, and also a question as to the admissibility of evidence.

Tenney, McConnell, Coffeen & Harding, for appellant. A. B. Jenks, for appellee.

WILKIN, J. (after stating the facts). That there existed between the appellant insurance company and the appellee, the mortgagee of the insured property, a contract of insurance distinct from that which existed between the company and the owner, is not and cannot be questioned. *Insurance Co. v. Olcott*, 97 Ill. 439; *Insurance Co. v. Race*, 142 Ill. 338, 31 N. E. 392. The question is, what are the terms of that contract? Manifestly, the loss clause alone would not be sufficient to constitute such a contract. It is not sufficiently complete to be given that effect. Do all the terms and conditions imposed on the owner in his contract apply also to the mortgagee's contract? The answer must be found in the stipulations, construed in the light of the surrounding circumstances. In the main body of the policy we find a clause as follows: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto." The meaning of this clause is, as we understand it, that, in case a mortgagee clause is added, the contract with the mortgagee shall include only such conditions as appear in such mortgagee clause or slip. The language of the policy, particularly in determining whether the liability is limited, is always to be strictly construed against the insurer. *Insurance Co. v. Robinson*, 64 Ill. 265. Under the well-known rule of construction, "*Expressio unius est exclusio alterius*," the statement in this clause that certain conditions shall apply, but only as set forth in the mortgagee slip, excludes all conditions not contained therein. The mortgagee slip in this case contains no such conditions as are claimed by the defendant. Had it been desired to impose the obligation on the mortgagee to make proof of loss, that require-

ment should have been inserted in the conditions applicable to the mortgagee.

What we have said applies equally to the limitation as to bringing suit within 12 months. The conditions in the body of the policy, by virtue of the clause above cited, are applicable solely to the insured, as distinguished from the mortgagee. This construction of the contract is sustained by the supreme court of Nebraska in *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646. We are cited by counsel for appellant to two cases which seem to sustain their contention,—*Southern Home, Building & Loan Ass'n v. Home Ins. Co.*, 94 Ga. 167, 21 S. E. 375, and *American Building & Loan Ass'n v. Farmers' Ins. Co.*, 11 Wash. 619, 40 Pac. 125. Both of these cases hold that the conditions in the body of the policy are applicable to the mortgagee. From an examination of the cases it is not clear that there was any such clause as the one above quoted, in the policies there involved. At all events, we prefer the rule here announced, and adopted in the Nebraska case referred to, believing it the sounder doctrine.

These views dispose of the merits of the main questions involved, and also of the question of interest. Unless the contract as to the mortgagee entitled the company to 60 days, or some other time, within which to pay, the amount was due immediately upon the loss; and, as we have construed that contract, interest allowed from that date was proper.

At the trial, the court permitted the secretary of the association to testify as to the interest of the appellee in the property. The debt included dues, interest, and premium, and may have included fines, taxes, and assessments. The better rule would perhaps have been to have required proof of the items that went to make up the total amount due; but, if the answer of the witness stated a mere conclusion, the facts on which that conclusion was based could readily have been ascertained on cross-examination. The bond showing the indebtedness was in evidence. It is not claimed that the interest of the mortgagee in the property was less than the face of the policy. We cannot see how the error, if error it be conceded to be, could affect the appellant prejudicially. Under the law as applied to the contract in question, the judgment is right. It is therefore affirmed. Judgment affirmed.

MAGRUDER, J., dissenting.

(175 Ill. 356)

LE MOYNE et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

CONDEMNATION—ASSESSMENT OF BENEFITS—RES JUDICATA.

The judgment in proceedings to assess lands benefited, to pay for a street, land for which had been condemned, is conclusive as

to amount of benefits, and a bar to subsequent assessment proceedings against the same lands for the same purpose, though there was a second condemnation of the land for a street after the first condemnation proceedings had been dismissed on motion of the owner of the land condemned, on the city failing to take the land in the proper time; the owners of the land assessed not being parties to the condemnation proceedings or the motion to dismiss.

Appeal from superior court, Cook county; Joseph E. Gary, Judge.

Proceedings by the city of Chicago to assess benefits to pay for land condemned for a street. Motion of William Le Moyne and others to dismiss was denied, and they appeal. Reversed.

Hamlin & Holland, for appellants. Charles S. Thornton, Corp. Counsel, and A. F. Teffy, Asst. Corp. Counsel, for appellee.

WILKIN, J. This is an appeal from a judgment of the superior court of Cook county confirming a special assessment against the lots of appellants to pay for land condemned by the city of Chicago in extending Winnemac avenue from North Clark street to Southport avenue. The condemnation proceeding was begun by petition filed in the superior court on May 27, 1896. Verdict and judgment having been entered awarding compensation for land taken, a supplemental petition was filed to levy a special assessment upon the lands benefited, to pay for the proposed extension. When the assessment roll was filed, appellants, whose property had been assessed therein, appeared and objected to its confirmation, and moved the court to dismiss the proceedings, on the ground that a petition to condemn this same land for the purpose of this same improvement had on June 2, 1892, been filed; that in that proceeding the land had been condemned; that subsequently an assessment had been made against appellants' lots, the same as in this proceeding, on the basis of benefit derived by reason of the proposed improvement; that that assessment had at the December term of the superior court been confirmed; "that said judgment was not appealed from, and remains unreversed," and is therefore a bar to this proceeding. The entire record of the former case was introduced in evidence. Motion to dismiss was overruled, and there being no evidence offered on the question of benefits in this case, except the assessment roll, the court, after overruling a motion for new trial, entered judgment confirming the assessment. The objectors appeal.

It is admitted by counsel for appellee that the land sought to be condemned in this proceeding is the same as that in the former suit, and is condemned for the same purpose, but the contention is that in the former case the land condemned was not actually taken; that the owner, John Chant, upon the city failing to take the land within proper time, had, before the filing of this petition, asked and received a dismissal of the condemnation pro-

ceedings; that the judgments in the assessment proceedings thereunder were thereby vacated, there being nothing upon which to base the supplemental proceedings in assessment. In other words, counsel for appellee insist that the proceeding to levy and collect a special assessment of this kind is supplemental to the original condemnation proceeding, and when the latter is dismissed the former is at an end, as a matter of course. We cannot agree with this view, first, because it appears to be an attempt to relitigate questions settled in a former case. The highest amount which the property owners can be called upon to pay for such an improvement is a sum equal to a just proportion of the benefits derived. In the first proceeding that amount was determined by the court, and a judgment rendered against appellants' property therefor. In this new proceeding appellants' property was assessed a much greater amount (upon the same theory of benefit derived) than had been assessed in the former. The benefit derived from the proposed improvement having been determined upon the former hearing, "the municipal authority, under the guise of a supplemental assessment, cannot impose upon the property assessed a greater burthen than the benefits accruing to it from the improvement." *Greeley v. Town of Cicero*, 148 Ill. 632, 36 N. E. 603. It was said in *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15, where lots are assessed for all the benefit accruing to them by the opening of a street the city is estopped in a new proceeding from again seeking to assess benefits therefor against the same property. Clearly, this is an attempt to litigate questions which have been adjudicated in a former proceeding involving the same subject-matter; and it follows that the city is bound by the former judgment, and it is proper to be set up here in bar of the present suit. See *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. 702, and cases there cited.

The contention that the dismissal of the former condemnation proceedings puts an end to the assessment made thereunder is not supported by reason or authority. The dismissal of the condemnation suit by the owner of the property sought to be taken affected that property only. Appellants were not parties to that act of dismissal, and are not bound thereby. As to them the condemnation proceeding and special assessment proceeding were entirely distinct. They could not, in the proceeding against them, raise any question as to the city having obtained title to the condemned strip of land, or as to the regularity of the condemnation proceeding. *Goodwillie v. City of Lake View*, supra. The former judgment against appellants' property is therefore still in force, and to that extent can the city call upon their property to contribute to the cost of the improvement, and no further. This result is not only in conformity with the law, but

seems to us eminently just and equitable. The judgment of the superior court will be reversed, and the cause remanded for further proceedings in conformity to this opinion. Reversed and remanded.

(175 Ill. 26)

EVANSTON ELECTRIC ILLUMINATING CO. v. KOCHERSPERGER, Treasurer, et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

TAXATION—PROPERTY SUBJECT.

The stock and franchise of a corporation "to furnish light, heat and power for public and private uses" are assessable by the state board of equalization, since it is not a purely manufacturing corporation, within Rev. St. c. 120, § 3, providing that corporations for purely manufacturing purposes shall be assessed by local assessors.

Appeal from circuit court, Cook county; *El F. Dunne*, Judge.

Bill by the Evanston Electric Illuminating Company against *D. H. Kochersperger*, county treasurer of Cook county, and another, for injunction. From a decree for defendants, complainant appeals. Affirmed.

George P. Merrick, for appellant. *Frank L. Shepard*, Asst. Co. Atty. (*Robert S. Iles*, Co. Atty., of counsel), for appellees.

CARTWRIGHT, J. Appellant filed its bill of complaint in the circuit court of Cook county to enjoin the collection of a tax amounting to \$774.03, extended upon a valuation of its capital stock and franchise, made by the state board of equalization in 1896. Appellees answered the bill, and upon a hearing it was dismissed for want of equity.

The ground upon which the appellant resists the collection of the tax is that it is organized purely for the purpose of manufacturing electricity, and is therefore exempted from assessment by the state board of equalization, under the fourth clause of section 3 of chapter 120 of the Revised Statutes, providing that "companies and associations organized for purely manufacturing purposes" shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed. In order to settle this question, resort must be had to its charter. In *Distilling & Cattle-Feeding Co. v. People*, 161 Ill. 101, 43 N. E. 779, it was said, "It goes without saying that the purpose for which a corporation is organized must be ascertained by reference to the terms of its charter." In this case the charter, as certified to by the secretary of state, was introduced in evidence, and shows the object for which the corporation was formed to be "to furnish light, heat and power for public and private uses." This is not a purely manufacturing purpose. The superintendent of appellant testified that it furnishes electric light and power to the public. Its wires are strung on the streets of the city of Evanston, and it has about 70 or 80 miles

of wires. It furnishes electric light to the citizens and to the city. It generates the electricity which it furnishes, but that does not extend the purpose for which the corporation was organized, as stated in its charter. It is not necessary in this case to consider whether a company formed for the purpose of generating or collecting electricity or producing electric light by a current of electricity, and furnishing such light or heat or power for public and private use, could be regarded as a corporation purely for manufacturing purposes. Appellant was not organized for that purpose, but under its charter might furnish light, heat, and power procured from some other person or corporation without engaging in the business of generating the electricity at all. It is not exempt under the provision of the statute relied upon, and the bill was properly dismissed. The decree is affirmed. Decree affirmed.

(175 Ill. 215)

SANITARY DIST. OF CHICAGO v. BERNSTEIN et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

EMINENT DOMAIN—STATUTES—CONSTITUTIONALITY
—COSTS—TRIAL BY JURY—EVIDENCE—
JUDGMENTS.

1. The eminent domain act, as amended in 1897, § 10 (Laws 1897, p. 218), providing that, if petitioner shall dismiss his petition, the court shall, on the application of defendant, order petitioner to pay defendant's costs and reasonable attorney's fees, is not unconstitutional because it is not applicable to all litigants; since, there being a distinction between such proceeding and others, the legislature had a discretion to impose such conditions as it deemed necessary for the furtherance of justice.

2. A petitioner is not entitled to have the question of the amount of such expenses submitted to the jury.

3. An objection to evidence as being incompetent should point out specifically the incompetency.

4. The eminent domain act, as amended in 1897, § 10 (Laws 1897, p. 218), providing that, if a petitioner shall dismiss his petition, the court shall, on application of defendant, order petitioner to pay all defendant's expenses and reasonable attorney's fees, applies to the dismissal of a petition before as well as after verdict.

5. Under Rev. St. c. 7, § 3, a case will not be reversed, because the judgment, though substantially right, is inaccurate in matter of form.

Appeal from circuit court, Will county; Robert W. Hilscher, Judge.

Action by the sanitary district of Chicago against Lena Bernstein and August Haase. From an order allowing defendants attorney's fees, plaintiff appeals. Affirmed.

Haley & O'Donnell (F. W. C. Hayes, of counsel), for appellant. C. W. Brown, for appellees.

CARTWRIGHT, J. The sanitary district of Chicago filed its petition in the circuit court of Will county to ascertain the compensation to be paid for different pieces of land described in the petition, and alleged to be

required for its use. August Haase owned part of one of these tracts, and Lena Bernstein owned part of another, and they were made defendants. There was a preliminary hearing, at which they appeared by their attorney, and established their respective titles. Afterwards the question of the amount of compensation came on for trial before a jury; and while the jury was being impaneled, after one or two jurors had been accepted, the petitioner dismissed its petition as to the lands of said two defendants, each of whom thereupon filed an application for allowance of attorney's fees, as provided by the statute. Evidence was heard by the court, and \$100 was allowed to each of them, and orders were entered accordingly. The petitioner excepted, and has brought the cases here by appeal. They are alike in all their features, and the same briefs have been filed in each. We shall dispose of the questions raised in the two cases together.

The first alleged error is that the statute authorizing the allowance is unconstitutional. It is section 10 of the act concerning eminent domain, as amended in 1897 (Laws 1897, p. 218), and is as follows: "The judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property, and the use of the same, upon payment of full compensation, as ascertained as aforesaid, within a reasonable time to be fixed by the court; and such order, with evidence of such payment, shall constitute complete justification of the taking of such property: provided, that in case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition, or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants, paid or incurred by such defendant or defendants in defense of said petition, as, upon the hearing of such application, shall be right and just, and also for the payment of the taxable costs." The ground upon which it is argued that the provision is unconstitutional is that it is special legislation, and imposes upon one class of litigants a charge from which all others instituting proceedings in court are free. Any other plaintiff or petitioner may dismiss his suit while pending, and suffer no penalty beyond the payment of statutory costs; while, if a petitioner under the eminent domain act shall, for any cause, dismiss the petition, this statute gives a right to the defendant to recover, in addition to the taxable costs, the amount paid or incurred by him for costs, expenses, and reasonable attorney's fees in his defense. Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights; and

It is true that a discrimination between different classes of litigants, which is merely arbitrary in its nature, is a denial of that right and of the equal protection of the law. If, however, there be a reasonable ground of distinction, so that the discrimination does not appear to be purely arbitrary or evasive of constitutional rights, we think that the legislature has a discretion to impose conditions or restrictions which they may deem in furtherance of justice. That discretion cannot be controlled by the courts, but its exercise must be left to the wisdom and sense of justice of the legislature. We think that no one will fail to observe a difference, in principle and natural justice, between a litigation where plaintiff invokes the action of the court to recover money or property from another, and dismisses such action, and a proceeding to ascertain the compensation to be paid for property to be taken for public use. The constitution protects the owner by a provision that his property shall not be taken for public use without just compensation. The proceeding is not the enforcement of individual right, but to settle the condition upon which the sovereign power to take the property may be exercised. The judgment is not binding upon the petitioner, but it may decline to enter upon the property or to make payment of compensation. If the possession is taken, and the compensation paid, the owner gets nothing but the fair cash market value of his property; and if it is not paid, or the attempted taking is discontinued by the dismissal of the petition, he is a loser to the extent of the amount expended. The act seems to be in harmony with the spirit and intent of the constitution, and we think it valid.

It is next insisted that the sanitary district had a right to a trial by jury. If such a right had existed, it would have been waived. The parties proceeded to a hearing by the court without a jury, and the petitioner interposed no objection, but acquiesced in having the issue determined in that way. *Burgwin v. Babcock*, 11 Ill. 28; *Henrichsen v. Mudd*, 33 Ill. 477; *Phillips v. Hood*, 85 Ill. 450; 6 Am. & Eng. Enc. Law (2d Ed.) 989. But there was no right to a trial by jury. The provision is in the nature of an allowance for costs incurred in the proceeding by a defendant; and, although the legislature may authorize a recovery for attorney's fees in the damages assessed by the jury, as in case of the failure of a railroad corporation to fence its track (*Rev. St. 1874*, p. 807, § 1), they may also direct the court to allow such a fee to be taxed as costs, as in the case of a suit for wages (*Laws 1889*, p. 362). It is not in the nature of an action at law, and the right of trial by jury does not extend to such a provision.

During the course of the trial, there was an objection made to the testimony of two witnesses that it was immaterial and incompetent, but the objection was overruled. It is argued that the evidence in question was not

competent, because it did not separate the charge for services rendered in the capacity of an attorney and those rendered as an agent in an attempt to settle the amount of compensation. The objection was general, and this particular objection, if it had any force, was not pointed out at the trial. It should have been made specifically.

It is next claimed that the act does not apply to a dismissal of a petition before a verdict, but that it is designed to protect the landowner against the outlay for a long and expensive trial, followed by an abandonment of the proceedings after verdict, in case the petitioner is not satisfied with the award. The reason and purpose of the act apply as much to a dismissal at one time as at another, and its language is not limited. It includes any dismissal of the petition.

Lastly, it is contended that the orders of the court in these cases do not answer the requirements of judgments. The petitioners filed their motion for a rehearing to have the orders and judgments set aside, but did not specify any fault in their form. The judgments are for the true amounts, and substantially right, and will not be reversed because of the want of accuracy in form. *Rev. St. c. 7, § 3*; *Pierson v. Hendrix*, 88 Ill. 34. Each contains an order that the money shall be paid within 10 days, and this, perhaps, is unauthorized. They will be modified by striking out those provisions, and, as so modified, they are affirmed. Judgments affirmed.

(151 Ind. 431)

ATKINSON et al. v. WILLIAMS.

(Supreme Court of Indiana. Nov. 4, 1898.)

APPEAL—JURISDICTION—NEW TRIAL AS OF RIGHT—JUDGMENTS APPEALABLE.

1. The court has no jurisdiction of an appeal that is not taken within one year after a judgment overruling a motion for a new trial for cause.

2. A judgment overruling a motion for a new trial as of right is a final judgment, from which an appeal will lie within one year therefrom, under *Burns' Rev. St. 1894*, §§ 644, 645 (*Horner's Rev. St. 1897*, §§ 632, 633), providing for appeals from the circuit and superior courts to the supreme court.

3. A party against whom a judgment is rendered in an action to recover damages for an alleged trespass to real estate, and to enjoin the threatened continuation of the same, is not entitled to a new trial as of right under *Burns' Rev. St. 1894*, § 1076 (*Horner's Rev. St. 1897*, § 1064), since such statute provides for new trials as of right only in actions for possession of, or to quiet title to, real estate.

Appeal from circuit court, Benton county; S. P. Thompson, Judge.

Action by Thomas Williams against Rachel Atkinson and others. From a judgment in favor of plaintiff, and overruling a motion for a new trial as of right, defendants appeal. Affirmed.

Fraser & Isham, for appellants. Stuart Bros. & Hammond, Saunderson & Hall, and J. W. Dyer, for appellee.

MONKS, J. This action was brought by appellee against appellants, and judgment was rendered against appellants September 15, 1896. Appellants filed their motion for a new trial for cause on September 18, 1896, which was overruled on November 20, 1896. On November 27, 1896, appellants filed their motion and bond for a new trial as of right, and this motion was overruled December 2, 1896. The transcript was filed in this court December 1, 1897. The errors assigned are: "(1) The complaint does not state facts sufficient to constitute a cause of action. (2) The court erred in its conclusions of law upon the facts found, and in each of said conclusions." "(4) The court erred in overruling the motion for a new trial for cause. (5) The court erred in overruling the motion for a new trial as a matter of right."

It will be observed that the transcript was not filed in this court until after the expiration of one year from both the rendition of the judgment and the overruling the motion for a new trial for cause. It was filed, however, within one year after the motion for a new trial as of right was overruled. It has been held by this court that an appeal lies within one year after the overruling of a motion for a new trial for cause. *Colchen v. Ninde*, 120 Ind. 88, 22 N. E. 94. It was so held upon the ground that a motion for a new trial for cause is not a collateral one, but is directly connected with the judgment, and is essential to present for review errors occurring on the trial, and until the motion is overruled there can be no final judgment, within the meaning of the statute regulating appeals. When judgment is rendered upon the verdict before the motion for a new trial for cause is filed, as in this case, the final judgment, within the meaning of the statute governing appeals, is the judgment of the court overruling such motion for a new trial for cause. The reasons given for this holding as to a motion for a new trial for cause have no application whatever to the overruling of a motion for a new trial as of right, as such motion is collateral, and does not present for review any of the errors occurring during or prior to the trial, or in the rendition of the judgment. The motion for a new trial as of right is not predicated upon error, but depends upon the character of the action. It is an independent proceeding, and such motion may be made and acted upon after an appeal has been taken from the final judgment, and the same is pending undisposed of in this court. *Railroad Co. v. McBroom*, 103 Ind. 310, 2 N. E. 760. It is evident, therefore, that this appeal not having been taken within one year after the judgment on the finding of the court, nor within one year after the judgment was rendered overruling the motion for a new trial for cause, this court has no jurisdiction of the questions arising upon the first, second, third, and fourth errors assigned, and they are therefore dismissed.

The judgment of the court below, overruling the motion for a new trial as of right, was a final judgment, as to said application, and an appeal therefrom within one year is clearly authorized by sections 644, 645, Burns' Rev. St. 1894 (sections 632, 633, Horner's Rev. St. 1897). *Rodman v. Reynolds*, 114 Ind. 148, 16 N. E. 516. In *Rodman v. Reynolds*, supra, the appeal was taken more than one year after the rendition of final judgment, but within one year after the judgment overruling the motion for a new trial as of right was rendered; and this court held that the court below erred in rendering judgment overruling said motion for a new trial as of right, and reversed the same, with instructions to sustain the motion for a new trial as of right. The question whether the court below erred in overruling appellants' motion for a new trial as of right, presented by the fifth error assigned, is therefore before us for decision. Appellee insists that the action was for trespass to real estate, and for injunction to prevent further acts of threatened trespass, and not an action to recover possession of, or to quiet title to, real estate, and that, therefore, the motion for a new trial as of right was properly overruled. An examination of the complaint shows that there are no allegations that appellants claimed any title or interest in the real estate, and that such claim was adverse to or a cloud upon appellee's title,—averments which are essential in an action to quiet title; nor is there any allegation that appellants were in possession of such real estate, essential to an action for possession of real estate, nor is any such relief asked for; but, judging the complaint from its general scope and tenor, it seeks only to recover damages for an alleged trespass to the real estate described, and to enjoin the threatened continuation of the same, on the ground that appellee had no other adequate remedy. In such case neither party is entitled to a new trial as a matter of right, under section 1076, Burns' Rev. St. 1894 (section 1064, Horner's Rev. St. 1897), which only provides for a new trial as of right in actions for possession of, or to quiet title to, real estate. *Hall v. Hendrick*, 125 Ind. 326, 330, 25 N. E. 350; *Miller v. City of Indianapolis*, 123 Ind. 196, 199, 24 N. E. 228, and cases cited; *Bennett v. Closson*, 138 Ind. 542, 550-552, 38 N. E. 46; *Richwine v. Presbyterian Church*, 135 Ind. 80, 86-88, 34 N. E. 737; *Davis v. Railway Co.*, 140 Ind. 468, 471, 39 N. E. 495, and cases cited; *Nutter v. Hendricks* (Ind. Sup.) 50 N. E. 748. In such cases the losing party is not entitled to a new trial as a matter of right because the title only comes in question collaterally, and as a mere incident. *Liggett v. Hinkley*, 120 Ind. 387, 388, 22 N. E. 256, and cases cited; *Richwine v. Presbyterian Church*, supra. It follows that the court did not err in overruling the motion for a new trial as a matter of right. The judgment overruling said motion is therefore affirmed.

(151 Ind. 349)

TRAVELERS' INS. CO. v. KENT et al.
(Supreme Court of Indiana. Oct. 26, 1898.)
On rehearing. Overruled.
For former report, see 60 N. E. 562.

HOWARD, J. The zealous and accomplished counsel for appellant argue earnestly to show that the court has misapprehended the position taken by them on the original hearing. But a reading of the brief now filed does not disclose any question not already fully considered by the court. No tax was assessed on the land in controversy until 1885, when the appellant had become the full and absolute owner of the property. Neither Prairie township nor the town of Brookston had a shadow of title as against appellant's deed. If appellant chose to allow a school to be conducted on its premises, that was a matter over which it had supreme control. Had appellant not been able to make any use whatever of the property, that could not have affected the right of the state to impose taxes upon it, in common with all other property of the state. The court is unable to agree with the position taken by the learned counsel either in this motion or in the original case. Petition overruled.

(151 Ind. 485)

COCHRAN v. WHITE, Trustee.
(Supreme Court of Indiana. Nov. 4, 1898.)
PUBLIC DRAINS — REPAIRS — ALLOTMENT — APPEAL — POWERS OF TOWN TRUSTEE — EXEMPTIONS.

1. Rev. St. 1894, § 5632 (Acts 1889, p. 53), authorizing the county surveyor to allot public drains among the owners of the lands assessed for their construction, to be by them kept in repair, and placing such drains under the supervision of the township trustee, includes a public tile drain.

2. Since Rev. St. 1894, § 5632 (Acts 1889, p. 53, §§ 2-5), provide for an appeal from an allotment of a drain to tributary landowners for repairing, a landowner who does not appeal from an allotment cannot afterwards attack it collaterally by refusing to repair the portion so allotted to him.

3. Under Rev. St. 1894, § 5632 (Acts 1889, p. 53, § 1), requiring a town trustee to see that public drains are kept cleaned and repaired, "so as to answer their purpose," he may cause a drain, built at a higher grade than specified, and accepted by the drainage commissioner as built according to specifications, to be lowered to the grade of the original specifications, whenever the grade at which it was constructed becomes too high to drain the lands assessed for its construction.

4. Rev. St. 1894, § 5637 (Acts 1889, p. 53, § 6, as amended by Acts 1893, p. 271), exempting the owner of drained lands from repairing a public drain whenever he converts the portion running through his lands into a covered tile drain of dimensions sufficient to serve the purpose of drainage, and avoid the necessity of repair, does not so exempt him where, because of its altitude, it does not drain the lands assessed for its construction.

Appeal from circuit court, Montgomery county; J. M. Rabb, Special Judge.

Action by Lewis W. Cochran against James

White, town trustee, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

Paul, Van Cleave & Paul, for appellant.
Crane & Anderson, for appellee.

HOWARD, J. This was an action to enjoin a township trustee from proceeding with the repair of an allotment of a public drain, the owner having neglected and refused to do the work. The facts were found specially by the court, and are as follows: (1) On and prior to November 25, 1889, there was in Madison township, Montgomery county, an open public ditch, passing over the lands of appellant and others, and theretofore established under provisions of the statutes in relation to public ditches. (2) On said day, appellant and others filed a petition in the Montgomery circuit court for the location of a public tile drain on and along the line of said open ditch, except 300 feet at the outlet thereof; and such proceedings were had that a tile drain was constructed, as prayed for, over and along the line of said open ditch, being a covered tile drain from its source to its mouth, and in length about two miles. On January 29, 1892, said tile drain was adjudged by the court to be duly established as the Catherine D. Morris ditch. (3) In April, 1897, the county surveyor of said county examined said tile drain, and, for the purpose of keeping the same in repair, as provided by section 2 of an act approved February 28, 1889 (Acts 1889, p. 53; Rev. St. 1894, § 5633), made allotment of said drain to the various tracts of land that had been assessed for its construction, allotting to the appellant 800 feet thereof, situated on his lands, and designated as sections 56 to 64, to be kept by him in repair; and said surveyor made a record of said allotments in the drainage record of said county, and gave appellant notice thereof, as provided by section 3 of said statute. (4) On July 9, 1897, the appellee was, and ever since has continued to be, the duly qualified and acting trustee of said Madison township, and on said date, as such trustee, gave to appellant notice to repair his said allotment, by leveling the same, before August 5, 1897, to a depth and width not less than its original specifications. (5) Prior to the giving of said notice by appellee said tile drain had never been cleaned out or repaired in any manner. For several years immediately after its construction it had completely drained all the lands assessed for its construction; but at the time of giving said notice, and for several years prior thereto, said ditch, while completely draining the lands of appellant, failed to drain effectually lands assessed for its construction, and situated at the head of the ditch. (6) In the original construction of the drain, the tile were not in all places put down to the grade line of the specifications, but in many places were a foot or more above such line. Yet the ditch was accepted by the drainage commissioner as complete according

to the specifications; and what was meant by the notice given by appellee to appellant, requiring him to level his allotment, was that appellant should correct said fault in the original construction of the drain, and put the tile down to the line required by the original specifications. The drain was in other respects in good repair at the time of giving said notice, being then in substantially the same condition in which it had been left after its acceptance by the drainage commissioner; but by reason of its faulty construction as aforesaid it failed fully to answer the purpose for which it had been constructed. (7) Prior to said August 5, 1897, all the tile in the allotments between appellant's allotment and the mouth of the drain, except about 300 feet, which was in good repair, had been taken up, cleaned, repaired, and put down again to the grade line of the original specifications. (8) Appellant failed and refused to level his said line of tile as required by said allotment and notice, and on December 28, 1897, appellee, assuming to perform the duties imposed upon him as township trustee by section 7 of said act as amended (Acts 1891, p. 48; Rev. St. 1894, § 5638), requiring him to make repairs in public drains when the owners refuse to do so, entered upon appellant's premises, and uncovered the 800 feet of tile drain allotted to him, and was preparing to put the tile down to the grade prescribed in the original specifications, lowering such tile for that purpose from nothing to one foot, and intending to charge the cost of such improvement to appellant, as provided in said statute. But when appellee so entered upon the land for that purpose, appellant ordered him off his premises, refused permission to have such repairs made, and caused appellee to be arrested for trespass. The conclusions of law by the court were: (1) That it was the duty of appellee to enter upon appellant's premises, and put the tile in the said allotment down to the grade as established in the original specifications; and (2) that appellant is not entitled to maintain his action.

The position taken by counsel for appellant, in objecting to the conclusions of law is stated as follows: "There is no statute authorizing the county surveyor to make allotments of a covered tile drain for the purpose of repairing the same; and there is no statute authorizing a township trustee to take up and lower the tile in a covered tile drain, nor to clean out and repair the same. And we contend that the county surveyor had no power or jurisdiction to make allotments of said covered tile drain for the purpose of repairing the same, and the township trustee had no power or jurisdiction to take up and lower said tile in said drain under the pretense of repairing or cleaning out said tile drain." Objection is likewise made to the sufficiency of the notice given to appellant by the trustee.

In the position thus assumed we think counsel take too narrow a view of the scope and

purpose of the laws enacted for the cleaning and repair of public drains. The language of the act of 1889, *supra*, for the repair of drains, could hardly be made more comprehensive, so as to include all public drains. By section 1 of the act (Acts 1889, p. 53; Rev. St. 1894, § 5632), it is provided: "That all ditches or drains that may have been, or may hereafter be, constructed under and by virtue of any law of this state, shall, except as hereinafter otherwise provided, after the allotment shall be made by the county surveyor as hereinafter provided, be under the charge and supervision of the trustee of the township in which the same are a part thereof, whose duty it shall be to see that the same are cleaned out and kept open and in proper repair, free from obstruction, so as to answer their purpose." By section 2 of the act provision is made for the allotments by the county surveyor. By sections 3 and 4 provisions are made for notice and a hearing before the surveyor, and by section 5 appeal to the circuit or superior court is provided for. Certainly, a tile drain is included in "all drains that may have been, or may hereafter be, constructed under and by virtue of any law of this state." Appellant is himself hardly in a position to claim that this tile drain is not such a public drain. It was constructed under direction of the circuit court, on petition filed by him and others.

Neither is he in a position to claim that the allotment for repairs made to him by the county surveyor, under section 2 of the statute cited, was not legal and valid. The statute itself provided for an appeal from such allotment, and, if the same ought not to have been made, he should not then have stood silent, and wait until this late day to make this collateral attack upon the surveyor's allotment.

But appellant must have failed even on appeal. The statute, as we have seen, made it the duty of the trustee to see that drains were "cleaned out and kept open and in proper repair, free from obstructions, so as to answer their purpose." In order to "answer their purpose" it is evident that the drains must continue to drain the lands that were assessed for their construction. But the court, in its fifth finding, found that while, for several years immediately after its construction, the drain in question had completely drained all the lands assessed for its construction; yet at the time of giving appellant notice to repair, and for several years prior thereto, said drain, although completely draining appellant's land, had failed to drain effectually certain lands assessed for its construction, and situated at the head of the drain. The requirement made by the trustee was that the tile in appellant's allotment should be placed to a depth and width not less than the original specifications. All the landowners between appellant and the mouth of the drain had, within the time provided for in the statute, taken up and cleaned their tile,

and replaced it to the grade required in the original specifications; but appellant not only refused to perform this work, but was unwilling to allow the township trustee to do so. We think, as the court found, that the trustee was in the strict line of his duty. It is not to be understood that a tile drain, quite the same as an open ditch, may not need repair. In section 1 of the act providing for tiling public drains (Acts 1893, p. 159; Rev. St. 1894, § 5649) it is required that the petition for such work shall show "that such drain or any part thereof can be tiled and kept in repair at a cost less than the expense of keeping the same in repair as an open drain." It is true that one of the provisions of section 6 of the act of 1889, *supra*, as amended by an act approved March 3, 1893 (Acts 1893, p. 271; Rev. St. 1894, § 5637), is: "That where any person or persons shall have converted that portion of said ditch running through his or their lands into a blind ditch by putting in drain tile of sufficient dimensions to serve the purpose of drainage, said drain tile being continuous from the head or beginning of such ditch through the land of said owner or owners, and thus obviating the necessity of working said ditch on his or their lands, he or they shall be exempt from working any part of said ditch, and the allotments herein provided shall be made among the landowners, roads or railroads only through whose land such ditch is open." It is evident, however, that this provision, interpreted, as it must be, in connection with the other provisions of the statute, can have no relation to such a case as that now before us. If appellant's tile drain were in fact down to the grade fixed by the original specifications, it would "serve the purpose of drainage," and thus obviate "the necessity of working said ditch" on his land, and he would not have been called upon to repair his allotment. Indeed, it appears in the seventh finding of the court that 300 feet of the tiling in this very ditch was left undisturbed, for the reason that it "was not out of repair nor filled up." The statute relied upon was merely intended to provide that a landowner, by properly tiling his allotment, might thus avoid the necessity of a cleaning out of his part of the ditch. It could not have been intended by the statute that tiling so placed as to obstruct drainage need not be put in repair. Some hardship, or even seeming injustice, may occasionally result from the administration of the drainage laws. It is necessary, however, for the accomplishment of the object in view, to wit, the proper drainage by a single system of ditches of numerous tracts of land owned by many persons, that the enforcement of the various provisions of the statutes upon the subject must be left to the good judgment of the officers and tribunals placed in charge of such work. Not only must ditches be constructed, but they must also be kept in repair, so as to accomplish the result intended. This work is committed to the judgment of those

believed by the lawmaking power to be competent for the purpose, namely, county surveyors and township trustees, subject to such appeals as are provided for. See *Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252. Judgment affirmed.

(21 Ind. App. 129)

EIGENMAN et al. v. CLARK et ux.

(Appellate Court of Indiana. Nov. 4, 1898.)

EQUITABLE SET-OFF—SURETY OBLIGATIONS—PAYMENT AFTER SUIT.

1. Burns' Rev. St. 1894, § 351 (Horner's Rev. St. 1897, § 348), providing that "a set-off shall be allowed only" where it consists of matter held by defendant when suit is commenced, does not preclude an equitable set-off for money paid on behalf of plaintiff's assignor after commencement of suit.

2. A maker of notes, sued by the payee's assignee, is equitably entitled to set off payments on a note which he had executed as surety for such payee, made after the suit was commenced, where the payee, while insolvent, assigned the notes after maturity.

Appeal from circuit court, Perry county; Edward Gough, Judge.

Action by John G. Eigenman and others against Abram D. Clark and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Henning, Henning & Land, for appellants. Sidney B. Hatfield, Jas. A. Hemenway, and Frank H. Hatfield, for appellees.

COMSTOCK, J. Appellants brought this action on three promissory notes executed by Abram D. Clark and Emma Clark, his wife, May 4, 1894, for \$500 each, payable to Samuel L. Sulzer in 30, 60, and 90 days, respectively, and assigned by Samuel L. Sulzer to appellants November 30, 1894. To the complaint of appellants, which is in ordinary form, the defendants filed separate answers, —Abram D. Clark, in four paragraphs; his co-defendant, Emma Clark, in two paragraphs. The first paragraph of the separate answer of Abram D. Clark is the general denial; the second, third, and fourth are in the nature of set-off. The first paragraph of the separate answer of Emma Clark is the general issue; the second, coverture. To these separate answers the plaintiffs replied by general denial. The court found for the defendant Abram D. Clark, that he was entitled to his set-off; and for Emma Clark, on her plea of coverture. The plaintiffs filed their motion for a new trial, for the reasons that "the finding and decision of the court is contrary to law; that the finding and decision of the court is contrary to the evidence; that the finding and decision of the court is contrary to the law and the evidence." The court overruled the motion for a new trial. This action of the court is the only error assigned. The liability of Emma Clark is not discussed, and the only question, therefore, that we are called upon to determine, is whether Abram D. Clark is entitled to his

set-off, as pleaded, according to the evidence.

Substantially, the facts as disclosed by the evidence are as follows: In May, 1894, Samuel L. Sulzer was engaged in the mercantile business in the city of Cannelton, and had been for many years prior thereto. In connection with his store he also operated what was known as the "Commercial Bank,"—a private concern. At the date above mentioned Abram D. Clark was engaged in the pottery business. Clark had from time to time drawn out of the Commercial Bank various amounts of money, to be used in his business. It was found on the 4th day of May, 1894, that Clark had overdrawn his account in the bank to the extent of \$1,500, for which he and his wife executed the three notes now in controversy. After the execution of the three notes, and before the assignment to appellants, one James P. Jackson had deposited with Sulzer, on banking terms, \$2,500; and on the 12th of November, 1894, Jackson required him to execute his note to him therefor, due 30 days, and on this note Abram D. Clark and M. F. Casper became sureties. The date of this note was November 12, 1894, and payable in 30 days after date. This note was commercial paper, being payable at the National Bank of Rising Sun, Ind. After the execution of the note to James P. Jackson, Samuel L. Sulzer executed a bill of sale to the plaintiffs of his entire stock of goods, bank fixtures, accounts, and notes, and all personal property of every description. This bill of sale was executed and possession given to the property thereunder November 30, 1894,—after the execution of the Jackson note, but before the maturity thereof. By this means plaintiffs became the owners of the three notes mentioned in their complaint. On the 13th day of December, 1894, the plaintiffs filed their complaint in this cause in the office of the clerk of the Perry circuit court, and caused a summons to issue to the sheriff of Perry county on that day. The summons was served by the sheriff on the 14th day of December, 1894. The note executed by said Samuel L. Sulzer and Abram D. Clark to James P. Jackson for \$2,500 was paid by Clark and Casper December 15, 1894. At the time of said payment, Clark had no notice of the suit. Thus, it will be seen that after the filing of plaintiffs' complaint, and the issuing and service of summons, but before he had any notice of this suit, the defendant Abram D. Clark paid one-half of the Jackson note; and for that reason, he maintains, he should be allowed the amount so paid as a set-off against plaintiffs' claim. Appellants' position is that the notes in suit passed absolutely to plaintiffs by virtue of the bill of sale executed to plaintiffs November 30, 1894, by Samuel L. Sulzer, and they took the notes subject to such defenses only as existed at that time; that the liability of Clark by reason of his suretyship on the Jackson note was only a contingent liability; that the

fact that Clark paid his part of the \$2,500 note due Jackson after the suit was commenced by plaintiffs does not entitle him to a set-off, because by the provisions of section 351, Burns' Rev. St. 1894 (section 348, Horner's Rev. St. 1897), "a set-off shall be allowed only in actions for money demands upon contract and must consist of matter arising out of debt, duty or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." *Balser v. Wood*, 69 Ind. 122; *Clafin v. Dawson*, 58 Ind. 408; *Convery v. Langdon*, 66 Ind. 311; *Gregory v. Gregory*, 89 Ind. 346; *Blount v. Rick*, 107 Ind. 244, 5 N. E. 898, and 8 N. E. 108,—and other cases, and *Wat. Set-Off*, § 73, cited by appellants' counsel state the general rule as to set-off under the statute, and support appellants' position, that the suretyship of Clark was only a contingent liability, and did not constitute a demand held by him at the time of the commencement of the suit, within the meaning of the statute. It must be conceded, therefore, that appellee Clark, not having paid the Jackson note until after appellant had brought suit, in this case cannot, under the statutory rule alone, be allowed the set-off claimed.

Counsel for appellees insist, however, that independently of the statute appellees are entitled to an equitable set-off. Courts have long recognized "set-off" as a natural equity. Before the statute of set-off, courts of chancery acted upon the doctrine of set-off, as grounded upon the principles of natural equity. *Barbour*, in the *Law of Set-Off*, says, "If a court finds a case of natural equity not within the statute, it will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross action;" citing *Lindsay v. Jackson*, 2 Paige, 581; *Piggott v. Williams*, 6 Madd. 95. In *Derby on Counterclaim* (page 74); under the New York Code, it is stated that "a defendant may have a right enforceable in equity when the cross demand is not due at the time of the assignment, and when it is against the assignor of an insolvent, though it may not have been pleadable at law" (citing *Chance v. Isaacs*, 5 Paige, 592), and that technical objections that would be available at law will not defeat an equitable set-off. *Bispham*, in his fourth edition of *Principles of Equity*, says, "When there is anything peculiar in the case, so as to render it impossible for exact justice to be done by a court of law under the statutes, a court of chancery will afford relief through the medium of an equitable set-off." See 2 Story, *Eq. Jur.* § 1434. The doctrine of equitable set-off has been recognized in the following cases by the supreme court of our own state: *Keightley v. Walls*, 24 Ind. 205, 27 Ind. 385; *Cosgrove v. Cosby*, 86 Ind. 511; *Carter v. Compton*, 79 Ind. 37. In *Keightley v. Walls*, 24 Ind. 205, 27 Ind. 385, the court treated set-off as

an equity depending for its allowance on the insolvency of the assignor, and not technically on the statute. In *Sefton v. Hargett*, 113 Ind. 592, 15 N. E. 518, Mitchell, C. J., in speaking for the court, after referring to the general rule both at law and in equity, that only material demands existing in the same right are proper matters of set-off, says exceptions to the general rule are made (1) whenever it becomes necessary to complete equity, or to prevent irremedial injustice, as in cases of insolvency, or of just credit given on account of an individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal; or (2) whenever the action is upon a note or other contract against several defendants, any one of whom is principal and others securities thereon." In *Carter v. Compton*, 79 Ind. 40, the court cites approvingly from *Brewer v. Norcross*, 17 N. J. Eq. 219, using substantially the foregoing language. *Morrow's Assignees v. Bright*, 20 Mo. 299, was an action by the general assignee of an insolvent to recover a debt due the assignor. The defendant was allowed to set up as an equitable defense, as set-off, the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment. Scott, J., in delivering the opinion of the court, said: "Bright could not sue Morrow to recover the money for which he was bound for him until he had actually paid it. But this goes on a technical ground, peculiar to the action for money paid, laid out, and expended. Money cannot be said to be laid out for another until money is actually paid on his account. But, in substantial justice, as Bright was Morrow's surety, and compellable by law to pay the debt, and as Morrow was insolvent, Bright may be regarded as the creditor of Morrow from the time the note was protested. Then, as there was an indebtedness on the part of Morrow to Bright, and as the money account of assignment was evidence of insolvency by which Bright became absolutely bound, there was an equity against the demand of Morrow at the time of the assignment growing out of his indebtedness to Bright." The decision of the court in *Williams v. Helme*, 1 Dev. Eq. 151, is thus stated in the syllabus: "A surety has, in respect of his liability, the rights of a creditor, and upon the insolvency of the principal debtor may retain any funds belonging to him in his hands. Therefore, where the surety owed the principal debtor, who became insolvent, and assigned, for value, the debt due by the surety, it was held that the latter might retain the amount of his subsequent payment against the assignee." In *Krause v. Beitel*, 3 Rawle, 203, Gibson, C. J., speaking for the court, said: "As regards cross demands, the trustee of an insolvent estate stands in a situation perhaps less, but certainly not more, favorable than that of any other assignee; his interest in the insolvent's debts being ex-

actly that of the insolvent himself, as it stood, affected by countervailing equities, at the time of the assignment. The creditors are not purchasers in the first instance, and the trustee takes for their benefit,—consequently, subject to all the rights which may grow out of the original transaction. It is immaterial, therefore, whether the liability set up as a defense were originally absolute or contingent, the relations of the parties being unalterable by the accidental insolvency of one of them. Here one of the defendants had actually paid a debt for the insolvent before his discharge, and was sued for another, which he has been compelled to pay since; and it conflicts with no provision of the legislature to allow the defendants the benefit of these payments,—not, perhaps, as a set-off, but as a defense that would be made available by a chancellor." In *Railroad Co. v. Rhodes*, 8 Ala. 212, the facts were "that Rhodes, the complainant, became a subscriber, with others, to the railroad company, for seventy-five shares of its stock, at one hundred dollars a share, which was to be paid for in accepted and indorsed bills of exchange, payable in five, eleven, and seventeen months, interest included. The object of the subscription was to enable the company to raise funds for the payment of its debts. About the same time Sherrod made a loan to the company of fifty thousand dollars, for five years, to secure the payment of which Rhodes and eleven others executed a bond to Sherrod for that amount, payable also in five years; the company, by an order on its minutes, pledging itself, in its corporate capacity, for the payment of the debt. Subsequently the company became insolvent, and being indebted to Sherrod in the sum of nearly two hundred thousand dollars, money paid by him for it, assigned to him some of its effects, and among other claims the one against Rhodes for his subscription, which he had not complied with, by executing bills of exchange, together with other claims against him. Upon this demand against Rhodes, Sherrod brought suit in the name of the company, for his use; and subsequently Rhodes paid to Sherrod, upon the bond for fifty thousand dollars, twenty-six thousand dollars. A judgment was obtained by the company, for the use of Sherrod, against Rhodes, and he sought to set off in equity the money thus paid against the judgment." And the court held that, as the company was insolvent at the time of the assignment to Sherrod of the debt of Rhodes, the latter could set off in equity the money he had paid for the company against the judgment obtained by Sherrod. In *Follett v. Buyer*, 4 Ohio St. 586,—a case involving the right of set-off,—Thurman, C. J., recognizes the doctrine of equitable set-off, using the following language: "I am aware that by some highly-respectable courts an exception to this rule has been introduced where the payee was insolvent when he made the assignment, and the maker was after-

wards compelled to pay money for him on a contract of suretyship entered into before the assignment took place; it being considered hard and inequitable that an insolvent payee should have the power, by an assignment made under such circumstances, to cast a loss upon his own surety. *Railroad Co. v. Rhodes*, 8 Ala. 206; *Williams v. Helme*, 1 Dev. Eq. 151. But these decisions rest expressly upon the ground of the assignor's insolvency, and consequently when, as in this case before us, that element is wanting, there is no room for the exception to the general rule." We think it fairly deducible from these decisions that insolvency is a distinct equitable ground of set-off, outside of the statute. It is in evidence that when appellants signed the note in favor of Jackson, as surety for Sulzer, the husband had in mind his indebtedness to Sulzer. He testified: That Sulzer promised him protection. "He would not see us suffer, but would protect us. That I was under obligations to him. That I owed him. I did owe him the note in suit, and \$1,800 besides. I would not have signed the Jackson note had I not owed him." It is apparent, too, that Sulzer requested Clark to become surety on his note for the reason that he was his debtor. Sulzer is insolvent. Clark has already paid the debt owing by Sulzer to Jackson. He is without remedy, unless he is allowed the set-off claimed. The circumstances of the case, we think, entitle him to the benefit of the doctrine cited. The assignment in this case is for the benefit of only three of Sulzer's creditors. The assignment gave to the appellants only the rights that Sulzer had in the notes in suit. They were past due at the date of the assignment. They were charged with all outstanding equities against them. The evidence shows that at the time of the trial there was due appellants a balance of \$11,000, and that they had in their hands property worth \$18,950 with which to pay the same. From this it would appear that no harm could come to appellants by permitting appellees' set-off. It would be inequitable, under the circumstances, to permit them to collect money from Clark for Sulzer, and not credit Clark what he paid out for Sulzer. In other words, it would be, in the language of *Thurman, C. J.*, in *Follett v. Buyer*, supra, "hard and inequitable that an insolvent payee should have the power, by an assignment made under such circumstances, to cast a loss upon his own surety."

Counsel for appellees further contend that as the Jackson note was commercial paper, Sulzer being insolvent at the time it was signed by Clark and Casper, it at once became the debt of the solvent sureties; that, the note being payable in a bank in this state, it was actual payment; so that Sulzer owed Clark one-half of the Jackson note (\$1,250) the moment it was delivered to Jackson, November 12, 1894, upon the assignment to appellants, and at the same time Clark owed

Sulzer the balance of the notes in suit. Counsel for appellees also claim that the judgment must be affirmed because the evidence is not in the record. The conclusion we have reached renders it unnecessary to consider either one of these claims. We find no error in the record. Judgment affirmed.

(21 Ind. App. 86)

HILGEMAN et al. v. SHOLL.

(Appellate Court of Indiana. Oct. 26, 1898.)

SALE OF LAND—CONTRACT—DEED—CONSIDERATION—PRESUMPTION.

1. In the absence of any evidence of what stipulations were contained in a deed made pursuant to a contract providing for payment of a certain amount per acre for anything over 18 acres which might be shown by a survey, it will be presumed that the terms of the contract were carried out in the execution of the deed.

2. Where the consideration of a deed is contractual, and is a direct promise to do certain things, it cannot be changed or modified by parol evidence.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by William H. Sholl against H. B. Hilgeman and another. Judgment for plaintiff. Defendants appeal. Affirmed.

John B. Peterson, for appellants. William Johnson, for appellee.

ROBINSON, J. This cause was transferred to this court by the supreme court. Appellee and appellant Hilgeman entered into a written contract, in which Hilgeman agreed to pay appellee \$3,550 for an 18-acre tract of land, the contract providing that if, upon a survey of the land, it should be found to contain more than 18 acres, Hilgeman should pay appellee for the surplus at the rate of \$200 per acre. Hilgeman assigned the contract to appellant Kulage, to whom appellee afterwards executed a deed for the tract of land described in the contract.

The only question presented by the record and argued is whether it was competent to prove by parol that at the time of making the deed it was agreed that the land described in the deed should be surveyed, and, if it was found that the tract contained more than 18 acres, appellant should pay for the overplus at the rate of \$200 per acre. It is shown by the evidence that a deed was executed pursuant to the contract, and that it was recorded. The contract thus became merged in the deed, but the deed was not introduced in evidence nor were its contents proven. The deed itself is the best evidence of its stipulations. If the language of the deed with reference to the consideration was merely by way of a recital of a fact, parol evidence was admissible to show what the real consideration of the deed was. While it is well settled that parol evidence is admissible to show the real consideration, though it be different from the recital in the contract, yet where the consideration is

contractual, as where a specific and direct promise is made to do certain things, it can no more be changed or modified by parol evidence than any of the other conditions of the contract. *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 537, 26 N. E. 188, and 28 N. E. 88; *Conant v. Bank*, 121 Ind. 323, 22 N. E. 250; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Hinckley v. Railroad Co.*, 56 N. Y. 429; *Cocks v. Barker*, 49 N. Y. 107. Counsel cite the case of *Welz v. Rhodius*, 87 Ind. 1, as declaring a different rule from the above. But the doctrine announced in that case has been criticised, if not expressly overruled. *Western Paving & Supply Co. v. Citizens' St. R. Co.*, supra; *Conant v. Bank*, supra. In the absence of any evidence of what stipulations the deed really contained, the presumption is that the terms of the contract were carried out in the execution of the deed, which it appears was made pursuant to the contract. The contract provides that any excess over 18 acres should be paid for at a certain price per acre, and there is evidence that there was an excess to an extent as great, if not greater, than the judgment rendered. There is no error in the record, and the judgment is affirmed.

(21 Ind. App. 115)

DOUGHERTY v. BROWN et al.

(Appellate Court of Indiana. Nov. 2, 1898.)

APPEAL—NOTICE—SERVICE—DISMISSAL.

A vacation appeal was taken under the second clause of Burns' Rev. St. 1894, § 652 (Rev. St. 1881, § 640), providing for filing a transcript with the supreme court clerk, and for official notice by him on the appellee, as amended by Act 1897, p. 277, providing for service of the notice on appellee's attorney, which act was afterwards declared invalid. *Held*, that after the year provided for appeals in section 645 had elapsed the defect could not be cured by the unofficial service on the attorney provided for in the first clause of section 652, under section 663 and rule 17 (27 N. E. v.), which provide for service on the attorney of a nonresident appellee, since, under section 661, providing that on service on him of the unofficial notice under the first clause of section 652 the clerk shall transmit a transcript, this notice is intended for taking an appeal, and not for giving notice of an appeal already taken, since such notice must be given within the year for taking an appeal, and hence the appeal should be dismissed under rule 35 (27 N. E. vii.), providing that when a vacation appeal has been on the docket 90 days, and notice to appellee has proved ineffectual, and no steps are thereafter taken for 90 days to bring appellee into court, the appeal will be dismissed.

Appeal from circuit court, Wells' county; E. C. Vaughn, Judge.

Action by William A. Dougherty against Rufus M. Brown and others. There was a judgment for defendants, and plaintiff appeals. Appeal dismissed.

Martin & Elchhorn and Todd & Todd, for appellant. Dalley, Simmons & Dalley, for appellees.

BLACK, J. The judgment from which this appeal is brought was rendered against the appellant, who was the plaintiff, on the 31st day of December, 1896. The transcript of the record, with the appellant's assignment of errors, was filed in the office of the clerk of this court on the 29th day of December, 1897, and thereupon, on the same day, the clerk issued notice of the appeal. The return of the sheriff of Wells county showed service of this notice on the 30th of December, 1897, upon Sharpe & Sturgis and Dalley, Simmons & Dalley, attorneys of record of the appellees, but did not show service upon the appellees. On the 29th of January, 1898, the cause was submitted by the clerk of this court under the rule. On the 28th of March, 1898, the appellant filed his brief on his assignment of errors. On the 28th of June, 1898, the appellees, appearing specially, filed their motion to dismiss the appeal for the reasons that this is a vacation appeal, and had been on the docket more than 90 days, and no steps had been taken to bring the appellees into court; that the notice was ineffectual, for the reason that it was served only upon said attorneys of the appellees, and not upon the appellees themselves, upon whom no notice whatever of the appeal had been served; that more than 90 days had expired since said ineffectual notice was issued; and that rule 35 of this court (27 N. E. vii.) therefore had not been complied with. On the 9th of July, 1898, the appellant filed in this court proof by affidavit dated July 8, 1898, of the service of a notice, dated the same day, to Robert F. Cummins, clerk of the Wells circuit court, and to Sharpe & Sturgis and Dalley, Simmons & Dalley, attorneys of record of the appellees, who, the affidavit stated, were, and had been since the 28th of December, 1897, and long before, nonresidents of this state, the last-mentioned notice being to the effect that the appellant procured from said clerk a transcript of the record in this cause, and filed it on the 29th of December, 1897, in the office of the clerk of this court, together with an assignment of errors upon said transcript, and that the appellant did, on said day, appeal to this court from the final judgment in said cause in and by the court below; and the persons notified were cited to appear, etc. On the same day (July 9, 1898) the appellant filed in this court his motion, wherein he asks this court to overrule said motion to dismiss, and, further, that the submission herein be set aside, the reasons stated being in substance a recital of the matters which we have already stated. Rule 35 of this court (27 N. E. vii.) is as follows: "When a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice

to bring the appellee into court, the clerk shall enter an order dismissing the appeal." By section 652, Burns' Rev. St. 1894 (section 640, Rev. St. 1881), it is provided: "After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were had, stating the appeal from the judgment or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee." It is provided by section 633, Horner's Rev. St. 1897 (section 645, Burns' Rev. St. 1894), that appeals in all cases must be taken within one year from the time the judgment is rendered. To have a perfected appeal, a transcript must be filed in this court. For taking appeals in vacation two methods are prescribed by section 652, quoted above. To perfect an appeal by the first method, the notices provided for must be given; yet this alone will not constitute the appeal, but the transcript must be filed in this court. *Johnson v. Stephenson*, 104 Ind. 368, 4 N. E. 46. It is provided by rule 2 of this court (27 N. E. iv.), that when an appeal is taken, and notice is given below, the transcript must be filed in the clerk's office within 60 days from the time of the taking of such appeal; and that, if the transcript is not so filed, the notice shall be without effect, and the appeal treated as abandoned; but that the appellant may, however, afterwards, and within the time limited by law, appeal, and in such case the appeal will be deemed to be taken as of the time the transcript is filed in the clerk's office, and shall be governed as to notice, submission, and the like matters by the rules and practice which govern in ordinary appeals prosecuted under the general statutory provisions. When the second method for taking an appeal provided for in section 652, supra, is pursued, the appeal is perfected by the filing of the transcript with a proper assignment of errors thereon within the year, without the service of notice on the appellees. *Tate v. Hamlin*, 149 Ind. 94, 97, 41 N. E. 356. In that case it was also held that service of the official notice provided for in the second branch of said section 652 (640) upon the attorneys of the appellees and not upon the appellees was without authority of law, and void, and was not legal notice of the appeal to the appellees; and that notice served only on the attorneys of the appellees was ineffectual notice, within the meaning of the second clause of said rule 35 (27 N. E. vii.). In that case, for reasons stated in the opinion, which were regarded as affording an excuse for the appellant, who, pursuing a practice which had theretofore been tolerated, pro-

cured service on the appellee's attorney, but not upon the appellee, the supreme court set aside the submission, and directed the issuing of another notice. It was said: "A failure to comply with the rule in appeals hereafter in this respect, and a failure to take action in appeals heretofore taken within ninety days after the announcement of this decision, may subject such appeals to dismissal under the rule." The decision in that case was rendered on the 24th of September, 1895, and a petition to modify the opinion was denied November 19, 1895.

By a statute enacted in 1897 (Acts 1897, p. 277; Horner's Rev. St. 1897, § 640) it was attempted to amend said section 652 so as to permit the service of the official notice upon the attorneys of record. This statute of 1897 was held to be invalid, because of defectiveness of its title, in *O'Mara v. Railway Co.* (Ind. Sup.) 50 N. E. 821, decided June 10, 1898. The attorneys for the appellant, who do not rely upon the validity of that statute, caused the official notice herein to be issued pursuant to its provisions. This would seem to afford some excuse for the appellant, if the requirement of the second clause of said section 652 (640) for the giving of notice can still be complied with. He sought service pursuant to a statute which had not been held invalid. He was not inexcusably negligent. Section 651, Horner's Rev. St. 1897 (section 663, Burns' Rev. St. 1894) provides: "Whenever it shall appear to the supreme court, by satisfactory proof, that the appellee in a cause appealed after the close of the term is not a resident of this state, and that a notice of the appeal can not be served upon the attorney of record in the court below, the court may order that notice of the pendency of the appeal be given in some newspaper printed and published in this state, for three weeks successively; after which the court shall proceed in all respects as if the defendant had been served with process." In rule 17 of this court (27 N. E. v.) it is provided that: "If the appellees are not residents of the state, the appellant shall obtain a form of notice from the clerk for publication: * * * provided, that when the appellees have attorneys of record, and notice has been served upon them according to law, or when notice has been served on resident parties, it shall not be necessary to issue summons or notice for publication." In *Tate v. Hamlin*, supra, it was held that, when the appellee is shown to be a nonresident of the state, and that service of notice cannot be got on his attorney of record, then it is shown that neither the unofficial notice provided for in said section 652 (640), which, to be complete, must be served upon the clerk of the trial court and the attorney of the adverse party, nor the official notice, which must be served on the appellee himself, can be given, though notice can be served on the clerk; and that then,—that is, when neither kind of notice provided for in said section 652 (640) can be given.—

"and not till then, is the appellant entitled to an order for publication notice." In the case before us, notwithstanding the affidavit that the appellees are nonresidents of the state, there is no sufficient reason for notice by publication, for it appears that notice could be served on the attorneys of record of the appellees. *Shaefer v. Nelson*, 17 Ind. App. 489, 46 N. E. 1021. After the notice issued by the clerk had become ineffectual because of the service thereof upon the attorneys alone, the appellant could not obtain the service of an alias notice to the appellees, they being nonresidents, and they could not obtain publication. They sought to bring in the appellees by giving the unofficial notice provided for in the first clause of said section 652 (640). This notice was dated July 8, 1898, and seems to have been induced by the motion to dismiss. *O'Mara v. Railway Co.*, holding the statute under which they had proceeded to be invalid, was not then decided. We must either hold the notice of July 8, 1898, sufficient, or we must dismiss the appeal, for the appellant, it appears, cannot procure service upon the appellees themselves, actual or constructive. Said section 652 (640) provides that "an appeal may be taken by the service of" the unofficial notice. Section 649, *Horner's Rev. St. 1897* (section 661, *Burns' Rev. St. 1894*), provides: "Upon the request of the appellant, or upon being served with notice as aforesaid [that is, with the unofficial notice of said section 652 (640)], and, in either case, upon the payment of the proper fee, the clerk shall forthwith make out and deliver to the party, at his request, or transmit to the clerk of the supreme court, a transcript of the record in the cause," etc. It seems to be intended in the statute and contemplated in the rules of this court that the unofficial notice provided for in said section 652 (640) shall serve as a method of taking a vacation appeal, which is perfected by the filing of the transcript within 60 days thereafter; and another method of giving notice is provided for where the transcript is filed without the previous giving of the unofficial notice. Service of the unofficial notice is a method of taking an appeal, and not a method of giving notice of an appeal already taken. It seems, also, to be meant by the statutes that where the appeal is taken by giving the unofficial notice, such notice must be given within the year for taking an appeal. Unless we can say that the unofficial notice may be substituted by the appellant for the official notice, and that an appellant may file the transcript in this court within the year, and after the year may bring the appellee into court by the unofficial notice instead of the official one, we cannot aid the appellant by any indulgence on the ground of excusable neglect or failure. The appellee must, in some legal method, be brought into court. The provision that the appeal must be taken within a year after judgment applies as well to appeals brought under the first branch of said section 652

(640) "as to those taken under the second branch, and in both cases requires the appeal to be perfected within the year, by the filing of the transcript." *Johnson v. Stephenson*, supra. To hold that, instead of the notice provided for in the second branch (the official notice), where it is required by the terms of the statute, resort may be had to the unofficial notice provided for in the first branch, would seem to be unwarranted, for it is not for the court to determine the method of giving the notice where the legislature has prescribed a method. The statute binds the court as well as the appellant. Under all the circumstances of this case, we would be disposed to still permit the appellant to seek service, and to thereby bring in the appellees, if it were possible to give such aid. The appeal is dismissed.

(21 Ind. App. 706)

HALLECK et al. v. IRWIN.

(Appellate Court of Indiana. Nov. 4, 1898.)

APPEAL—RULING ON MOTION—AFFIDAVITS—
RECORD—BILL OF EXCEPTIONS.

Where affidavits filed in support of a motion are not brought up by a bill of exceptions, or are not made part of the record by order of court, the ruling on the motion cannot be reviewed.

Appeal from circuit court, Jasper county; S. P. Thompson, Judge.

Action by William P. Irwin against Abraham Halleck and others. Judgment was for plaintiff, and from an order overruling a motion to set aside a default defendants appeal. Affirmed.

Sellers & Uhl, for appellants. M. F. Chilcote and Foltz, Spittler & Kurrie, for appellee.

ROBINSON, J. Appellee brought suit against appellants upon a promissory note. Certain of the defendants answered, and appellants Halleck, Halleck, and Gleason were defaulted, and judgment was rendered against all the defendants, on the day preceding the day of adjournment for the term. On the second day of the succeeding term of court appellants Halleck, Halleck, and Gleason filed a motion to set aside the default, and in support of the motion filed certain affidavits. Counter affidavits were also filed. It appears from the record that leave was asked to substitute papers, and that lost papers were ordered to be substituted, and that appellants filed "the substituted motion reading as follows." But such substituted motion is not in the record, nor is there any reference to any part of the record where such motion may be found. There is in another part of the transcript what purports to be a motion to set aside the default, but this was superseded by the substituted motion. Even if we should concede that there is in the record a motion to set aside the default, the affidavits and counter affidavits filed in support of and against the motion have not been

brought up by any bill of exceptions, nor were they made part of the record by any order of the court. It does not appear whether the matter was submitted to the court upon the affidavits and counter affidavits exclusively, or whether there was some additional evidence. The affidavits and counter affidavits, as they come to us, form no part of the record. The bill of exceptions contains nothing that presents any question for the consideration of this court. *Hancock v. Fleming*, 85 Ind. 571; *Crumley v. Hickman*, 92 Ind. 388; *Cottrell v. Insurance Co.*, 97 Ind. 311; *Board v. Karp*, 90 Ind. 236. Judgment affirmed.

WILEY, J., took no part in this decision.

(21 Ind. App. 486)

TERRE HAUTE ELECTRIC RY. CO. v. YANT.¹

(Appellate Court of Indiana. Nov. 2, 1898.)

STREET RAILROADS—NEGLIGENCE—PLEADING.

1. A street-railway company is not liable for failure to stop a car running at a proper speed, on approaching a frightened horse, where it does not appear that thereby the horse could have been controlled, or that the motorman had reason to apprehend the occurrence of an accident.

2. Averments that a street car was run carelessly and negligently, and run at a high rate of speed, making great noise, do not state facts showing negligence.

Appeal from superior court, Vigo county; David Henry, Judge.

Action by Phillip H. Yant against the Terre Haute Electric Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

McNutt & McNutt, for appellant. John O. Piety and Saml. R. Hamill, for appellee.

COMSTOCK, J. Appellee, who was plaintiff below, sued the Terre Haute Electric Railway Company to recover damages for a personal injury alleged to have been caused by the negligence of the appellant company. The complaint was in two paragraphs; the first charging negligence, the second willful injury. The second paragraph was withdrawn. A demurrer for want of facts to the first paragraph was overruled, the cause put at issue by general denial, and verdict returned in favor of appellee for \$905. A motion for a new trial on the grounds that the verdict was contrary to law, was not sustained by sufficient evidence, that the damages were excessive, and for alleged errors of the court in admitting and refusing to admit evidence and in giving and refusing to give instructions, was overruled, and judgment rendered on the verdict. The first and second errors assigned question the sufficiency of the complaint; the third, the action of the court in overruling appellant's motion for a new trial.

¹ Rehearing denied.

The complaint charges that on the day of the alleged injury, defendant owned and operated a street-railway line with double tracks running along a public street in the city of Terre Haute, and along the center of the National road east of said city; that on said day, while plaintiff and his wife were traveling in a one-horse buggy along said highway, and on the south side thereof, and going east, they met one of the defendant's electric street cars going west; that "the said horse saw and heard the said car traveling as aforesaid, and said horse did then and there become frightened at said fast-going car, and noise caused thereby, and began to plunge and start, and was becoming unmanageable; that thereupon this plaintiff jumped out of his said buggy, and took hold of the harness and bridle on and about the said horse's head, so that he would be more able to manage and control said horse, all of which was in plain view of defendant and defendant's agents who were controlling, operating, and running said car, and said servant ought to have seen, and did see, some time before the said car had come near said horse, the imperiled condition and position of the plaintiff caused by the fast-going car as aforesaid; that, notwithstanding the plaintiff's dangerous and imperiled position and condition, caused as aforesaid, the defendant, by its agent, wrongfully, carelessly, and negligently ran said car at a high rate of speed as aforesaid, towards, on, near to, and within but a few feet of this plaintiff and the said horse, which caused said horse to become entirely unmanageable, and to start, plunge, turn, and to run, throwing this plaintiff down, and causing said horse to run over and trample on said plaintiff." It is not claimed by appellee's learned counsel that appellant was at fault in running its car and making the noise necessarily incident thereto, nor that it was run, upon the occasion in question, in an improper manner, up to the point where it was alleged the horse was becoming unmanageable; but that, when the motorman saw that appellee's horse was frightened and becoming unmanageable, he should have stopped the car. Booth on Street Railway Law, in section 298, states the law in the following language: "And for obvious reasons companies which have been duly licensed, and therefore have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot, ordinarily, be held responsible for horses taking fright at the appearance, management, or noise of the car. If a horse takes fright at an approaching car, and, because the car is not stopped, * * * becomes unmanageable, and runs away, injuring the driver or others, the company is not liable, unless the conduct complained of in the management of the car is attributable only to a wanton and malicious disregard for the

safety of the driver or other travelers upon the street. * * * To the extent that whether travelers, whether in cars, on foot, or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable; for if drivers, motormen, or gripmen were required to stop their cars, slacken their speed, or omit or discontinue necessary signals, upon which the safety of others depends, because timid horses may become frightened, or already manifest symptoms of fear, not indicating imminent peril, street-railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are granted; and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced."—citing the following, among other, cases: *Chapman v. Railway Co.*, 27 W. L. B. 70; *Coughtry v. Railway Co. (Or.)* 27 Pac. 1031; *Cornell v. Railway Co.*, 82 Mich. 495, 46 N. W. 791. In *Doster v. Railway Co.*, 23 S. E. 449, the supreme court of North Carolina said: "Whenever a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it gives unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision." In *Steiner v. Traction Co.*, 134 Pa. St. 199, 19 Atl. 491, which was an action to recover for injuries received occasioned by the running away of a team of horses standing by the street-railway track, growing out of the continuous ringing of the bell, the court said: "If the gripman saw that plaintiff's horses were restive, it does not follow that he had reason to apprehend the accident that occurred. The plaintiff, according to his own testimony, was at the heads, and might naturally be supposed to be able to control them." The pertinency of these extracts from the text-book and reports justify, we think, the foregoing lengthy quotations. The complaint, judged by the law as set out in the foregoing authorities, is fatally defective. It does not appear from the averments that appellee would have been able, because of the gentleness of the horse, or from any other reason, to have controlled it, and prevented the injury, had the car been stopped before its near approach; nor that the motorman had reason to apprehend the accident that occurred. Neither do they show that he manifested a wanton disregard for the safety of appellee; nor that he had reason to believe that appellee, who was in

the position which he believed the best to manage his horse, would not be able to do so. The averments that the car was being run at a high rate of speed and making a great noise, and that it was run carelessly and negligently, are not averments of facts showing negligence. Many decisions might be cited from the reports of this and other states in which railway companies have been held liable for damages occasioned by frightening horses. Upon examination it will appear that the liability was held to attach on the ground of negligence when the fright has been caused by the running of the train or car in an unusual, unnecessary, or improper manner, or when those in charge, seeing the injured party in imminent peril, have acted in a manner attributable only to a wanton disregard for the safety of those in peril. To hold the complaint sufficient would be to declare it to be the duty of a motorman operating a car in a lawful manner to at once stop or slacken its speed at the sight of a frightened horse on the public highway adjacent to the track, although held by his owner in a manner from which it might fairly be supposed he would be able to control him. To so hold, we believe, would be error. The complaint in *Railroad Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, cited by appellee, in its averments charged that the servants of the railway company operating the hand car at which plaintiff's horse was frightened refused to check the car although signaled and requested to do so; this at the time plaintiff was in the buggy, with two other persons, when said agents saw that the horse was unmanageable. These facts alone were sufficient to show a wanton disregard for the safety of those in the buggy, amounting to negligence. We do not deem it necessary to consider the other alleged errors discussed by counsel. Judgment reversed, with instructions to sustain the demurrer to the complaint.

(21 Ind. App. 110)

CONWELL v. JEGER et al.

(Appellate Court of Indiana. Nov. 2, 1898.)

CHATTEL MORTGAGES—CONVERSION OF PROPERTY—RIGHT OF ACTION—PLEADING—VARIANCE—BURDEN OF PROOF—LANDLORD AND TENANT—CROPS—HUSBAND AND WIFE—EXCESSIVE DAMAGES—HARMLESS ERROR—QUESTION OF FACT.

1. In an action by a mortgagee against a purchaser from the mortgagor for wrongfully converting the mortgaged property, the burden is on plaintiff to show that the purchase by defendant was without his consent.

2. The finding of the trial court on a question of fact is conclusive where there is any evidence from which such an inference could be drawn.

3. Where a complaint by a mortgagee for conversion of the mortgaged property alleges ownership in plaintiff, and also that he is entitled to immediate possession, proof of a breach of a condition in the mortgage, providing that in case of sale without the consent of

the mortgagee the latter should be entitled to possession, is not a variance.

4. Where a chattel mortgage provides that the mortgagee shall be entitled to possession of the property upon a sale by the mortgagor without the former's consent, such mortgagee has a right of action against a purchaser without such consent, who converts the property, without regard to the solvency or insolvency of the mortgagor.

5. Where a landlord dies, and his land descends to his heirs in common, and one of them consents to a continuation of the tenancy under a lease, and the other heirs, knowing that fact, stand by, and permit the tenant to raise a crop on the land, the latter will have a tenant's interest therein.

6. Where, after the making of a lease, and before its expiration, the tenant's wife becomes the owner of the leased land, the lessee's relation, as regards a mortgagee of the crop, remains that of tenant, and not that of a husband planting crops on his wife's land.

7. A verdict for excessive damages is harmless error where a remittitur of the excess is filed, and judgment entered for the correct amount.

Appeal from circuit court, Howard county; Hiram Brownlee, Judge.

Action by Rodney Jeger and another against George W. Conwell and another. Judgment was for plaintiffs, and defendant Conwell appeals. Affirmed.

Blackledge & Shirley, for appellant. Heron & Stratton, for appellees.

ROBINSON, J. Appellees, Jeger and Ashley, brought suit against appellant and one Foy, alleging in their complaint that in July, 1896, they were partners, and were the owners and entitled to the immediate possession of certain wheat of the value of \$100; and that on said date the defendants, being in possession of said property, unlawfully converted and disposed of the same for their own use and benefit, all without the knowledge or consent of plaintiffs. A trial resulted in a judgment in appellees' favor. The only questions discussed by appellant's counsel are that the verdict of the jury is not sustained by sufficient evidence, and that the damages assessed by the jury are excessive.

Appellees claimed ownership and the right to possession of the property by virtue of a chattel mortgage executed to them by Michael Foy. The mortgage was duly recorded. Appellant had purchased the property from Foy. The note given by Foy, and which was secured by the mortgage, became due September 1, 1896. This action was brought August 17, 1896. The mortgage provided that, if the note was not paid when due, the property should become the absolute property of appellees, and they should have the right to immediate possession. It is evident appellees did not become the owners of the property and entitled to its possession by reason of nonpayment of the note.

Among the provisions in the mortgage was one that, if the mortgagor sold the property without the consent of appellees, they should have a right to take immediate and unconditional possession of the same, and sell it

at public or private sale. It is argued that there is no evidence showing that the wheat was sold without the consent of appellees. It is alleged that appellant was in possession of the property, and had unlawfully converted and disposed of the same. Appellees are relying upon the mortgage, and, if appellant obtained possession with the consent of Jeger and Ashley, or either of them, he committed no wrong in selling the property. The burden was upon appellees to show that the purchase by appellant was without the consent of Jeger and Ashley. There is direct evidence that one of the partners did not consent to the sale of the wheat to appellant, but no direct evidence that consent was not given by the other. However, it is a familiar rule in civil actions that proof of circumstances warranting a given inference is sufficient, and, where the question is a close one, and there is evidence, as there is in this case, from which such an inference can be drawn, the rule requires us to sustain the conclusion reached by the trial court. The only fair inference from the facts and circumstances established is that appellees did not consent to the sale. *Railroad Co. v. Balch*, 122 Ind. 533, 23 N. E. 1142; *Shugart v. Miles*, 125 Ind. 445, 25 N. E. 551; *Railroad Co. v. Collingwood*, 71 Ind. 476; *Heaton v. Shanklin*, 115 Ind. 595, 18 N. E. 172; *Railroad Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357.

It is argued that the evidence is not in keeping with the theory of the complaint; that the complaint alleges ownership, and the evidence shows only a lien. It is true, the complaint alleges ownership, but it also alleges that appellees are entitled to the immediate possession of the wheat. And, as we have already stated, the mortgage provides that, in case of sale of the wheat by the mortgagor without appellees' consent, appellees have the right to immediate possession. Upon breach of this condition appellees had the right to immediate and unconditional possession, and a right of action accrued in their favor. It is not material, so far as this case is concerned, whether we conclude that a mortgagee takes the legal title upon the execution of a mortgage of chattels, as held in *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889, and cases cited, or that a mortgagee of personal property is a mere lienholder, as held in *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687, and cases cited. The complaint alleges a right of possession, and there is evidence that a condition of the mortgage was broken giving this right.

As the right to take possession of the property became absolute upon breach of the condition, it was not necessary to show that, at the time, the mortgagor was insolvent. Appellant can in no sense be said to occupy the position of a surety. The contract between the parties provided in what manner the possession of the property should pass to the mortgagees, and upon breach of the con-

dition this right became absolute, without reference to the solvency or insolvency of the mortgagor.

We cannot agree with counsel for appellant that the evidence fails to show that the mortgagor, Foy, was the owner of the wheat mortgaged. There was evidence to the effect that the mortgagor, Foy, was first the tenant of David Fickle, since deceased, and then the tenant of his children, who held the land as tenants in common. The court instructed the jury: "So, if you find from the evidence in this case that after the death of Fickle, and in the fall of 1895, any one of the tenants in common of this land agreed or consented that the tenancy of Michael Foy upon the land should continue, and that the heirs knew the fact, without objection stood by, and saw him put out and tend and reap a crop, I charge you that he would have a tenant's interest therein." This instruction states the law correctly, and is applicable to the evidence. There is evidence that when the wheat was sown Foy held the land as tenant of the heirs of David Fickle, deceased. When Foy sowed the wheat he was to pay two-fifths of it as rent, when harvested, to the heirs of David Fickle, and the fact that Foy's wife, one of the heirs, afterwards became the owner of the land, did not destroy his tenancy. Foy was a tenant before his wife became the owner of the land, and his lease had not yet expired when she became such owner. So that the rules declared in those cases where a husband plants crops on his wife's lands are not applicable to the case at bar.

Conceding that the court's instruction as to the measure of damages was erroneous, it was not such error as warrants a reversal of the case. The measure of damages was the value of the wheat converted in an amount not to exceed the debt secured by the mortgage. The amount due on the note in principal and interest was less than the value of the wheat as shown by the evidence. A remittitur was filed, and judgment rendered in an amount less than the amount due on the note in principal and interest. So that, in any view, the damages cannot be said to be in an amount too large. Judgment affirmed.

(22 Ind. App. 86)

LAKE ERIE & W. R. CO. v. MAUS.

(Appellate Court of Indiana. Nov. 3, 1898.)

INJURY TO EMPLOYE OF LICENSEE.

Where one railroad company agrees to permit another to connect its standpipe with a water tank on the former's premises, and to permit the use of water therefrom to fill the tanks of the latter's locomotives, and entry on the premises to perform work of maintenance or repairs, or to remove the connection at the end of the agreement, whether the agreement is regarded as a license or a lease, since there is no covenant to repair, the company owning the tank is not liable to an employé of the other company for an injury caus-

ed by the giving way of a stationary ladder attached to the tank, used while engaged in repairing the connection.

Appeal from circuit court, Decatur county; S. A. Bonner, Special Judge.

Action by Christian Maus against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

John B. Cockrum, W. E. Hackedorn, Geo. Shirts, and E. H. Bundy, for appellant. W. W. Lambert, Moore & Davis, and Stansifer & Baker, for appellee.

HENLEY, C. J. This is an action for damages resulting to appellee by reason of a personal injury received by him while in the employ of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, commonly called the "Panhandle Company." It appears from the record that appellant and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, commonly known as the "Big Four Company," were the joint owners of a water tank, and that while so owning it, and on the 17th day of October, 1890, they entered into the following agreement with the Panhandle Company: "Agreement Made This 17th day of October, 1890, between the Lake Erie & Western Railroad Company and the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, First Parties, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Second Party. Whereas, the first parties are joint owners of a water tank and pumping station at Rushville, Indiana, and second party desires the right to connect a standpipe on its property with said water tank, and to use water therefrom from time to time: Now, this agreement witnesseth that first parties, for and in consideration of the agreement of second party, hereinafter set out, hereby agree to allow said connection with their said water tank, and permit the use of water therefrom from time to time by said second party for the purpose of filling the tanks of second party's locomotives. First parties also grant to second party the right to enter on their property for the purpose of performing any work necessary in the way of maintenance or repairs, or for the purpose of removing the said connections at any time after this agreement has terminated. In consideration of the premises, second party agrees: 1st. That it will at its own expense make all necessary connection with said water tank. 2nd. That it will cause its employés in charge of locomotive engines to furnish to the joint agent of first parties at Rushville a notation every time water is taken, signed by the employé so taking it. 3rd. That it will pay to the first parties twenty-five (25) cents per tank of water taken, in the following manner: One-half of full sum due for each and every month to each of said first parties. It is mutually understood and

agreed by the parties hereto that the first parties are not and will not be under obligation to furnish water to second party at said tank at any time when the supply of water falls, or becomes insufficient to supply the same to the said second party; and said first parties reserve the right at any time to terminate this agreement, and exclude second party from the use of said water tank, upon ninety (90) days' notice to said second party, and that second party may at any time terminate this agreement on ninety (90) days' notice in writing to first parties. It is further mutually understood and agreed that each taking of water at said tank by the employes of second party shall be considered a full tank of water, and shall be charged and paid for at the rate of twenty-five cents per tank. In witness whereof the parties hereto have signed the foregoing in duplicate the day and year first above written. [Signed] The Lake Erie & Western Railroad Company, by Geo. L. Bradbury, Gen'l Mngr. The Cleveland, Cincinnati, Chicago & St. Louis R. R. Co., by W. M. Green. The Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., by Joseph D. Wood, Gen'l Mngr." It was pursuant to this license that the Panhandle Company entered upon appellant's premises, and at its own expense and in its own way connected its standpipe with appellant's water tank. Nearly two years thereafter, appellee, who was a servant of the Panhandle Company, was directed by said company to do some work of repair in and about the connection made with said tank by said company; and, in proceeding to do said work, he procured from his master's premises a ladder with which to reach the bottom of the tank, which was set out on a high trestle; and, after reaching the bottom of the tank, he proceeded to climb to the top of the tank by a ladder which had been constructed on the tank by the builders thereof. This ladder was stationary, and was made by fastening perpendicularly to the side of said tank two wooden strips or pieces, each about 4 inches wide and 2 inches thick and 16 feet long, and placed about 2 feet apart, and by nailing across said upright pieces 12 short pieces, to be used as steps. Having reached the top of said tank in the way mentioned, and having repaired a valve placed in said tank by the Panhandle Company, appellee was descending on the stationary ladder, when one of the crosspieces broke, and he was precipitated to the ground, and received the injuries for which damages are claimed in this action. The action was originally brought against all the parties to the contract which was set out at the beginning of this opinion, but, for reasons which the record discloses, and which are not pertinent in disposing of this cause, appellee dismissed his action against the Panhandle Company and the Big Four Company, and prosecuted it against the appellant alone. Appellee's complaint was challenged by demurrer in the

lower court. The demurrer was overruled, and this ruling of the lower court is one of the alleged errors assigned to this court. Appellant answered in seven paragraphs. The third, fifth, and seventh paragraphs were held bad on demurrer, and the cause was put at issue by appellee replying the general denial to the fourth and sixth paragraphs of answer. There was a trial by jury, and a verdict against appellant for \$3,500; and, over appellant's motion for a new trial, judgment for said amount was rendered on the verdict.

It is contended by counsel for appellant that the complaint in this cause is insufficient; that no cause of action is therein stated against this appellant. This view of the complaint is undoubtedly correct, and meets with our approval. The complaint shows no pretense of any intentional wrong, or of placing on the premises any means of danger in the nature of a trap, or of doing any act in the nature of a fraud. There can be no doubt of the correctness of the rule that where a person is a licensee he can have no cause of action on account of existing dangers in the place he is licensed to enter. *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113; *Railroad Co. v. Griffin*, 100 Ind. 221; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Railway Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121. If the appellee can recover in this cause, it must be by reason of some undischarged duty of appellant to him, arising out of the relations between them which result from the contract entered into between appellant and the Panhandle Company, appellee's master. Thus, it was said in *Sweeny v. Railroad*, 10 Allen, 368: "There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act, by which a legal duty or obligation has been violated." Appellee's rights being wholly derivative, the question arises whether any duty whatever was, under the contract, owing from appellant to appellee's master, to furnish this ladder for his use, or to furnish or keep in repair any tool or appliance which might be necessary to aid appellee's master in making, repairing, or maintaining its connection with appellant's tank. It is stated by *Patterson*, in his excellent work on *Railway Accident Law*, that the rule as to licensees is that the railway is not liable to licensees for injuries resulting from the condition of its premises, or caused by its failure to maintain those premises in repair, but is only liable to licensees for injuries caused by negligence in the operation of the line, and that a railway, like other owners of real estate, is not

liable to a licensee if its premises be out of repair, provided there be no such concealed dangers as would be considered a trap for the unwary. The Panhandle Company having availed itself of the permission to enter upon the premises of appellant for a certain purpose of its own, appellee was there by virtue of such permission or license. As was said in *Bolch v. Smith*, 7 Hurl. & N. 736, "Permission involves leave and license, but it gives no right." The water tank was not jointly occupied by appellant and the Panhandle Company. The last-named company had no rights whatever in the tank. Its right upon the premises grew out of the naked license to enter to make and repair its connection, or to remove the same. And this comes with still greater force when we examine the contract, and find that by its terms appellant could not compel the Panhandle Company to make the connection with the water tank. The contract was not enforceable against appellee's principal, and this alone, it seems to us, would determine that the Panhandle Company was, in so far as the entry upon appellant's premises was involved, a mere licensee. In this case no public duty, nor duty arising by statutory enactment, existed. Nothing can be gathered from the complaint but a private contract, and that contract was not between the appellant and appellee. In fact, no contract was entered into to provide and maintain means of ascending to the top of the tank, nor any provision by which the Panhandle Company should use any implement or appliance belonging to the owners of the water tank in the repair of its connection. A breach of duty is alleged in the complaint, in not providing a safe ladder by which to reach the top of the tank; and that duty in this cause could only arise from the contract between appellant and the Panhandle Company, and to that contract appellee was not a party. As the agent of the Panhandle Company, he, of course, had the same rights thereunder as his principal,—no more and no less; and the duty owing to him by appellant was the duty owing to the Panhandle Company by appellant. It seems to us, then, that the sufficiency of the complaint in this cause must be tested by a determination of the rights of the parties to the contract heretofore set out. This must necessarily be true, because the ladder upon the tank was not for the use or benefit of the public. No invitation was extended to the public to use it. It was placed there for the convenience of the owner alone, and appellant in connection therewith owed no duty to any one, except to its (appellant's) servants who might rightfully be upon it in the discharge of their duty. Appellee was in no sense appellant's servant. The tank was not a place furnished appellee in or upon which to work, nor was the ladder nailed thereon an implement or tool furnished appellee with which to work, nor did appellant and appellee's master occupy and

use the tank jointly. The relation of master and servant not existing, it follows that the rule as to safe working places and safe appliances does not obtain. Conceding for the purpose of the argument that appellant did owe some duty to appellee under the contract with his master, then, if, as alleged in the complaint upon which the cause was tried, the Panhandle Company knew that the ladder on the tank was defective and dangerous, the appellee, who was the agent of the Panhandle Company, must be held to be chargeable with such knowledge. The actual knowledge of appellee's principal, as charged in the complaint, that the ladder leading from the bottom of the tank to the top of the same was defective and out of repair, has the same effect in law as if the owners of the tank had given formal notice to the proper officials of the said Panhandle Company of the condition of the ladder. The knowledge of the defect is the test, not how such knowledge was acquired; and if appellee went upon the ladder, having full knowledge of its dangerous condition, it will certainly not be claimed that he can recover. Again, if by the contract the relation of lessor and lessee was created,—and which, we think, is the most favorable position in which appellee could be put for the purposes of this case,—there was no covenant to repair the leased premises on the part of the lessor; and without such covenant the lessee was bound to take the premises as they were found, and keep them in safe condition for his own use; and this duty of the tenant extended to all the appurtenances connected with the demised premises, and included steps, stairways, or other approaches, and everything, however great or small, on which the lessee exercised any right under the lease. *Purcell v. English*, 86 Ind. 34.

Upon the facts stated in the complaint, no cause of action could be maintained against appellant, and the lower court ought to have sustained the appellant's demurrer thereto. Cause reversed, with instruction to sustain appellant's demurrer to the complaint.

BLACK, COMSTOCK, and ROBINSON, JJ., concur in conclusion reached.

(21 Ind. App. 692)

McFARLAN CARRIAGE CO. v. POTTER.¹

(Appellate Court of Indiana. Nov. 4, 1898.)

MASTER AND SERVANT—PERSONAL INJURIES—ASSUMPTION OF RISK.

When a servant, with knowledge of a dangerous defect in a machine which he is operating, continues to operate it, relying on a promise of the master that it will be repaired as soon as the job of work at which the servant is then engaged is completed, the servant is relieved from an assumption of the risk during the time required to complete the job. Point referred to the supreme court for decision, as in conflict with *Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14.

¹ Transferred. For original opinion in Supreme Court, see 52 N. E. 209. Superseded by opinion, 53 N. E. 465. Rehearing denied.

Appeal from circuit court, Rush county; John D. Miller, Judge.

Action by William Potter against the McFarlan Carriage Company to recover damages for personal injury received by plaintiff while in defendant's employ. Judgment was for plaintiff, and defendant appealed to the appellate court, which refers the case to the supreme court on the question of the assumption of the risk.

Miller & Elam, McKee, Little & Frost, and Smith, Cambern & Smith, for appellant. Conner & McIntosh and Morris, Innis & Morgan, for appellee.

BLACK, J. The appellee recovered judgment against the appellant for a personal injury. The appellant's demurrer to the complaint for want of sufficient facts was overruled. It was shown in the complaint: That the appellant, a private corporation, was engaged in manufacturing carriages. That the appellee, on the 12th of December, 1895, and for six months prior to that date, was an employé of the appellant in its shops. That on that day, and for several days before, the appellee, by order of the appellant, was operating a rip saw in appellant's factory, as its employé. That the table in which the saw was situated, and the saw, at the time of the injury complained of, were defective, and out of repair, as follows: That the table should have been so situated that the top thereof would be level, but the floor on which it stood had given way and sunk down, causing the top of the table to stand in a slanting position; that the slot irons upon the table should have been even with the top of the table, so that the top of the table would have a smooth and even surface, but the slot irons had become raised as much as one-fourth of an inch above the top of the table; that the saw should have stood perpendicular, but its top stood one-fourth of an inch from a perpendicular line. That said defects in the saw and table had existed for several days, and the appellant had full knowledge of said defects. That by reason of said defects the hazards of operating the saw were greatly increased. That on said day, while the appellee was operating the saw, by the orders of the appellant, as its employé, the piece of timber that he was then cutting with the saw was, by reason of said defects in the saw and table, caught by the saw in such manner as to quickly turn said piece of timber, and, the piece of timber being thus unexpectedly and quickly turned, the appellee's hand was thereby thrown against the saw, whereby his hand was cut and mangled by the saw to such extent that the hand, and the use thereof, were entirely and forever destroyed, and he had suffered, and still suffered, great pain from the injury. It was further alleged that the appellant, from time to time before the appellee received said injury, promised him that it would

cause the saw and table to be repaired; that appellee had not been operating the saw for several days prior to the happening of said injury; that on the morning of said day the appellant promised the appellee that it would repair said saw and table as soon as the job of work that the appellee was then working on was completed; that the appellee, relying upon said promise, by order of the appellant commenced to operate said saw, and was injured within two hours thereafter, and before said job of work was completed; that the appellee, relying upon said promises to repair the saw and table, and at the request of the appellant, continued to operate the same until he received said injury, believing from day to day that the appellant, in pursuance of its promise, would repair said defects in the saw and table; that at the time he received said injury he was operating the saw with due care, and was free from any fault or negligence on his part; that said injury was occasioned wholly by said defects in said saw and table and the negligence of the appellant; that by reason of said injuries the appellee was damaged in the sum of, etc.; wherefore, etc.

Upon the question as to the responsibility of a master for injury suffered by his servant while continuing the service under a promise of the master to repair a hazardous defect, there has been some want of uniformity in the decisions, and especially in the announced reasons upon which adjudications have proceeded. The reciprocal duties and rights of master and servant arise out of their contractual relation. It is the master's duty to exercise reasonable care and diligence to provide and maintain a safe place and safe appliances for the use of the servant in the performance of his duties under the employment, and the master's failure in this regard is treated as negligence. The servant is presumed to contract with reference to the risks ordinarily incident to the particular employment, and he is regarded as having assumed all such ordinary risks. He is also regarded as assuming all risks of which he has knowledge, if, with such knowledge, he voluntarily continue in the service without any promise of the master to remedy the defects by which they are occasioned. But if, upon the servant's complaint or objection, the master promise to repair the defect, and request the servant to continue to use the defective appliance, and the servant complies with the request in reliance upon the promise, he cannot be regarded as assuming the risk of such defect. The servant is bound to exercise ordinary care for his own safety, and he cannot recover for an injury suffered through the master's fault if the servant's own negligence contributed thereto proximately. It is sometimes said in the opinions of courts that when the master so promises he assumes the risk. He does not insure the safety of the servant. It is the master's work that is being done

with his appliances. and, if he will have it done with dangerous appliances, and to that end, and to induce the protesting servant to go on, the master requests the servant to proceed, and promises that he will repair, and the servant consents and obeys in reliance upon the promise, and is injured through such defect, there is a breach of duty on the part of the master which may be, as it is, classed as negligence. The servant is bound to exercise ordinary care, and, if the danger from the defect which the master has promised to repair is so obvious and imminent that negligence can be fairly imputed to the servant for knowingly exposing himself to it, the risk being one which an ordinarily prudent person would not willingly encounter under the circumstances, the master cannot be held liable for injury resulting to the servant from such defect. The servant may recover when his injury has been occasioned without his negligence from a risk which he had not assumed. Where the servant calls the attention of the master to a defect which occasions an extraordinary risk, and thereupon the master promises to repair, and requests the servant to continue in the service, and the servant complies with the request relying upon such promise, he may recover for an injury suffered through such defect without his contributory negligence.

It has sometimes been decided, in effect, that he cannot recover for an injury suffered in the use of such defective appliance after the lapse of a reasonable time for the performance of the promise to repair. Whether this rule should be placed upon the ground that the servant, in the continued service after such period, assumes the risk, or upon the ground of his contributory negligence, perhaps need not be determined for the decision of the question as to the sufficiency of the complaint before us; though where the servant is using a defective appliance with the knowledge of its defect and the risk thereof, and it cannot be said that he is still using it under the master's direction with reliance or reasonable ground for reliance on the promise of the master to repair, the authorities would seem to lead to the conclusion that he should be considered as having assumed the risk as in the case of so serving without any promise of the master to repair. In *Hough v. Railway Co.*, 100 U. S. 213, the court, by Mr. Justice Harlan, adopts the statement of *Shearman & Redfield on Negligence* (section 96) that "there can be no doubt that when a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." In the same case is quoted also the following statement of Mr. Cooley in his work on Torts: "If the servant, having a right to abandon

the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes the assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks." *Cooley, Torts*, 559. In the fifth edition of *Shearman & Redfield on Negligence* (published this year), in section 215, it is said: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept. * * * Nor, indeed, is an express promise or assurance from the master necessary. It is sufficient if the servant may reasonably infer that the matter will be attended to." In *Stone Co. v. Phillips*, 11 Ind. App. 118, 128, 39 N. E. 96, 99, it was said that if, under all the circumstances, "and in view of the promise to remedy the defect, the appellee was not wanting in due care in continuing to use the defective and dangerous machinery, or the manner in which he used the same, then the appellant will not be excused for the omission to supply proper and safe machinery on the ground of contributory negligence. If the danger on account of the use of the defective machinery was not of so grave a character that it would deter a reasonably prudent man from incurring it, and if, in the line of his duty, appellee used care commensurate with the danger, he was not guilty per se of contributory negligence." In *Railway Co. v. Ott*, 11 Ind. App. 564, 38 N. E. 842, and 39 N. E. 529, where a brakeman having reported a defect in his lantern to the superintendent, who directed the brakeman to continue at his work, and promised a new and safe lantern when it arrived, saying that he was expecting it every day, it was said by the court: "The promise of appellant to provide appellee with a new lantern within the reasonable time necessary for its performance removed all ground for the argument that he, by continuing in the employment, under the circumstances disclosed, assumed the risks of the dangers incurred by the use of the defective lantern." In *Greene v. Railway Co.*, 31 Minn. 248, 17 N. W. 378, it was said: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested and induced him to continue its use under a promise thereafter to repair it." In *Railway Co. v. Watson*, 114 Ind. 20, 27, 14 N. E. 721,

725, and 15 N. E. 824, after a review of many cases, it is said: "The rule which we regard as sound in principle and supported by authority may be thus expressed: The employé who continues in the service of his employer after notice of a defect augmenting the danger of the service assumes the risk as increased by the defect, unless the master expressly promises to remedy the defect. The promise of the master is the basis of the exception." In *Roux v. Lumber Co.*, 85 Mich. 519, 48 N. W. 1092, the servant, on the day before the injury, called the attention of the superintendent to the defect, and the latter promised to attend to it that night. When the servant went to the mill the next morning, nothing having been done, he again called the superintendent's attention to the defect, and the latter stated that he had not had time, but that he would fix it at noon, directing the servant to go to work, but to take care of himself till noon, and that it would then be fixed. About 10 o'clock of the same day the servant was injured. It was said by the court that there was no voluntary assumption of the risk on the part of the servant. It was held not to be contributory negligence for a servant to continue to work with an incompetent helper if he had been assured by the foreman, who had authority to engage and discharge servants, that a suitable person would be employed in the place of the helper as soon as such person could be obtained. *Wust v. Iron Works*, 149 Pa. St. 263, 24 Atl. 291. In *Greene v. Railway Co.*, supra, the rule was stated, in effect, that if a servant, who has knowledge of defects in the instrumentalities provided for his use, fully understanding the risks to which such defects would naturally expose him, gives notice of the defects to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, "and the injury occurred within the time at which the defects were promised to be remedied," and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. It was said also that the statement in *Wharton on Negligence* (section 221), to the effect that the rule only applies where the servant, in reliance upon the master's promise, continues in the service supposing that the defects had been already remedied, finds no support whatever in the authorities. In that case the plaintiff, judgment in whose favor was affirmed, was a locomotive engineer, who had reported a defect in the engine, and had stated his objection to taking the engine out on that account, whereupon the foreman stated that he had no other engine to send out, and added: "Proceed with that, and you can get it fixed at Albert Lea, if you have time; if not, I will remedy it when you get back." The plaintiff did so, and was injured

on the way. See, also, *Harris v. Hewitt* (Minn.) 65 N. W. 1085; *Foundry Co. v. Van Dam*, 149 Ill. 337, 36 N. E. 1024. In *Eureka Co. v. Bass* (Ala.) 8 South. 216, where six days before the accident the master promised to get another fuse instead of the defective one in use, and told the servant to do the best he could with what he had, it was held error to refuse to charge that the servant assumed the risk if, knowing the danger, and that the promise to get another fuse had not been kept within a reasonable time, he still continued in the service, using the defective fuse. In *Rothenberger v. Milling Co.* (Minn.) 59 N. W. 531, it was held that the servant may recover for an injury caused within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept. In *Ferriss v. Machine Works*, 90 Wis. 541, 63 N. W. 234, where the plaintiff, a servant with full knowledge of a defect in machinery, whereby he was injured, continued to work with it for several weeks before the injury, it was held not error to charge the jury that if he continued in the service upon the faith of repeated promises of the master, the defendant, to repair the defect, yet, if he remained in the service for a longer time than was reasonable to allow the defendant to perform his promise or promises, then he must be deemed to have waived the objection, and to have assumed the risk; and that whether he, under such circumstances, continued in such employment only a reasonable time or unreasonable time was mainly a question of fact to be determined by the jury from all the facts and circumstances disclosed on the trial. When the servant continued to serve a week after the last promise to remedy a defective electric light, it was held to be a question for the jury whether or not, at the time of the injury, he assumed the risk of insufficient light. *Smith v. Lumber Co.* (Minn.) 67 N. W. 358. Where, upon complaint of the servant of the want of ladders in a shaft of a mine, the master said he had sent for ladders, and that, as soon as they came, he would put them in, it was held to be a question for the jury whether a reasonable time to remedy the defect had passed after the promise and before the injury. *Davis v. Graham* (Colo. App.) 29 Pac. 1007.

We do not understand the rule of exception to be that, to relieve the servant from the assumption of the risk, he must be in constant expectation, after the promise, that the defect will be repaired immediately. He may, relying upon the promise that the repairs will be made, use the defective appliance for a reasonable time with knowledge that it has not yet been repaired, and in the expectation of the future repair in fulfillment of the promise. In such case there is some period of use while waiting for the repairs. It may be as reasonable to go on in expectation that the repairs will be made when the

present stress of work is done as to go on in reliance upon a general or indefinite promise to repair. If the servant does go on, and is injured while doing so, the question would seem to be whether or not he has continued to use the machine or appliance for such an unreasonable time after the making of the promise that it may be said reasonably that the servant was not, when injured, continuing in fact under the master's promise to repair, and therefore had assumed the risk. If he had thus assumed the risk by continuing longer than a reasonable period of waiting, this is matter of defense. The assumption of risks by a servant is contractual, and does not constitute contributory negligence. In *Railroad Co. v. Orr*, 84 Ind. 50, it was held that, in an action by a servant against the master to recover for an injury sustained by the use of defective machinery negligently supplied by the master, facts showing that the servant assumed the risks incident to the use of the defective machinery amount to an affirmative defense precisely as an express agreement to assume such risks would have done. If, after a promise of the master to repair, whereby the servant is relieved from the assumption of risk which would otherwise be implied, he continues in the use of the defective appliance for such a period that he cannot claim that at the time of his injury he was still so under protection of such promise, he must be regarded as at that time assuming the risk. The servant having shown in the complaint the master's promise and request, and that the master had assumed the risk, or the servant had been relieved from the assumption thereof, it would seem to devolve upon the master in defense to show that at the time of the injury the risk had been assumed by the servant. If, however, it should be regarded as more proper to say that such unduly long continued use by the servant is contributory negligence, the general averment of his freedom from fault or negligence, in the absence of facts indicating the contrary, would be sufficient.

In the argument before us there has been much discussion of two comparatively recent cases in our supreme court: *Burns v. Manufacturing Co.*, 146 Ind. 261, 45 N. E. 188, and *Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14. In the former case the court, after stating the positions taken by counsel, declined to pursue the inquiry as to the reason for the exception to the rule that the servant assumes the hazards incident to such defects as he has knowledge of in case of a promise of the master to remedy the defect, and the court did not state when and how the exception is allowable. The court said that the complaint under discussion was not sufficient under any recognized statement of the rule and the exception. In holding the complaint bad, therefore, the court cannot be regarded as having intended to pronounce against any recognized form of statement,

and we find it difficult to deduce any rule from the case upon which we could base our decision of the case at bar. If it can be said that the decision is to the effect that the complaint of the servant must show either that he, at the time of the injury, had continued to use the defective appliance after the master's promise to repair had been delayed an unreasonable time, or that the master had had a reasonable time after the promise, and before the injury, in which to make the repairs, we cannot find sufficient support for such a decision. In *Oil Co. v. Helmick*, supra, the court, after finding itself justified in reversing the case on the ground that the special verdict failed to show that the servant was free from contributory negligence, proceeded to discuss the claim put forward on behalf of the servant that the facts found brought him within the exception to the general rule that the employé who continues in the service after notice of a defect in machinery, etc., augmenting the danger, assumes the risk; the exception being that he does not assume such risk if the master expressly or impliedly promises to remedy the defect. The court said (we think, correctly): "In case of such promise to repair by the master, relied upon by the servant, inducing him to remain in the service, the servant may recover for an injury caused by such defect within such a period of time after the promise as would be reasonable to allow for such repairs to be made." Among the cases cited in support of this proposition was *Railway Co. v. Watson*, supra. The court also cited, as authority for the same proposition, *Burns v. Manufacturing Co.*, supra. In this *Helmick* Case it was found that the servant had known of the defect two weeks before he was injured, and the master had knowledge of the defect one week,—in ample time to have repaired said machine and remedied said defect before plaintiff's injury. About a week before the injury the servant notified the master of the defect, and the master then promised to repair it "as soon as the order they were then filling was turned out." It was not stated whether or not the order had been filled at the time of the injury, though it was stated that the promise to repair was not fulfilled, and it appeared that the servant continued to use the defective appliance, and was injured, after the master had had ample time, subsequent to the promise, to make the promised repair. It was said by the court that the promise did not relieve the servant from the risk during the time required to run out the order, and that the burden of showing that the servant's injury occurred after the expiration of the time required for filling the order, and within a reasonable time thereafter for making the repairs, was on the servant; and that a failure to find that the injury occurred after the order was finished, and within such reasonable time thereafter, must be held as a finding against him on that point. With

such a conclusion we cannot find ourselves able to agree. These cases seem, from the claims of counsel in argument, to be regarded as establishing a new rule of exception in this state, which, as we think, is not supported by sound reason or good authority. It is of great importance that there be no uncertainty in the decisions on such a matter. It is after hesitation, and with the highest respect for the supreme court, that we are driven by our duty to refer this cause to that court under the provision of the statute that when this court, in a case pending here, shall conclude that any decision of the supreme court should be overruled or modified, it shall be our duty to transfer the cause, with our opinion of what the law should be held to be, to that court. The clerk will transfer this cause and certify this opinion to the supreme court.

(21 Ind. App. 123)

SPAULDING et al. v. NATHAN et al.
(Appellate Court of Indiana. Nov. 3, 1898.)
INTOXICATING LIQUORS—GUARANTOR—PARTNERSHIP—STATUTES.

1. Acts 1895, p. 248, §§ 1, 8, providing that a liquor license shall be issued only to a male over 21 years of age, and that no more than one license shall be issued to "any one" person, and in no case to any one other than the owner of said business, who must apply in his own name, inhibits a partnership for the purpose of engaging in the licensed retail-liquor business.

2. Where a liquor dealer sold goods to a licensed retailer on the verbal guaranty of a third person, and charged them to both, but did not know of an alleged partnership between the buyer and guarantor until after the sale, and in view of Acts 1895, p. 248, §§ 1, 8, which inhibit a partnership in the licensed retail-liquor business, the guarantor is not liable as a partner.

Henley, C. J., dissenting.

Appeal from circuit court, Delaware county; George H. Koons, Judge.

Action by Julius Nathan and others against Dustin M. Spaulding and another. There was a judgment for plaintiffs, and defendants appeal. Reversed as to defendant Spaulding.

Gregory, Silverburg & Lotz, Pierce & Bonham, and John P. Boyd, for appellants. Henry C. Hanna, for appellees.

WILEY, J. Appellees were plaintiffs below, and sued appellants upon an account. The complaint is in three paragraphs, the first and second of which seek a recovery against appellants as partners, and the third avers a joint liability, without the averment of partnership. The action was to recover a balance due upon an account for intoxicating liquors alleged to have been sold and delivered to the appellants, which were to be sold at retail by the appellant Wikel, as a licensed saloon keeper. Appellant Wikel was defaulted, and judgment pronounced against him, and as to him no question is presented by the record. Appellant Spaulding demurred to each paragraph of the complaint, which de-

murrer was overruled. He then answered in six paragraphs, but, as the case will have to be decided without reference to his answer, it is unnecessary to refer to it further. The case was tried by a jury, resulting in a general verdict for the appellees, and with the general verdict the jury answered and returned certain interrogatories propounded to them by the court. Appellant Spaulding's motions for a judgment in his favor on the answers to the interrogatories and for a new trial were respectively overruled, and in this court he has assigned several alleged errors; but the one calling in question the overruling of his motion for a new trial, and the overruling of his motion for judgment on the answers to the interrogatories, are the only ones that it is necessary for us to consider.

It is clearly apparent from the record that appellees prosecuted their action on the distinct and definite theory that appellants were liable to them as partners, and their right of recovery under the third paragraph, which merely charges a joint liability, is expressly waived by their contention that the only question in the record for decision is the one question of a partnership existing between appellants at the time of the sale and delivery of the goods. A brief statement of the facts as shown by the evidence will, in our judgment, lead to an easy solution of the one controlling question, to wit, whether or not there was a partnership existing between appellants, by which they would both be liable in this action. The only evidence in the case was that of appellee Nathan, and the written agreement between appellants, offered and read in evidence by appellees. From the evidence of appellee Nathan it clearly appears that appellant Wikel procured a license from the board of county commissioners of Blackford county to retail intoxicating liquors in the town of Montpelier; that appellees sold Wikel certain saloon furniture and fixtures, for which he gave his notes, and upon which appellant Spaulding became surety; that Spaulding verbally guarantied to appellees the payment of a limited amount of goods sold by appellees to Wikel; that upon such guaranty appellees sold and shipped to Wikel, in his own name, a quantity of intoxicating liquors from time to time, and upon his order, and charged the same to Spaulding and Wikel; that all bills therefor were rendered individually to Wikel, who made payments thereon from time to time until he went out of business, leaving an unpaid balance, which forms the basis of this action; that no bills were ever rendered to Spaulding, and no demand made upon him for payment, except by a draft through a bank after Wikel had quit business, and which Spaulding refused to pay. Appellee Nathan further testified that he knew the license to sell intoxicating liquors was issued to and held by Wikel; that he sold the goods on Spaulding's guaranty and credit, and did not know of the existence of any partnership between them until after

Wikel had gone out of business. The lease or contract between appellants, which was introduced in evidence, discloses the following facts: That Spaulding owned a certain business room in Montpeller, which he leased to Wikel for a term of one year at a rental of \$50 per month, payable in advance; that Spaulding was to furnish all necessary money, except \$125, to conduct and operate a saloon; that Wikel was to furnish \$125, for which Spaulding was to pay him 8 per cent. interest during the time it was used in said business; that Wikel was to pay to Spaulding one-half of the net profits of the business, and was to pay Spaulding at least once each week all proceeds of the business, out of which Spaulding was to pay all expenses of operating the business, including rent,—such payments to be made on the check of Wikel to Spaulding; that Wikel was to give his entire time to the business, and was to draw out of the net profits \$8 per week. This contract might, in any ordinary line of business, constitute a partnership; but whether it would or not we do not decide, for the question is not before us. Appellees are bound by the theory of the complaint, and they rely upon this contract alone to establish a legal, existing partnership between the appellants. Under the law in this state a legal partnership cannot exist for the purpose of retailing intoxicating liquors under a license. Intoxicating liquors can only legally be vended at retail by virtue of a license issued by the board of county commissioners, and such license cannot be issued to two or more persons as partners. *Kelser v. State*, 58 Ind. 379, is in point here. In that case Kelser and one Swigert entered into an agreement the nature and character of which were identical in principle to the contract in the case before us, between Spaulding and Wikel. Kelser leased his building to Swigert for carrying on a retail saloon. Swigert was to employ Kelser to purchase stock and to act as salesman. He was to pay over to Kelser, for his services, rent, etc., all proceeds and receipts of the business, except \$2 per diem, which was to be Swigert's share of profits, etc. After reviewing the terms of the contract, the court say: "Upon an examination of the contract between Kelser and Swigert, we think it clear that it did not make them partners as between themselves, and probably not as to third persons. * * * Kelser had no lien on the profits, as against creditors, for the amount of his compensation, and the fact that his compensation depended upon the amount of net profits did not make him a partner as to third persons. He was to have all the net profits as his compensation for services, rent, etc., except two dollars per day, whether the profits were great or small. His compensation might have been profitable or otherwise. That the stipulated compensation did not make him a partner is settled by the authorities,"—citing *Macey v. Combs*, 15 Ind. 469; *Emmons v. Newman*, 38 Ind. 372;

Bradley v. White, 10 Metc. (Mass.) 303; *Holmes v. Old Colony Railroad*, 5 Gray, 58; *Berthold v. Goldsmith*, 24 How. 536. We would cite, as bearing upon the question, the case of *Woodford v. Hamilton*, 139 Ind. 481, 39 N. E. 47.

The statute provides "that no license shall be granted to any other than a male person over twenty-one years old," etc. See section 1, Acts 1895, at page 248; also, *Horner's Rev. St. 1897*, § 5323a. Section 8 of said act provides that "no more than one license shall be granted or issued to any one person and in no case to any person other than the actual owner and proprietor of said business, who must apply in his own name," etc. Acts 1895, p. 251, *Horner's Rev. St. 1897*, § 5323h. It is a maxim of the law that "the express mention of one person or thing is the exclusion of another." *Whart. Leg. Max.* p. 11. Or, as stated by another distinguished author, "what is expressed makes what is silent to cease." *Coke, Litt.* 210a. It is evident that it was the intention of the legislature that the license to sell intoxicating liquor at retail should only be issued to one person, and, guided by the established principle of construction as laid down above, it is clear that two or more persons are inhibited by the statute from obtaining a license jointly or as partners, and hence cannot engage as partners in retailing intoxicating liquors under the law. From the evidence it is quite plain that appellees did not sell their goods on the strength or credit of the alleged partnership between appellants; for appellee Nathan testified that he did not know of said partnership until after Wikel went out of business, and that he sold the goods and gave the credit upon the strength of Spaulding's verbal guaranty to pay for them. Under these facts and conditions, the law will not aid appellees to collect their debt from Spaulding as a partner of Wikel, but will leave the parties in the situation in which they have knowingly and voluntarily placed themselves. *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804; *Woodford v. Hamilton*, supra. As to whether appellees would have a right of action against appellant Spaulding on his verbal guaranty we do not express an opinion, for that question is not before us, and appellees have not proceeded upon that theory.

Without setting out the interrogatories propounded to and answered by the jury, it is sufficient for us to say that they clearly disclose facts from which the court can say, as a matter of law, that appellant Spaulding is not liable upon the theory of the complaint, and judgment should have been rendered for him on his motion, notwithstanding the general verdict. The judgment as to the appellant Spaulding is therefore reversed, and the court below is directed to render judgment in his favor on the answers to interrogatories.

HENLEY, C. J. (dissenting). It is stated in the principal opinion in this cause, in ef-

fect, that a partnership for the purpose of trafficking in intoxicating liquors cannot exist in this state. Granting that the law as it now stands prohibits the issuing of a license to retail intoxicating liquors to any firm or company, and only to a male person over the age of 21 years, and that such person must possess certain other qualifications, yet I can see no reason why a partnership in the ownership of goods, and in the profits and losses of the business, could not exist. It is not illegal for A. and B. to own a stock of intoxicating liquor as partners, and, if a license is issued to A. to sell intoxicating liquors, it matters not whose goods he sells, or what he does with the proceeds of such sales. So long as B. does not sell or attempt to sell under the license issued to his partner, A., the law is not violated, and no principle of public policy infringed. *Shaw v. State*, 56 Ind. 188. The question of partnership was at issue, and the general verdict in favor of appellees was a finding that appellants were partners, and the answers to the interrogatories submitted to the jury clearly and definitely so find. Believing that a legal partnership existed between appellants at the time of the sale of the goods in question, and that the same were sold to said partners, and were used in the said partnership business, I am of the opinion that the finding of the lower court was right, and ought to be sustained.

(157 N. Y. 109)

WARN v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Oct. 28, 1898.)

MASTER AND SERVANT—CAR INSPECTOR—RULES—SIGNALS—NEGLIGENCE.

A car inspector in a passenger station went under a passenger train, in the usual manner, to inspect it. All the employés controlling movements of the train knew he was there, but the train was backed, and he was injured. A rule of the company provided that a blue signal placed on the end of the car denoted that car inspectors were at work, that a train thus protected must not be coupled to or moved until the signal was removed, and that, when a car or train standing on a siding was protected by the signal, other cars must not be so placed as to obscure the signal, without notifying the inspector. *Held*, that the rule did not apply to passenger trains in a station while in transit, and hence, under the circumstances, the absence of such signal was not negligence of the company.

Appeal from supreme court, general term, Fourth department.

Action by Elias Warn against the New York Central & Hudson River Railroad Company. A judgment for plaintiff was affirmed in the general term (36 N. Y. Supp. 336, also, see 29 N. Y. Supp. 897), and defendant appeals. Reversed.

Frank Hiscock, for appellant. William S. Jenney, for respondent.

O'BRIEN, J. The plaintiff recovered a judgment for damages against the defendant in an action for personal injuries sustained while in the defendant's service as a car inspector. He had been employed in that capacity for several years prior to the accident, which occurred on the night of the 29th of May, 1890, while inspecting the cars of a passenger train which had just arrived at the defendant's station at Syracuse. On the arrival of the train the plaintiff immediately commenced to inspect the cars, under the direction of the depot master, as he had been accustomed to do for years before. His duties required him sometimes to go under or between the cars, and on the night in question, while under or between them, he was caught by a sudden movement of the train, and sustained injuries of a somewhat serious nature. The plaintiff called as a witness in his own behalf the head inspector, and this witness described the manner in which the plaintiff was required to do his work, in the following language: "All trains that passed through the depot were inspected. It is the duty of the car inspectors to look everything over, and see that it is safe. When a train arrived in the depot, as soon as the train stops the car inspectors commence on each side. Sometimes two trains come in together. Sometimes commence on the rear end, and sometimes on the front end, but generally we commence on the rear end. We let the train go past, and see whether there are any flat wheels on it, or anything broken. When the train stops, the car inspectors go along from rear to forward end to see if they find anything wrong. The inspectors inspect the running gear, the wheels, and drawhead, and air brakes, and oil boxes, and everything. We sound the iron wheels, and we look over with our eyes the wheels which are not of iron. The inspector goes ahead and opens the oil boxes, and sees whether there is anything hot, or whether any oil is needed. He looks the air brakes over, and the drawhead. The air brakes are underneath the car,—right in the middle of the car. The rubber hose is between the cars and below the car. Along the side of the car there are iron pipes. These iron pipes, which run on the bottom of the car, are joined together at the end of each car by a rubber hose. For the purpose of inspecting the air brake, the inspectors go sometimes and look close under. We generally had our heads between the cars. Always peek under, nights, and look under. Besides the air brakes and wheels, they inspect the brake connection and drawheads. There is a brake beam on each truck, and these two brake beams are coupled with an iron rod; and when you put the brake on they are drawn to each wheel, and retard the motion of the wheel. * * * The inspectors go along after the train has come to a stop from one end of the train to the other,—one

on each side of it,—making an examination. If he discovers something broken or out of order, as he passes along the side of the car, if it took any length of time, he first notifies the depot master. The inspector then gives notice to the head end to not move the train; to the man that has charge of the train; the man under whose orders or signals the engineer operates his engine. The inspector tells whoever is in charge that he is going to do the work. We tell them that something is out of order, and we are going to do the work, and not to move the train. If it is a small matter that is out of order, and which the car inspector can repair himself, he goes in and repairs it. * * * The inspector, before he went under the car to work, always gave information to those in charge that he was going under there to work, and that the car should not be moved until we had heard from him that he had made the repairs and had come out. That is the way plaintiff worked during all the years that he was inspector, and all of the inspectors work in that way." It also appeared that it had been the practice for men to go along the side of the train with the inspectors, in order to call them out from under the train at the proper time.

The ground upon which the defendant has been held liable for the result of the accident is that it neglected to observe or enforce its own rules and regulations concerning the inspection of cars in passenger trains. The defendant doubtless owed a duty to the plaintiff and its other employes to use reasonable care and vigilance in the enforcement of all reasonable rules and regulations intended for their protection against accident. The plaintiff testified that up to the time of the accident he was not aware that there existed any rule or regulation as to the method of inspecting cars. There was undoubtedly a well-defined method of doing the work, which had always before been in use at this station, and which had been found to be perfectly safe, since no accident of this character had ever occurred before. That is the method which has already been described, and which the plaintiff had followed during all the years of his employment. But the plaintiff has recovered in this case upon the theory that all the time there was existing among defendant's standing rules, which had been promulgated and published many years, a regulation relating to the inspection of cars, which applies to this case, and which was disregarded at the station, to the knowledge of the defendant, and in fact had never been applied or enforced. If the learned counsel for the plaintiff is right in this position, then clearly the judgment ought to stand. The rule thus invoked as the basis of a charge of negligence against the defendant is as follows, being No. 36 of the printed rules: "A blue flag by day, and a blue light by night placed on the end of a car,

denote that car inspectors are at work under or about the car or train. The car or train thus protected must not be coupled to or moved until the blue signal is removed by the car inspectors. When a car or train standing on a siding is protected by a blue signal, other cars must not be placed in front of it, so that the blue signal will be obscured, without first notifying the car inspector, that he may protect himself." If this rule had any application to the passenger train that the plaintiff was inspecting when injured, it certainly was not observed on that occasion, and indeed never had been observed. It is not very plain how a blue light on the end of the train on the occasion in question could have prevented the accident, or operated as any protection to the defendant, since the force that moved the train did not come from the rear, but from suddenly backing the train towards the east. Every one having charge of the movements of the train knew perfectly well that the cars were being inspected at the time, and a blue light on the end of the train would not have given them any more knowledge than they already had. The depot master wanted to cut certain cars out of the train. He supposed at first that these cars were at the rear of the train, but, on discovering that they were at the head, a change of program became necessary in getting the cars out, and this change resulted in the sudden backward movement that produced the accident. But we are not concerned with the question whether the blue light would or would not have been of any benefit or protection to the plaintiff. The sole question in the case is whether the rule had any application to the train in question, and we think it had not. It will be seen that the rule is made up of three distinct clauses or sentences. The first simply defines the meaning of the blue light and the blue flag when used. It does not provide that either shall be attached to the rear end of a car on a passenger train. The second provides that, when a car or train is thus protected, it must not be coupled or moved until the signal is removed. The third sentence provides for the case of a car or train on a siding, and forbids running other cars in front of it so as to obscure the signal without first notifying the inspector, to the end that he may protect himself. When all is read together, the rule obviously relates to cars or trains on sidings or in the yard, and not to regular passenger trains coming into the station and departing frequently in a few minutes. There is nothing in the language of the rule, or in its evident purpose, that requires the signal to be placed upon such train, or the cars composing it, and negligence cannot be predicated of an omission to do so. It follows that the judgment in this case rests upon a wrong construction of the rule, since the only negligence imputed to the defendant consisted in the omis-

sion to place a blue light on the rear car of the train on the night of the accident, and this was upon the assumption that the rule required it.

The legal question was raised by the defendant by motion for a nonsuit, and requests to charge, which were denied, and exceptions taken. The judgment should be reversed and a new trial granted; costs to abide the event. All concur, except MARTIN, J., not voting, and VANN, J., not sitting. Judgment reversed, etc.

(172 Mass. 175)

COMMONWEALTH v. CLEARY.

SAME v. GUIHEEN.

(Supreme Judicial Court of Massachusetts. Hampshire. Oct. 31, 1898.)

RAPE—EVIDENCE—COMPLAINT BY FEMALE.

1. On an indictment for rape, evidence of the complaint of the ravished female, when not too remote in point of time, is admissible, not as part of the *res gestæ*, or as evidence of the substantive facts charged, or to disprove consent, but as tending to corroborate her testimony on the trial.

2. Whether such complaint is made too late to be admissible is a preliminary question for the trial judge.

3. On a trial for unlawfully abusing a female child under 16 years of age, it appeared that the alleged rape occurred between 9 and 10 o'clock in the evening; that the female was in the ravisher's company until 10:30 o'clock, when she entered a friend's house, crying and frightened; that the latter took her home at 12 o'clock, when she was still frightened and trembling; that her mother then put her to bed; and that she made complaint the next morning. *Held*, that such complaint was not made too late to be admissible to corroborate her testimony.

Exceptions from superior court, Hampshire county.

William C. Cleary and Patrick Guiheen were each convicted of unlawfully abusing a female child under the age of 16 years, and they except. Exceptions overruled.

J. C. Hammond, Dist. Atty., for the Commonwealth. J. B. O'Donnell and J. T. Keating, for defendants.

HOLMES, J. These are indictments for unlawfully abusing a female child under the age of 16 years. St. 1893, c. 466, § 2. They come here on exceptions to evidence that the child "made complaint to her [mother] the next morning after the occurrence as to what had been done to her by the defendants the night before." It does not appear that more was admitted than the fact that the child made complaint, with sufficient to identify the subject-matter, and therefore it is not necessary to consider whether the whole statement would have been admissible if offered, as the district attorney asks us to decide. The only question argued for the defendants is whether the statement appears, as matter of law, to have been too remote in point of time to be admissible. It is not argued that the common law in cases of rape does not

apply. See *Com. v. Roosnell*, 143 Mass. 32, 8 N. E. 747; *Com. v. Hackett*, 170 Mass. 194, 196, 48 N. E. 1087.

The rule that, in trials for rape, the government may or must prove that the woman concerned made complaint soon after the commission of the offense, is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal. *Glanville*, 14, 6; *Bract* 147a; *Fleta*, 1, c. 25, § 14; *St. 4 Edw. I. Stat. 2*. Appeals became obsolete, and left rape to be dealt with by indictment before the development of the modern law of evidence. Lord Hale, after stating the old law as to appeals, quoting *Bracton*, went on to deal with the evidence upon an indictment for rape. Having stated that the party ravished might give evidence upon oath, the value of which would be affected by corroborative facts, he resorted to the matter of fresh complaint, and said that, if she "presently discovered the offense, made pursuit after the offender," etc., "these and the like are concurring evidences, to give greater probability to her testimony." 1 Hale, P. C. 632, 633. Obviously, this was suggested by, and merely echoed, the requirement in appeals, but it gave that requirement a more or less new turn. If it means, what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. In general, you cannot corroborate the testimony of a witness by proof that he has said the same thing before, when not under oath. But Lord Hale's statement of the law has survived as an arbitrary rule in the particular case, notwithstanding the later-developed principles of evidence; and, although nowadays recognized as an exception attempted to be fortified by exceptional reasons, still it is put upon the ground upon which it was placed by his words. The evidence is not admitted as part of the *res gestæ*, or as evidence of the truth of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman. *Reg. v. Lillyman* [1896] 2 Q. B. 167, 170, 177; 3 Russ. Crimes (6th Ed.) 387, see *Grave's* note (m); *State v. Kinney*, 44 Conn. 153, 155; *Haynes v. Com.*, 28 Grat. 942, 947, 948; *Hornbeck v. State*, 35 Ohio St. 277, 280; *People v. O'Sullivan*, 104 N. Y. 481, 496, 10 N. E. 880; *Beddingfield's Case*, 14 Am. Law Rev. 830, 838; 3 Greenl. Ev. § 213; 1 McClain, Cr. Law, §§ 455, 456.

It follows that the complaint could not be rejected because it was no part of the *res gestæ*, or because, under our statute, the child was too young to consent. The former point was argued by both sides, seemingly under the mistaken notion that the complaint is substantive evidence of the facts charged. The test is whether, according to the principles of the exception, her having made the complaint tends to corroborate tes-

timony given by the child at the trial. It does not appear whether the child testified or not, but it would seem that she did, and, on the bill of exceptions, it must be assumed that she did. The only question open, therefore, is whether it can be said, as matter of law, that the complaint was made too late. This depends upon a preliminary finding by the judge. *Com. v. Bond*, 170 Mass. 41, 48, 48 N. E. 758. We cannot say that the admission of the evidence was not justified. The alleged rape was between 9 and 10 o'clock in the evening. The girl was not out of the alleged ravisher's company until half past 10, when she entered a friend's house, crying, excited, and frightened. The friend took her to her home at 12. She was still frightened and trembling, and her mother put her to bed. She made the complaint the next morning. It might have been found on this evidence that she was not in a condition to speak until she had rested, and that she was dealt with accordingly. *Hill v. State*, 5 Lea, 725, 732; *State v. Knapp*, 45 N. H. 148, 155.

Some cases have cut free from the original ground, and intimate that lapse of time before making complaint goes only to its weight, not to its competency. *State v. Mulkern*, 85 Me. 106, 26 Atl. 1017; *State v. Niles*, 47 Vt. 82, 86. But it is not necessary to lay down so broad a rule. In extreme cases the evidence has been ruled out. *People v. O'Sullivan*, 104 N. Y. 481, 490, 10 N. E. 880.

Exceptions overruled.

(174 Ill. 386)

CHURCH et al. v. PEOPLE ex rel. KOCHERSPERGER, County Treasurer.

(Supreme Court of Illinois. Oct. 24, 1898.)

PUBLIC IMPROVEMENTS—CONFIRMATION OF ASSESSMENT—CHANGE OF LOCATION.

Rev. St. c. 24, art. 9, § 19, requires an ordinance for a special improvement to specify the locality thereof. Section 20 requires an estimate of the cost of the improvement contemplated by such ordinance. *Held*, that where an ordinance located a sewer in a certain part of a street, and the special assessment for the cost as thus located was confirmed, after which the location was changed by the corporate authorities, the proceeding was invalid, and, on application for judgment for sale of the property assessed, the owners may show that the change resulted in a material injury.

Appeal from Cook county court; R. H. Lovett, Judge.

Application by the people, at the relation of D. H. Kochersperger, county treasurer, against L. A. Church and others, for judgment for the sale of property for special assessments. From a judgment for relator, defendants appeal. Reversed.

Harvey Strickler, for appellants. Geo. E. Finch and F. W. Pringle, for appellee.

BOGGS, J. This was an application to the county court of Cook county by the appellee, Kochersperger, in his capacity as county treasurer of said county, for a judgment

against certain lots belonging to the appellants, respectively, for alleged delinquent special assessments. The appellants filed objections to the entry of the judgment against their property, but such objections were overruled, to which ruling of the court exceptions were duly preserved. The improvement, the cost whereof such assessments were levied to pay, was a pipe sewer to be constructed in South boulevard, from Franklin to Park avenue, in the town of Cicero. The ordinance authorizing the improvement provided that the sewer should be laid "on a line parallel with, and twenty-one feet north of, the south line of said South boulevard." The lots owned by the appellants abutted upon said South boulevard, in which the sewer was to be so constructed. On the hearing in the county court, counsel for the appellee admitted in open court that the sewer in question had not been built on a line 21 feet north of the south line of the said South boulevard, but had been constructed 5 feet nearer the said south line. This admission was accompanied with the statement that, when the contractors entered upon the work of putting in the sewer, they found the line provided by the ordinance, to wit, 21 feet north of said south line of the boulevard, occupied by water pipes, and in view of which fact the trustees of the said town of Cicero adopted a resolution authorizing the sewer to be constructed 5 feet nearer the said south line of the boulevard, and the sewer was so constructed and completed in accordance with the resolution adopted by the said trustees. The court ruled that certain testimony proposed to be introduced by the appellants for the purpose of showing that the change in the location of the sewer operated to their injury, and was less beneficial to them than would have been a sewer constructed on the line provided by the ordinance, was not competent for consideration, and appellants saved exceptions to such ruling.

The resolution of the board of trustees authorizing the contractors to construct the sewer at another place than that fixed by the ordinance, and the construction of said sewer upon such new line in accordance with the resolution, were subsequent to the judgment of confirmation. It therefore appeared the objection could not have been urged on the hearing of the application for confirmation of the assessment. A valid ordinance is the authority for and the basis of a special assessment for local improvements. The improvement, when completed, must conform substantially to the nature, character, locality, and description given in the ordinance. Here it was conceded the sewer had not been put in on the line provided by the ordinance; that is to say, the locality of the improvement which has been constructed is not the locality of the improvement ordered to be constructed by the ordinance. The resolution of the board of trustees did not constitute authority for a change of the locality of the im-

provement, and, if it did, there would be no judgment of confirmation of benefits under it to be collected by the appellee collector warranting a judgment of the court, as asked in the application. It is, however, impracticable to require literal compliance with the requirements of an ordinance as to the location of an improvement, and substantial compliance therewith is all that is required. Unless the line on which the sewer is located and completed is substantially and for all practical purposes the line where the ordinance provided it should be constructed, an assessment to defray the cost of making the sewer on such new line would be wholly without authority of an ordinance to sustain it. Property owners cannot be compelled to pay for a public improvement, by way of special assessments, unless an ordinance has been passed authorizing the improvement to be made. *Pells v. People*, 159 Ill. 580, 42 N. E. 784. Whether the deviation in the line of the sewer in the case at bar is a substantial and material change in the location thereof was a question of fact. It having been conceded that the sewer had been completed, but had not been located on the line designated by the ordinance, it became essential to the right of appellee to recover a judgment for special assessments levied to defray the cost of putting in the sewer, to show that, though not upon the exact line specified in the ordinance, the locality of the completed sewer was substantially the location established by the ordinance, and that the deviation from the exact line had not operated to the injury of the property owners against whose property judgments were sought, and that the sewer as constructed is not less beneficial to their property than a sewer located in literal compliance with the terms of the ordinance. The burden thus cast upon the appellee may be otherwise stated to be to show that the locality of the sewer, as completed, is such as that its construction there was authorized by the ordinance of the town of Cicero. In the absence of such proof, the court, in view of the conceded fact that the sewer had not been located on the line provided by the ordinance, should have denied the application for a judgment, for the reason that authority did not appear to construct a sewer by special assessments at the place where the one in question was constructed.

The position of appellants, that exact and literal compliance with the terms of an ordinance is necessary in order to fix the liability of the property holder to pay the assessments, is not tenable. Nor is the case of *Rossiter v. City of Lake Forest*, 151 Ill. 489, 38 N. E. 359, authority in support of that contention. In that case we said (page 493, 151 Ill., and page 360, 38 N. E.): "Unquestionably, the ordinance is the authority for and the basis of a special assessment for a local improvement, and the work must conform substantially to the nature, character, locality, and description given in the or-

dinance, and any deviation therefrom which renders the improvement less beneficial to the property assessed should entitle the owner to relief against the assessment. Any such alteration, however slight, becomes to the owner a substantial, material change."

Nor is the position of the appellee tenable, that the liability to pay a special assessment is irrevocably fixed by the judgment of confirmation, and that no act of the municipality, or a failure of the municipality to act, after the rendition of judgment of confirmation, can be availed of as a defense to a judgment and order of sale of premises which the judgment of confirmation adjudged would be benefited by the completion of the improvement. We recognize the general rule announced by Mr. Cooley in his work on Taxation, and quoted by this court in *Ricketts v. Village of Hyde Park*, 85 Ill. 110, viz.: "It is no defense to an assessment that the contract for the work was not performed according to its terms. The proper authorities must decide upon this, and, if they accept the work, the acceptance, in the absence of fraud, is conclusive." The same rule was recognized by this court in *Fisher v. People*, 157 Ill. 85, 41 N. E. 615; *People v. Green*, 158 Ill. 594, 42 N. E. 163; and *Callister v. Kochersperger*, 168 Ill. 334, 43 N. E. 156. But the rule is general, and subject to exceptions. Mr. Cooley, on page 672 of the same work from which the foregoing quotation was made, said: "In general, no defense to an assessment, that the contract for work has not been performed according to its terms, is allowed, but this doctrine must be confined within the proper limits. It cannot be extended to cover a case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place; for, if this might be done, the statutory restraint upon the action of local authorities in these cases would be of no more force than they should see fit to allow." To allow individual property holders to defeat the collection of a special assessment on the ground that the city had not, at the time of the application for judgment, performed the work, or had omitted to perform some portion of it, or had failed to observe the requirement of the ordinance in relation to the manner in which the work, or some portion of it, should be performed, would operate to render impracticable the construction of local improvements by special assessments. Nor does the law leave the property owner, in such cases, remediless. The city may be restrained by injunction from departing from the terms of the ordinance in any material respect, or the writ of mandamus may be invoked to compel the city to complete the improvement in compliance with the ordinance. *Callister v. Kochersperger*, supra; *Fisher v. People*, supra. But when, as in this case, the applicant for judgment and order of sale admits that since the adoption of the ordinance and

the rendition of the judgment of confirmation a change in the location of the improvement has been ordered and made, and that the assessments for which he asks judgment are to be applied to the payment of the expenses of an improvement confessedly not located in exact accordance with the provisions of the ordinance, the question legitimately arises whether the ordinance and judgment of confirmation are properly applicable to the sewer as constructed. We conceive it to be the duty of the court, in such a case, to require of the applicant that it be proven that the location of the sewer is, in every substantial and material point of view, within the proper construction of the terms of the ordinance upon which the assessments were estimated, and the judgment of confirmation proceeded. For the reasons indicated, the judgment must be reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 521)

GAFFIELD et al. v. PLUMBER.

(Supreme Court of Illinois. Oct. 24, 1898.)

WILLS—CONSTRUCTION—RIGHTS OF LEGATEE—RES ADJUDICATA.

1. A decedent gave to a legatee \$2,700, \$800 to be invested in a home, and the balance to be kept on interest, the interest to be paid annually to her, and appointed trustees "to carry out this part of my will, and at her death to revert to J.'s heirs, if any fund unused at her death remained," and devised all his household goods to the same person. *Held*, that the direction as to the \$800 created an absolute gift of the home purchased out of such money, and that the legatee could draw from the principal in case the annual income was insufficient to supply her with the reasonable comforts of life.

2. Where a will gave one the annual income from a fund, with permission to draw from the principal in case the income proved insufficient for her support, and directed that, if any of the fund was unused at her death, it should go to others named in the will, a requirement was properly made that, before the principal sum should be resorted to, the beneficiary should make it appear to the court that such a course was proper.

3. Where a beneficiary under a will filed a petition, and had a decree entered, to obtain the appointment of trustees to execute a trust in her favor created by the will, and no construction of the will was sought, and no directions to the trustees asked, matters appearing in the petition and decree by way of narration, and beyond their scope and purpose, are not a binding adjudication of her rights under the will.

Appeal from circuit court, Iroquois county; Dorrance Dibbell, Judge.

Bill by Elizabeth Plumber against William Gaffield and others to construe the will of George W. Gaffield, deceased. From a decree construing the will in complainant's favor, defendants appeal. Affirmed.

This is an appeal from a decree of the Iroquois circuit court declaring the true construction of the second clause of the will of George W. Gaffield, deceased. The clause is as follows: "Second. I give and bequeath to

my cousin and friend Elizabeth Plumber \$2,700, \$800 to be invested in a home, and the balance of the \$2,700 to be kept on interest, and the interest to be paid annually to her; and I appoint my friends Asbury Clark and Frank Coughenour trustees to carry out this part of my will, and, at her death, to revert to John Gaffield's heirs, if any funds unused at her death remain." Clause 18 of the will, which it is insisted is to be considered in connection with clause 2, is as follows: "Eighteenth. I give and devise all my household goods to Elizabeth Plumber." The said second clause of the will was construed by the chancellor in the court below to mean that \$800 of the said sum of \$2,700 in the said second clause mentioned should be devoted to the purpose of purchasing a home for said Elizabeth Plumber, and that, when purchased, said home should be her absolute property; that the remainder of said sum of \$2,700, to wit, the sum of \$1,900, should be kept at interest, and the annual interest income thereof should be paid to the said Elizabeth Plumber; but that it was the intention of the testator that, if the necessities of the said Elizabeth so demanded, the necessary portion of the principal sum should be applied to her relief. In accordance with this construction, the court decreed that a lot which William Brown and John H. Karr, the then acting trustees under the second clause of the will, had previously purchased out of the said fund, and on which lot said trustees had, also out of the same fund, erected a dwelling house, at a total cost of \$800 for said lot and said dwelling, the title to which said trustees had caused to be conveyed to themselves, as trustees for the said Elizabeth Plumber, was the sole and absolute property of the said Elizabeth, and should be conveyed to her by the master in chancery. The court further decreed that, should said Elizabeth deem it necessary to expend all or any portion of the said sum of \$1,900, she should apply to a court in chancery by petition, setting forth the reasons for breaking in upon the principal sum of the said fund. It was further decreed that certain defendants to the proceeding, being the heirs of the said John Gaffield, deceased, were entitled to the said principal sum of \$1,900, or such part thereof as remained unexpended at the time of the death of said Elizabeth Plumber. The other defendants to the proceeding were the trustees, the administrator de bonis non with the will annexed of the said deceased, and John Gaffield. This is an appeal perfected by the heirs of the said John Gaffield.

C. W. Raymond, for appellants. Kay & Kay, for appellee.

BOGGS, J. (after stating the facts). The true purpose to be attained by the construction of a will is to ascertain the intention of the testator. Unless some principle of public

policy or unyielding legal rule intervenes, the intention of a testator is to be observed and enforced by the courts. *Phayer v. Kennedy*, 169 Ill. 360, 48 N. E. 828; *Taubenhan v. Dunz*, 125 Ill. 524, 17 N. E. 456; *Dickison v. Dickison*, 138 Ill. 541, 28 N. E. 792. The said second clause opens with a clear and unequivocal bequest of \$2,700 to Elizabeth Plumber. The remainder of the clause was not, in our opinion, added to this bequest for the purpose of depriving the said Elizabeth Plumber of the benefit of the bequest, but rather for the purpose of securing to her every possible advantage therefrom. Therefore it was the testator directed that \$800 of the money he had given her should be devoted to the purpose of buying a home. The direction then is that the "balance" of the bequest to her should be devoted to the purpose of producing an annual income for her. That it was not the intention of the testator that said "balance" of the bequest could never be availed of by her, and that she could not, in any possible event, use the same otherwise than as a principal sum to produce interest, is clearly manifested by the directions given to the trustees in whose custody said principal balance was committed, as to their duties in connection with said balance in case of her death. These directions are that, if said Elizabeth should die leaving in their hands any unused part of said balance, the same should be paid to the heirs of John Gaffield.

A careful reading and consideration of the entire clause has convinced us the testator intended that Mrs. Plumber should have the full benefit of the said \$2,700; that he desired a designated portion of it to be expended in securing her a home; that he wanted the balance put at interest for her benefit, but did not desire to restrict her to the use of the income alone. The gift to the heirs of John Gaffield of any part of said balance of said fund which might remain unused necessarily implies the testator understood the clause permitted the use of the principal of the fund. It would follow as a further necessary implication that any depletion of the principal sum should be for the benefit of the party to whom he had bequeathed the entire sum. The reasonable construction of the clause therefore is that the testator intended the beneficiary, Mrs. Plumber, should be allowed to draw from the principal in case the annual income arising from the interest should prove insufficient to supply her with the reasonable comforts of life. Such was the view entertained by the trial court, and we think it the correct one.

The directions of the trial court that, before the principal sum should be broken in upon, the legatee or beneficiary should make it appear to the court that such a course was justifiable and proper, also meets our approbation. Such a course will secure to Mrs. Plumber every just demand upon her part, and will protect every possible interest of the

heirs of John Gaffield. The directions of the testator that \$800 of the bequest to Mrs. Plumber should be invested in a home for her cannot but be regarded as an absolute gift of the home so purchased out of the money bequeathed to her.

We are unable to see that the provisions of clause 18 of the will serve to throw any light upon the proper construction of clause 2. The gift in the eighteenth clause is of articles of personal property, and that of the second clause is of money. The use to be made of the articles of personal property was determined by the nature and character of the different articles embraced within the gift of the clause. The testator was, for that reason, content to throw no safeguard around this property. Money, however, which is the subject-matter of the second clause, may be devoted to many different wants, real or imaginary, made productive of income, or wasted by extravagance, lack of forethought or judgment; and for these reasons the testator chose to direct the manner of investment and use of the money bequeathed to Mrs. Plumber. The trustees named in the second clause declined to accept the trust, and the appellee, Mrs. Plumber, prior to the date of the filing of the bill in this case, exhibited a petition in chancery wherein she asked the appointment of other persons as trustees. The phraseology of portions of this petition, and some of the language employed by the court in the decree rendered upon it, are made the basis of a contention by the appellants that the rights and interests of the appellee, Mrs. Plumber, in the said homestead property, and in the said balance of the said bequest of the said \$2,700, were involved in the proceeding, and were adjudicated by the court adversely to the right of Mrs. Plumber, as declared by the decree brought before us by this record. This is a misapprehension. The sole purpose of the petition and of the decree entered upon it, which are interposed here as an adjudication, was to procure the appointment of trustees to execute the trust. No construction of the will was sought, and no directions to the trustees asked or attempted to be given by the court. That which appears in either the petition or decree, and which is relied upon as an estoppel or adjudication, is beyond the scope and purpose of the petition and decree, and appears only by way of narration. The decree appealed from is correct, and is affirmed. Decree affirmed.

(175 Ill. 425)

In re GROSSMAN'S ESTATE.

(Supreme Court of Illinois. Oct. 24, 1898.)

NUNCUPATIVE WILL—APPEAL—REVERSAL.

1. Decedent was taken suddenly ill, and an operation was set for 3 o'clock the next day, and his brother and others consulted with him about his making a will. The brother wrote down the wishes of decedent, and said he would write it up and send it over in the morn-

ing, and, if it was right, decedent could sign it, and, if not right, it could be made so. Nothing was said by decedent as to desiring any one present to bear witness that it was his will, as provided in Rev. St. c. 148, § 2, relating to nuncupative wills. The next morning, before the will was brought to him, he was dead. *Held* not to be valid as a nuncupative will.

2. Where the judgment of a court is correct, it will not be reversed, though the reasons given therefor are erroneous.

Appeal from appellate court, First district.

Petition of Emma Bricher to admit to probate a certain document as a nuncupative will of Louis Grossman, deceased. There was an order denying the petition, and petitioner appeals. *Affirmed*.

Flower, Smith & Musgrave, for appellant. Wilson, Moore & McIlvaine, for appellees William and Frederick Grossman. Adolph D. Weiner and Andrew Hirschl, for appellee M. T. Grossman.

CRAIG, J. This was a petition by Emma Bricher, in the probate court of Cook county, praying that a certain document, purporting to be the nuncupative will of Louis Grossman, be admitted to probate. The court heard the testimony in support of the alleged will, and denied the application. An appeal was taken to the circuit court, where it was stipulated that a hearing might be had on the evidence heard in the probate court. After the evidence was read, the court instructed the jury to find that the alleged nuncupative will of Louis Grossman is not and was not the nuncupative will of the said Louis Grossman, and the jury returned a verdict in conformity to the instruction. An appeal was then taken to the appellate court, where the judgment of the circuit court was affirmed.

The proposed will offered in evidence is as follows:

"Be it remembered that heretofore, on or about the 11th day of June, A. D. 1894, the undersigned, Frederick Grossman, of 5623 Dearborn street, Chicago, Dr. A. M. Harvey, of St. Elizabeth Hospital, corner of Davis and Le Moyne streets, Chicago, Illinois, and William E. Burcky, of 6641 South Halsted street, Chicago, Illinois, were present at said St. Elizabeth's Hospital, at the bedside of Louis Grossman, since deceased, a brother of the said Frederick Grossman. A consultation of physicians had just been held, and it had been decided that an operation should be performed upon the said Louis Grossman, as the only chance of saving his life. After the consultation the undersigned, together with Frederick A. Grossman, were left alone with said deceased. Thereupon the undersigned, Frederick Grossman, stated to said deceased that an operation was the only means of saving his life, and that the time for the operation had been fixed for three o'clock on the afternoon of Monday, June 11. Said Frederick Grossman further asked said

deceased whether, in view of the uncertainty of the result of said operation, he (Louis Grossman) wished to make any settlement of his matters. Louis Grossman said that he did. Thereupon Frederick Grossman secured pencil and paper. Louis Grossman then said: 'I give,' etc. "In testimony of the above, we have set our hands hereto this 19th day of June, A. D. 1894. Frederick Grossman. William E. Burcky. Andrew M. Harvey.

"The foregoing was read to Frederick Grossman, William E. Burcky, and A. M. Harvey in our presence, and was subscribed by them in our presence. F. E. Prestley, M. D., St. Elizabeth Hosp. W. R. Livingston, M. D., 269 La Salle Ave. Wm. B. McIlvaine, 502 N. State St. H. C. Adcock, 4450 Evans Ave."

Louis Grossman died at 10 o'clock in the forenoon of Monday, June 11.

It is not questioned that the alleged will was reduced to writing within the time required by law, nor is there any controversy in regard to the form of the instrument. It is, however, contended that the instrument is invalid as a will for the reason that the alleged testator, as appears from the evidence, never desired or requested any person present at the time the alleged will was made to bear witness that such was his will. Section 2 of chapter 148 of the Revised Statutes provides that all wills and codicils by which property shall be devised shall be in writing, and signed by the testator or testatrix. Oral wills are, however, excepted from the operation of this section of the statute by section 15, which provides as follows: "A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days after the making thereof, and proven before the county court by two or more credible, disinterested witnesses who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory, and that he or she did at the same time desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect, and that such will was made in the time of the last sickness of the testator or testatrix," etc. The facts which led to the making of the alleged will may be briefly stated as follows: Louis Grossman was taken suddenly ill. A consultation of physicians was held at St. Elizabeth's Hospital, where he was then lying, on the evening of Sunday, June 10, 1894, and it was decided that an operation would have to be performed. The time for the operation was fixed for 3 o'clock on the following Monday afternoon. His brother, Frederick Grossman, had learned of his illness on Sunday afternoon and had gone over to the hospital with his son, Frederick

A. Grossman, and his son-in-law, Dr. William E. Burcky. After the consultation was concluded, Frederick Grossman asked the physicians whether his brother was in any danger of immediate death,—whether it would be safe to postpone the settlement of his affairs. The reply of Dr. Fenger was that the sick man would be in as good condition at 3 o'clock on the following day as he then was, but it was stated that it would be advisable to talk with him about his affairs, so that he could think them over before the operation, and sign such papers as might be necessary. Thereupon the relatives mentioned, together with Dr. Harvey, the attending physician at the hospital, went to the room of the deceased, and reported the result of the consultation. Frederick Grossman asked the deceased if he wished to make any disposition of his affairs,—whether he wanted to attend to it, or whether he wanted it attended to. The answer given by the deceased, as Grossman testified, was as follows: "So he said: 'All right; you can take a statement of how I want it fixed,' and then Dr. Harvey gave me a slip from his prescription pad, or whatever it was, and a paper and pencil. This was in the presence of Andrew M. Harvey and William E. Burcky. I said: 'I will make a memorandum, and then fix it up in shape. If you think it is proper, you can sign it, and make a kind of will of it.' He said: 'All right.'" The deceased then made a statement of the disposition he intended to make of his property, and Frederick Grossman wrote down in pencil the statement as given. The next morning Frederick Grossman received a message by telephone that Louis was sinking very fast. He then wrote out a will from the data he had taken the previous night, but, before it reached the hospital, Louis was dead. The will in question was then prepared from the memoranda taken on the night of June 10th. In the probate court, Frederick Grossman, William E. Burcky, and Andrew M. Harvey, who were present when it is alleged Louis Grossman made his will, were called as witnesses for the purpose of proving the will. These witnesses concur in their evidence that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory; but no one of the witnesses was able to testify that Louis Grossman desired them, or any person present, to bear witness that such was his will. Indeed, all three of the witnesses testify that Louis Grossman said nothing whatever in regard to any person present bearing witness to the will. Dr. Harvey, one of the witnesses to the will, testified that Frederick Grossman said to him, "You are a witness," but that Louis Grossman never mentioned the word "witness" at all. In regard to the remark claimed to have been made by Frederick, he is contradicted by Frederick and by all others present, who testify that the sub-

ject was not mentioned by Frederick or any other person present.

As has been seen, in order to establish a nuncupative will the statute is imperative that two or more credible witnesses who were present at the speaking and publishing of the will must declare on oath that they were present and heard the testator pronounce the words, and that he at the same time desired the persons present, or some of them, to bear witness that such was his will, or words to that effect. The fact that the words of the will may have been spoken in the presence and hearing of the witnesses is not enough, but the testator must in some way manifest his intention and desire that those present, or some of them, should bear witness that such was his will. If the testator says nothing at all in regard to witnessing the will, how can it be said that he desired or wished those present to bear witness to the will? The construction of this statute came before this court several years ago, in *Arnett v. Arnett*, 27 Ill. 247; and the court held that it was indispensable to the validity of a nuncupative will that the testator should request those present to bear witness that such was his last will, or that he should say or do something equivalent to such an expression. It may be true, as held in *Harrington v. Stees*, 82 Ill. 50, that no formal request of the testator to the attesting witnesses is required, but the desire of the testator must be clearly manifested in some way that the witnesses bear witness to the will. Here nothing was said by the testator on the subject, and hence the record fails to show that the testator had any wish or desire in regard to the matter. Indeed, the fact that the testator called upon no one present to bear witness that the statement he made to Frederick Grossman was his will would seem to indicate that the statement was given, not as a will, but as a memorandum from which a will might afterwards be prepared and submitted for execution. There is much evidence in the record tending to sustain this view. Dr. Burcky testified that, after the memoranda had been read over to Louis, Frederick Grossman asked him if that was about what he wanted, "and he says, 'Yes,' that is about what he wanted, and Frederick Grossman says: 'All right; I will write this up, and send it over to-morrow morning, and you can look it over, and, if it is right, you can sign it; and, if it ain't right, you can make it right.'" Frederick A. Grossman, the son, who was also present, testified: "After the substance of the will was stated, father read over the notes to Uncle Louis, and then told him that he would take these notes home and write them out, and bring it in the next morning, and, after he had seen it, if he wanted it that way, and if he wanted to make any changes, that he would have time to have it changed and make the changes before he signed it." The fact that Frederick Grossman prepared a

will from the memoranda, and sent it over the next morning for execution, would seem to indicate that no will was intended. But, however that may be, the proof of the alleged nuncupative will did not conform to the requirements of the statute, and the circuit court properly instructed the jury to find that the alleged will was not the nuncupative will of Louis Grossman.

It is said, however, that the circuit court decided against the validity of the will, not on the ground above suggested, but upon the ground that the testator attempted to devise real estate, and, as the will was invalid as to real estate, it must be declared invalid as an entirety. What ground the circuit court may have predicated its decision upon is immaterial. The only question here is whether the judgment of the circuit court was correct or incorrect, regardless of the reasons that may have been given for that judgment. The judgment of the appellate court will be affirmed. Judgment affirmed.

(175 Ill. 432)

DOPPELT v. NATIONAL BANK OF THE REPUBLIC.

(Supreme Court of Illinois. Oct. 24, 1898.)

BANKS AND BANKING—DEPOSIT OF CHECKS—INDORSEMENT IN BLANK—LIABILITY FOR PROCEEDS—EVIDENCE.

1. Where plaintiff had indorsed in blank, and deposited in his bank to his credit, certain checks, which such bank indorsed to defendant for collection to its credit, plaintiff could not hold defendant liable for the proceeds of such checks, though such bank had become insolvent, as his indorsement transferred a good title, free from all equities in his favor.

2. Evidence that defendant held collateral to secure the debt of the bank was properly refused, as irrelevant, where the question in issue was whether such bank was indebted to defendant so as to authorize the application of the checks to the debt.

Appeal from appellate court, First district.

Action by Jacob Doppel against the National Bank of the Republic. A judgment in favor of defendant was affirmed by the appellate court (74 Ill. App. 429), and plaintiff appeals. Affirmed.

Daniel M. Rothschild (Blum & Blum, of counsel), for appellant. Lowden, Estabrook & Davis, for appellee.

CARTER, C. J. The appellant, Jacob Doppel, deposited with the banking house of Kopperl & Co. two checks on New York banks, both indorsed by him in blank, amounting to \$1,518.48, receiving credit for such amount in his pass book. His account was overdrawn several hundred dollars at the time, and he drew against his account after making this deposit. The banking firm deposited the checks with appellee, indorsing them, "For collection to the credit of Kopperl & Co." Appellee gave credit on its books to Kopperl & Co. for the amount, and sent the checks on to New York for collection, and

they were paid on or before February, 14, 1898. On the latter day Kopperl & Co. made an assignment for the benefit of their creditors. Appellant filed his claim with the assignee for the balance due on his account with Kopperl, being \$1,017.58, which was the proceeds of these checks less the amount he had checked out. Subsequently he brought this action in the circuit court of Cook county against appellee, alleging that Kopperl received these checks as his agent for collection; that he was not indebted to Kopperl at the time; that Kopperl was then insolvent, and had since made an assignment for the benefit of his creditors; that appellee had received these checks from Kopperl for collection, and duly collected them; and that by reason of the premises the appellee became liable to account to appellant for the proceeds. The cause was heard before the court without a jury, and judgment was entered for the defendant below. The plaintiff appealed to the appellate court, where the judgment was affirmed.

Under the pleadings it became incumbent on appellant to show that he deposited these checks with Kopperl for collection only. He indorsed them in blank, without any restrictions whatever; and, under the well-settled rule of this state, he thereby transferred a good title to Kopperl, free from all equities in his favor, and the appellate court has so found. Under these circumstances, appellee could not know that he claimed or pretended to any rights in the paper, and it was authorized to act upon Kopperl's indorsement of the checks, and proceed to collect the same and credit his account with the proceeds. Its cashier testified that Kopperl drew against these checks, and that his account was overdrawn, and when he failed there was no balance to his credit. All the facts having been found by the appellate court against appellant, and the judgment of the court being in accord with the law on such facts, there is no question left, affecting the merits of the case, for us to pass upon.

Exceptions were taken to the refusal of the trial court to admit evidence that appellee held collateral to secure it for Kopperl's indebtedness. The evidence was properly refused, as wholly irrelevant to the question whether Kopperl was indebted to appellee. It had no knowledge that appellant claimed any interest in the proceeds of the checks. It therefore had the right to act upon his indorsement, treat the checks as Kopperl's property, credit his account, and honor his drafts accordingly. Even if appellant could, after having filed his claim for the balance due from Kopperl against his estate, have rescinded the transaction, and recovered the checks or their proceeds in the hands of the assignee (American Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co., 150 Ill. 336, 37 N. E. 227), he clearly had no such right as against appellee, who had applied the proceeds as directed by Kopperl; he having an

unrestricted indorsement. The judgment of the appellate court must be affirmed. Judgment affirmed.

(174 Ill. 412)

BOARD OF COM'RS OF COOK COUNTY v. HARLEV.

(Supreme Court of Illinois. Oct. 24, 1898.)

TRIAL—ADMISSION OF EVIDENCE.

The order in which evidence shall be admitted is wholly within the discretion of the trial court.

Appeal from appellate court, First district.

Action by William Harlev against the board of commissioners of Cook county. From a judgment of the appellate court (73 Ill. App. 218) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Robert S. Iles, Co. Atty., and Frank L. Shepard, Asst. Co. Atty., for appellant. Wing, Chadbourne & Leach, for appellee.

CARTER, C. J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county in favor of appellee. The appellee, William Harlev, brought suit against Cook county for \$18,000, which amount he claimed was due him for extras furnished by him in the construction of the second ward building of the Cook county insane asylum at Dunning. No evidence was offered by appellant, and the jury returned a verdict for \$8,402. All questions of fact have been settled adversely to appellant by the judgment of the appellate court, and the only errors we can consider relate to the instructions and the admission of evidence. The only objection to the reception of evidence was to the order of its admission. This is wholly within the discretion of the trial court. We do not find that appellee's instructions are open to the criticisms made on them, but think that they stated the law applicable to the case correctly, and were reasonably clear and explicit, and, taken in connection with those given for appellant, could not have misled the jury. Appellant's refused instructions were fully covered by those given, and the modification of instruction 10 was warranted by the evidence, and could not have resulted in any harm to appellant. Finding no error the judgment is affirmed. Judgment affirmed.

(175 Ill. 234)

PLOTKE v. CHICAGO TITLE & TRUST CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL—RECORD—AFFIDAVITS—BONDS—FILING—EXTENSION OF TIME—APPROVAL.

1. Affidavits filed in the appellate court are no part of the record, and cannot be considered.

2. Where, after the time for filing an appeal bond has expired, the court gives additional

time, such time is computed from the day it is allowed, and not from the day of such expiration.

3. A county court has discretionary power to approve an appeal bond filed after the time fixed for filing has expired, where such approval and expiration occur at the same term.

Appeal from appellate court, First district.

In the matter of the assignment of Negley & Co., insolvents, Isadore Plotke was removed as assignee, and the Chicago Title & Trust Company was appointed as his successor, and Plotke appealed to the appellate court, which dismissed the appeal, and he appeals to the supreme court. Reversed.

Wm. A. Marsh (G. W. Ambrose, of counsel), for appellant. Rosenthal, Kurz & Hirschl, for appellees.

CARTER, C. J. This is an appeal from a judgment of the appellate court dismissing appellant's appeal to that court. The record does not show upon what ground the appeal was dismissed, but the only ground suggested in the argument is that the bond was not filed within the time limited by the trial court. On January 22, 1898, an order was entered in the county court of Cook county removing appellant as assignee of the Negleys, who had assigned for the benefit of their creditors, and appointing the appellee company as his successor, from which order appellant was allowed an appeal to the appellate court on his filing his appeal bond, to be approved by the court, within 20 days from that date, and leave was given him to file his bill of exceptions within the same time. On February 9th the time for filing the appeal bond was, by order of court, extended to February 17th, at 9:30 o'clock a. m., and on February 11th the time for filing his bill of exceptions was extended to the same time by order of the court. On February 17th the time to file bill of exceptions was, by stipulation and order of court, extended to February 23d, at 9:30 o'clock a. m., and on February 23d the time to file bond and bill of exceptions was, by order of court, extended one day. On February 28th, as the record shows, appellant presented his appeal bond to the court for approval, and the court examined said bond and the sureties thereon, and approved it, and ordered it to be filed, and it was then filed. In the appellate court the appellee's motion to dismiss the appeal bond was sustained, and the appeal dismissed.

Certain affidavits were filed in the appellate court, which, as held in *Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74, are no part of the record, and cannot be considered.

The appellee contends that the time for filing the appeal bond expired February 18th, and that the effect of the order of February 23d, extending the time one day, was simply to extend the time from the 17th to the 18th, as the order of the 17th applied only to the

bill of exceptions. We are of the opinion that such was not the effect of the order of February 23d. Such an order would have been a useless act by the court, as applied to the bond, for the reason that no bond had then been filed and several days had already passed since the 17th. The effect of this order was to extend the time, as to both bond and bill of exceptions, one day from the 23d of February. The case was properly on the docket of the February term for the purpose of settling the bill of exceptions and approving the appeal bond. Both were judicial acts, and the court had jurisdiction of the cause and of the parties for those purposes. Neither the bond nor the bill of exceptions was filed within the time limited by the order of February 23d, but, as before stated, the court, acting judicially, on the 28th of the same month, and during the same term, approved the bond and sureties after examining the same, and ordered the bond to be filed. The contention, in effect, is that the court had no power to do this; that it had lost jurisdiction of the matter. We cannot so conclude. The term had not ended, and the court had the power to set aside the orders which it had made at the same term and enter others. If the court had no power to enter the order approving the bond and ordering it filed on the 28th, it had no power on the 23d to extend the time, which had expired on the 17th. The effect of the order entered on the 28th was to extend the time, limited by the previous orders, to the 28th, and to approve the bond as then presented. *Association v. Leonard*, 166 Ill. 154, 46 N. E. 756. It was discretionary with the trial court to extend the time or not, and had it refused to do so appellant would have been too late to perfect his appeal, but, having made and entered the order which we hold operated as such extension, the bond was filed within the time limited.

There are expressions in *Pardridge v. Morgenthau*, supra, not fully in accord with these views, but they were not necessary to the decision of the case, for there the last extension appeared to have been by the judge out of court, and it has been uniformly held in the cases, many of which are cited in the *Pardridge Case*, that extensions of this character are judicial acts, and cannot be performed except by the court in session, but we have been referred to no case in this court holding that the court, at a term when it has jurisdiction of the subject-matter and the parties, may not make an order such as was made in this case.

No motion was made in the county court to strike the bond from the files, and no objection appears to have been made or exception taken to the order of the court. See *Village of Hyde Park v. Dunham*, 85 Ill. 569, and the *Leonard Case*, supra. Nor can we presume, from the record, that appellee had no notice, if, indeed, notice were necessary. As the court had jurisdiction, we must pre-

sume, as the record is made up, that its discretion was properly exercised.

We are of the opinion that it was error to dismiss the appeal, and the judgment of the appellate court will be reversed, and the case remanded to that court for further proceedings. Reversed and remanded.

(175 Ill. 435)

BLOMSTROM v. DUX et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

VENDOR'S LIEN—WAIVER.

The taking of a mortgage for part of the purchase money is, in the absence of statement therein to the contrary, a waiver of the vendor's lien for the balance, though this was left in the vendee's hands, with which to pay an assessment which was afterwards set aside.

Appeal from appellate court, First district.

Bill by Carl J. Blomstrom against Joseph Dux and others. From judgment of the appellate court reversing a decree for complainant (70 Ill. App. 62), complainant appeals. Affirmed.

This is a bill filed by appellant against the appellees, alleging the sale of certain lots in the city of Chicago by the appellant to the appellees Joseph Dux and John Thorsen, and praying for an account as to the amount due the appellant for purchase money, and that the appellant may have a vendor's lien for such purchase money. An answer was filed by appellees, the defendants in the court below, denying that the appellant was entitled to a vendor's lien. Replication was filed to the answer. A hearing was had upon testimony taken in open court before the chancellor, and a decree was rendered finding the allegations of the bill to be true, and that appellant was entitled to have a vendor's lien for \$2,083, and ordering the appellees Dux and Thorsen to pay that amount to the appellant, with interest and costs, within 30 days, and that in default thereof the premises should be sold. The present appellees, who were defendants in the superior court of Cook county, and against whom a decree was rendered as above stated, took an appeal from such decree to the appellate court. The appellate court reversed the decree of the superior court, and dismissed the bill for want of equity. The present appeal is prosecuted from such judgment of the appellate court.

Kerr & Barr, for appellant. Ross & Todd, for appellees.

MAGRUDER, J. (after stating the facts). On July 20, 1892, a written contract was entered into between the appellant, as party of the first part, on one side, and the appellees Joseph Dux and John Thorsen, as parties of the second part, on the other, for the sale of the lots in question by the party of the first part to the parties of the second part for the sum of \$6,800, payable \$200 in cash at the signing of the contract, \$3,300 upon delivery of a warranty deed, and \$3,300 on or before three years. The

contract contained a provision "that the parties of the second part shall pay one-half of the general taxes for the year 1892; all other and prior taxes and assessments to be paid and discharged by the party of the first part." The party of the first part thereby agreed to furnish an abstract of title, with a continuation down to the date of the contract. The property sold consisted of two vacant lots fronting on Washington street, at the corner of West Fifty-Second street, in Chicago. At that time there were no curbs, nor any street pavements, except a certain amount of macadam which had been used in making a roadway in Washington street, and which had been paid for by special assessment levied by the town of Cicero. The evidence shows that the appellees knew the physical condition of the premises at the time of the purchase. When the abstract was brought down, it revealed that a special assessment had just been made for improving the street as a boulevard. This assessment was confirmed by the circuit court. It is claimed by the appellant that the assessment and improvement were not in the contemplation of the parties at the making of the contract. The assessment had been levied by the board of West Chicago park commissioners on June 28, 1892, and amounted to about \$2,800. The superior court found in its decree "that the said assessment and improvement were not in the contemplation of the parties at the time the contract was entered into, and it was not known by any of the parties that the assessment had been made; that Dux and Thorsen insisted and demanded that appellant should pay and discharge the assessment claim; that it was a lien on the premises; that complainant was compelled, under the terms of his contract, to pay the same; that complainant, believing that it was a charge on the premises, and that he would be compelled in due course of time to pay the same, or respond in damages in case he should give a warranty deed in accordance with the terms of the contract, agreed to allow the supposed assessment to the amount of \$2,083, and thereupon, on July 29, 1892, the contract of sale was closed up and consummated, and the defendants Dux and Thorsen were permitted to retain out of the purchase money \$2,083, and thereupon complainant made a warranty deed conveying the premises in accordance with the contract, but subject to the supposed special assessment, which was to be paid by Dux and Thorsen." The deed executed by appellant and his wife to appellees, dated July 29, 1892, contains the following provision: "This deed is given subject to all taxes and assessments levied, charged, or assessed upon said premises after the year 1891, and subject to all assessments for improvements not yet made; the payment of all such taxes and assessments being assumed by the grantees herein as part of the consideration of this deed."

It is claimed on the part of the appellees, and not seriously denied by the appellant, that

the assessment in question was brought before the supreme court of the state for review, and that the judgment confirming the assessment was reversed by the supreme court. The evidence shows conclusively that in June, 1895, the board of West Chicago park commissioners annulled the assessment and abandoned the same, so that the same ceased to be a lien upon the lots, and Dux and Thorsen became relieved from the payment thereof. The theory of the appellant is (and such theory is sustained by the finding of the decree entered by the superior court) that the retention by Dux and Thorsen of the \$2,083, under the circumstances, amounts to a payment of that amount to them by the appellant under a mistake of fact with regard to the existence of the special assessment, and that appellant is entitled, in equity and good conscience, to have the said sum paid to him, inasmuch as it would have been so paid to him had not the mistake induced and brought about the new arrangement above set forth. The contention of the appellant is that said sum of \$2,083 constitutes a part of the purchase money of the lots, and that appellant is entitled to have a vendor's lien for that amount.

The main question of fact in controversy between the parties is whether the subject of improving Washington street, and the assessment therefor, were considered by the parties at the time the contract was made, and whether such improvement of the street was one of the inducements to the appellees to buy the property in controversy herein. The testimony is somewhat conflicting upon this question of fact, but inasmuch as the lower court has found that the assessment and improvement were not in the contemplation of the parties at the time the contract was entered into, and that it was not known by any of them that the assessment had been made, we would not be disposed to disturb the finding of the decree in this regard. The chancellor heard the testimony of the witnesses, observed their capacity and manner of testifying, and could judge of the credibility of the witnesses, and the weight of their evidence, better than an appellate court, which sees only the cold record. Under such circumstances the finding of fact made by the chancellor will not be disturbed, unless it is manifestly against the weight of the evidence. We do not regard the finding in this case as being manifestly against the weight of the evidence. *Metcalfe v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Greenwood v. Fenn*, 136 Ill. 146, 26 N. E. 487; *Lane v. Lesser*, 135 Ill. 567, 26 N. E. 522. Counsel for appellant insist upon the proposition that here the money was paid under a mistake as to a matter of fact, and therefore that he can recover it back. It is undoubtedly the law that, when money is paid under a mistake of fact, it may be recovered back. "Money paid by one party to the other through a mutual mistake of facts, in respect to which

both were equally bound to inquire, may be recovered back." *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161; *Bank v. Mitchell*, 88 Ill. 52; *Stempel v. Thomas*, 89 Ill. 146. The present bill is filed to enforce a vendor's lien, and the answer denies that the complainant in the bill is entitled to a vendor's lien. We are of the opinion that even if the controverted question of fact above stated has been properly decided by the superior court in favor of the appellant, and even if the proposition of law as to the payment of the money by mistake is correctly invoked in his behalf, yet the appellant cannot insist upon a vendor's lien, because the facts show that there has been a waiver of such lien, if any in fact existed. By the original contract in writing of July 20, 1892, the vendor was to pay all assessments. By the deed which was executed on July 29, 1892, by appellant to appellees, the appellees assumed payment of the assessments. It is claimed by appellant that the appellees kept back \$2,083 of the contract price, and were to pay it to appellant by paying the assessment upon the property, which under the contract the appellant would have been obliged to pay, and that inasmuch as the judgment confirming the assessment was set aside, or the assessment itself was abandoned by the park board, so as not to be a charge upon the property, and so as to relieve the appellees from the payment thereof, therefore appellees ought to restore to appellant the sum of \$2,083, which the abandonment of the assessment relieved them from paying. It is admitted by the appellant that the lots were sold for the sum of \$6,800. It is also admitted by the appellant that \$4,717 of this amount was paid in the manner herein-after stated. The remaining \$2,083 of the \$6,800 was, according to the contention of the appellant, to be paid by the assumption of the payment of that amount of the assessment to the park commissioners. The proof shows that the appellees paid in cash \$200; that when the deed was delivered they paid the further sum of \$3,306.15, or \$3,317; and that they then executed a trust deed upon the lots to secure the sum of \$1,200, the balance of the \$4,717. It thus appears that there was paid in cash, and upon the delivery of the deed, the sum of \$3,517. If the latter sum be deducted from \$6,800, the total amount of the purchase money, there remains \$3,283 of unpaid purchase money. Part of this unpaid purchase money, to wit, \$1,200, was secured by a trust deed upon the lots. A vendor's lien is not recognized by our statute. It is a creature of the courts of equity. It does not grow out of any agreement, but is created in equity without an express agreement of the parties. It is an implied agreement, existing between the vendor and vendee, that the former shall hold a lien on the land for the payment of purchase money. If the vendor does not rely on the lien, such implied agreement is done away with, and a court of equity will hold that the lien has been waived. A vendor's lien is waived if the vendor takes other secu-

rity for the purchase money. It has been held that any act manifestly declaring an intention not to rely on the lien may defeat it, or prevent it from attaching. *Kirkham v. Boston*, 67 Ill. 599; *Mitchell v. Shaneberg*, 149 Ill. 420, 37 N. E. 576; *Moshier v. Meek*, 80 Ill. 79; *Conover v. Warren*, 1 Gilm. 498; *Doolittle v. Jenkins*, 55 Ill. 400; *Cowl v. Varnum*, 37 Ill. 181. Among the securities, the taking of which will operate as a waiver of a vendor's lien, is a mortgage or trust deed upon the property sold, to secure the purchase money. The authorities are uniform to the effect that a mortgage by the vendee, either on the land conveyed or on other land, is a waiver of the lien. *Land Co. v. Peck*, 112 Ill. 408; *Brown v. Gilman*, 4 Wheat. 255; 28 Am. & Eng. Enc. Law, p. 179, and cases cited in note 2. It is true that here the trust deed given by appellees, the vendees, was for only \$1,200, a part of the \$3,283, the amount of the purchase money remaining unpaid according to the contention of the appellant, thus leaving \$2,083 of the purchase money unsecured. The question then arises whether the taking of a mortgage for a part of the unpaid purchase money operates as a waiver of the lien as to all of the unpaid purchase money. It seems to be settled by the authorities that the taking of a mortgage as security for a portion of the purchase money waives the lien for the remainder, unless the presumption of waiver is overcome by an express statement to the contrary in the mortgage deed. *Fish v. Howland*, 1 Paige, 20; *Orrick v. Durham*, 79 Mo. 174; *Briscoe v. Callahan*, 77 Mo. 134; *Emison v. Whittlesey*, 55 Mo. 254; *Phillips v. Saunderson*, 1 Smedes & M. Ch. 462; *Bond v. Kent*, 2 Vern. 281; 28 Am. & Eng. Enc. Law, p. 180, and cases cited in notes. There is no such express statement in the trust deed executed here. Our conclusion, therefore, is that the taking of the trust deed for \$1,200 to secure a part of the unpaid purchase money operated as a waiver of the vendor's lien, independently of the correctness of any of the other positions assumed by the appellant in this case. As the bill is a bill to enforce a vendor's lien, there is no other ground for maintaining the bill. *Moshier v. Meek*, supra. The judgment of the appellate court, reversing the decree of the superior court and dismissing the bill, is affirmed. Judgment affirmed.

(174 Ill. 416)

HOPKINS v. PEOPLE ex rel. CHESTNUT.

(Supreme Court of Illinois. Oct. 24, 1898.)

TAXATION—TOWNS—LEVY—AUTHORITY.

Under Rev. St. c. 139, art. 4, § 3, conferring upon the electors at the annual town meeting the power to levy taxes for town purposes, the board of town auditors have no authority to make such levy.

Appeal from Edgar county court; E. G. Rose, Judge.

E. O. Hopkins, receiver, filed objections to the application of Charles O. Chestnut, coun-

ty collector, for judgment against delinquent lands. Objections overruled, and judgment ordered against property in custody of objector, who appeals. Reversed.

Stevens & Horton, for appellant.

PHILLIPS, J. An advertisement of an intended application at the June term, 1897, of the county court of Edgar county, for judgments against lands and lots delinquent, etc., was published, and E. O. Hopkins, receiver of the Peoria, Decatur & Evansville Railway Company, appeared, and filed objections to three items of tax levied against the property in his charge, in Edgar county, for the year 1896. His objections were sustained to all but the tax extended as a town tax for Embarras township. This appeal involves the validity of that tax.

The property of the railroad company in the town of Embarras was assessed on an equalized valuation at the sum of \$22,345, against which valuation a town tax for that township was extended at the rate of 16 cents on each \$100 valuation, making a tax of \$35.75. Judgment was sought against the property of appellant as delinquent. The receiver appeared, and filed his objection to entering judgment, for the reason that the sole and only authority the county clerk had for extending the said town tax was a certificate made by the board of town auditors, who made a certificate of tax for \$600 for the ensuing year as the entire amount of money required for all town purposes. That certificate was made September 1, 1896, and filed in the office of the county clerk September 5, 1896. This objection was overruled, and judgment was entered against the property of appellant for said town tax, amounting to \$35.75, to which appellant objected and excepted.

The only authority the county clerk had for the extension of the tax in question was this certificate of the board of town auditors. That board had no power to levy this tax. *Peoria, D. & E. Ry. Co. v. People*, 141 Ill. 483, 31 N. E. 113; *St. Louis, R. I. & C. R. Co. v. People*, 147 Ill. 9, 35 N. E. 228. The power to levy taxes for town purposes is, by section 3 of article 4 of chapter 139 of the Revised Statutes, expressly given to the electors at the annual town meeting. No such power is conferred on the board of town auditors, and none can be implied. *Town of Kankakee v. Kankakee & I. R. Co.*, 115 Ill. 88, 3 N. E. 741; *Williams v. Town of Roberts*, 88 Ill. 11; *Cooper v. Town of Delavan*, 61 Ill. 96. The power of taxation cannot be exercised unless the authority clearly appears from the law. *School Directors v. Fogleman*, 76 Ill. 189; *Fisher v. People*, 84 Ill. 491; *Commissioners of Highways v. Newell*, 80 Ill. 587. This certificate did not authorize the extension of this tax, and it was error to overrule the objection. The judgment of the county court of Edgar county is reversed, and the cause is remanded. Reversed and remanded.

(176 Ill. 9)

CICERO LUMBER CO. v. TOWN OF CICERO et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

COSTS — DISMISSAL — CONSTITUTIONAL LAW — DUE PROCESS OF LAW — DISCRIMINATION — EMINENT DOMAIN — MUNICIPAL CORPORATIONS — PLEASURE DRIVEWAYS — EXCLUSION OF TRAFFIC — ORDINANCES — INJUNCTION — SPECIAL AND IRREPARABLE INJURY.

1. Where a bill presents equities entitling plaintiff to relief, he is entitled to costs on its dismissal because of defendant's action making unnecessary a decree for the relief sought.

2. Laws 1889, p. 88, empowering the board of trustees of an incorporated town to designate not to exceed two streets as public driveways for pleasure driving only, on petition of owners of more than two-thirds of the frontage thereon, and to exclude traffic teams, etc., therefrom, does not contravene Const. art. 2, § 2, providing that no person shall be deprived of property without due process of law.

3. Nor does it violate section 13, providing that private property shall not be taken for public use without just compensation.

4. Nor is the act, in limiting the use of such streets to the purposes of pleasure driveways, objectionable as class legislation, or as making an unjust discrimination between the citizens, as it is general in its operation on all citizens who may wish to employ their vehicles for other than traffic purposes over such driveways.

5. Nor does the limitation of the use of such streets to the purposes of pleasure driveways involve any violation of trust imposed on municipal authorities in respect to highways.

6. Nor is the act unreasonable in providing for the exclusion of traffic teams from such highways, since they must be constructed in a particular manner, and, if heavy teaming is permitted, injury would result, and frequent repairing be necessary.

7. The power to authorize a municipality to vacate one of its streets includes the power to authorize it to limit the use of a street to a particular purpose benefiting the public.

8. An ordinance forbidding the use of a pleasure driveway by traffic vehicles unless special permission of the board of trustees of the town has been obtained, is unreasonable and invalid, since it leaves to unregulated official discretion a matter which should be regulated by permanent local provisions operating generally and impartially.

9. Where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance falls.

10. A bill to restrain a town from enforcing an illegal ordinance excluding traffic vehicles from a certain street, alleging that such street is the only one complainant could use to deliver goods sold by it from its place of business to persons entitled to receive them, shows a special injury, different in kind and degree from that suffered by the general public, and presents a case of which equity will take jurisdiction.

11. Such bill can also be maintained on the ground of prevention of irreparable injury, where complainant has no means of transacting its business without the use of such street, and the drivers of its wagons were arrested and prosecuted under the ordinance, and the officers of the town instituting the prosecutions are insolvent.

Appeal from circuit court, Cook county; O. H. Horton, Judge.

Suit by the Cicero Lumber Company against the town of Cicero and another. From a decree dismissing the original,

amended, and supplemental bills at complainant's costs, it appeals. Reversed.

The original bill in this case was filed by the appellant on June 9, 1896, against the town of Cicero and Lewis E. Hansburry, captain of police of the town of Cicero, to enjoin the prosecution of appellant's teamsters by the officers of said town for violations of the town ordinance prohibiting traffic teams upon Austin boulevard. The bill alleges that appellant is a corporation having its place of business in the town of Cicero, and is a citizen and taxpayer of that town, and engaged in dealing in lumber and other building material; that its lumber yard is located on Central avenue, in said town, just south of, and adjacent to, the Wisconsin Central Railroad; that Central avenue is a street running north and south from the north line of the town to Twenty-Second street, which latter street runs east and west through the town, and about a mile and a half south of complainant's place of business; that Central avenue, at the time of the location of appellant's yards at the place above mentioned, was a well-improved street, which fact influenced appellant in locating its yards at that place; that appellant is obliged to deliver lumber and other building material, sold by it, by teams and wagons, and to load its wagons heavily; that it cannot conduct its business except by using paved or improved streets; that the soil in Cicero is of such a character that roads suitable for heavily loaded wagons cannot be made from it; that appellant, with other citizens of the town engaged in business similar to appellant's business, and doing business in that neighborhood, have expended large sums of money in improving Central avenue; that the town of Cicero is engaged in building a sewer 6 feet in diameter on Central avenue, and in building the same is digging a trench from 18 to 20 feet deep, and is depositing the materials taken from such trench on the roadway of Central avenue, and thereby destroying said roadway; that said sewer has progressed to a point on said avenue about half a mile south of appellant's place of business, and, as it proceeds north, will pass the same, and obstruct all means of access thereto from Central avenue; that a short distance north of appellant's place of business is the embankment of an old, abandoned railroad, which is graveled, so as to make an excellent roadway from a point near appellant's yards to Austin avenue or boulevard for heavy teaming; that appellant has made arrangements with the proprietors of said embankment to use the same from its yards to Austin avenue; that Austin avenue is an improved highway, extending north and south, and located about half a mile west of appellant's place of business; that there is no street between Central avenue and Austin avenue running north and south, so as to give appellant an outlet from its place of business, and that there is no

street running east and west from Central avenue between Madison street and Twelfth street; that Austin avenue has been a public highway, and was such for more than 20 years prior to January 16, 1892, and as such highway was open and used for ordinary travel, passage, and traffic without distinction; that along the line of certain railroads south and north of appellant's business are certain villages where public and private improvements have been carried on, and that the principal part of appellant's business consists of selling and delivering lumber and other material to be used in these improvements, whereby appellant makes large profits; that, prior to the digging of the said sewer, appellant used Central avenue as a means of access to its lumber yards, and thereby reached said villages in connection with certain streets running east and west; that since Central avenue has become impassable appellant has been obliged to use Austin avenue.

The bill then alleges that, on January 16, 1892, the board of trustees of said town, acting under an act of the legislature entitled "An act to provide for pleasure driveways in incorporated cities, villages and towns," approved March 27, 1889, passed an ordinance ordaining that Austin avenue, from the north line of Twenty-Second street to the south line of Morgan boulevard, in the town of Cicero, be "designated as a public driveway to be used for pleasure driving only, pursuant to the statute in such case made and provided," which ordinance did not prohibit traffic teams thereon, nor impose any penalty for the violation thereof; that on May 23, 1896, said board of trustees passed an ordinance, entitled "An ordinance in reference to Washington boulevard and Austin boulevard in the town of Cicero," in and by which last-named ordinance it is provided, among other things, as follows: "All persons are also forbidden to solicit patronage for any vehicle for hire upon either of the said boulevards; to drive or to take any omnibus or heavy public vehicle, or any traffic vehicle, whether propelled by man, animal or other power, upon either of the said boulevards, except private wagons conveying families, or upon special permission of this board;" which ordinance also imposed a penalty of from \$5 to \$100 for each violation of its provisions. The bill further alleges that by said act of 1889 the powers therein conferred upon cities, villages, and towns shall only be exercised when the corporate authorities thereof are petitioned thereto by the owners of more than two-thirds of the frontage of land fronting upon said proposed pleasure driveway; and that no petition was ever presented to said board of trustees, asking that said Austin avenue be designated as a pleasure driveway between the termini mentioned in the ordinances above named, as required by said act; and that said board were without authority and power to pass

said ordinances, and that the same are void. The bill further charges that the act of 1889 above named is unconstitutional and void upon the alleged ground that Austin avenue was, for 20 years prior to its passage, a public highway, open for travel of all kinds for which highways are used, and that thereby the right so to use the same was vested in all the citizens of Illinois, and particularly the citizens of said town; that the legislature was without power to divest any of said citizens of such vested right; and that such act is in conflict with sections 2, 13, art. 2, of the state constitution, and therefore void. The bill further alleges that appellant for many years has conducted a profitable business, and spent a large amount of money in building houses on its yard, and occupying the same for business, and in purchasing teams and wagons, and that the only way now open to it for the delivery of material which it sells is by way of Austin avenue and the said abandoned railroad embankment; that, if it is not permitted to use Austin avenue, its business will be completely ruined, and the money invested by it lost, and it will suffer irreparable injury; that, by said ordinances, traffic teams, like those used by appellant, are prohibited from traveling upon said Austin avenue, and a penalty is imposed on all persons violating the provisions of said ordinances; that the police authorities of said town have arrested appellant's employes driving its traffic teams on Austin avenue, and put appellant to great loss, inconvenience, and damage; that about May 23, 1896, the police officers of said town arrested six of the employes of the appellant for driving traffic teams on said avenue, and afterwards abandoned their prosecution; that, after the passage of the ordinance of May 23, 1896, said police officers have arrested three of appellant's employes for driving traffic teams on Austin avenue; and the prosecution of said arrests has been continued at the request of the town to June 10th. The bill further alleges that there are many persons in the same situation as that of the appellant; that the enforcement of said penalties will affect a great many of such persons; that the prosecutions for the violation of said ordinances will result in a multiplicity of suits, not only against appellant, but also against many other persons; that the officers and police authorities of said town threaten to further enforce said penalties, and arrest appellant's employes, when found violating the provisions of said ordinances; that, if said threats are carried into effect, irreparable loss and injury will be sustained by appellant, and there will thereby result a multiplicity of suits against appellant and its employes, which will greatly injure it, and against which it has no adequate remedy at law. The bill furthermore alleges that the liability, if any, for such prosecutions, rests on the individuals claiming the right to enforce said ordinances and

penalties, and who, in fact, enforce the same.

On June 10, 1896, the appellees entered their appearance, and filed a general and special demurrer to the bill, and a number of affidavits in opposition to the motion for an injunction. The motion for an injunction was referred to a master in chancery. On June 13, 1896, an amendment was filed to the bill, setting up that by the terms of the ordinance of May 23, 1896, it was ordained by the town that Austin boulevard should be used for pleasure drives only, and that all persons were forbidden to take any omnibuses or heavy public vehicle or any traffic vehicle, whether propelled by man, animal, or other power, upon said boulevard, except upon the special permission of said board of trustees, and that any person violating said ordinance should pay a fine of not less than \$5 nor more than \$100 for each offense; that said ordinance, in so far as it forbade persons to take traffic teams upon said avenue except upon special permission of said board, is unreasonable, unlawful, oppressive, unfair, partial, and not general, and therefore illegal and void. The amendment to the bill alleges, as did the original bill, the unconstitutionality of the act of 1889, and the void character of the ordinances passed thereunder; also, that Hansburry and the police officers of the town, being the persons who enforced said penalties, and who made the arrests thereunder, and threaten to continue to make arrests, especially of appellant's employes when they drive traffic teams on said Austin avenue, are insolvent, and unable to respond in damages to any amount, which appellant may recover against them in an action at law, and that any judgment against them for damages by reason of the enforcement of said penalties and the trespasses thereby committed would be unavailing to appellant, and wholly lost to it. The prayer of the bill is that said town, and its captain of police and other officers, may be enjoined from enforcing said penalties against appellant and its employes, and from prosecuting them for violations of the provisions of said ordinances; that said ordinances may be declared illegal and void, and said act may be declared unconstitutional and void. On July 15, 1896, the master made a report, in which he found that the appellant was entitled to the injunction asked for, and in which he recommended that a decree be entered in accordance with the prayer of the bill. Objections were filed to the master's report, which were overruled by him. On the hearing of the application for the injunction before the master, various affidavits were filed by appellant and by appellees, to which said ordinances and various proceedings of said board were attached as exhibits. On January 11, 1897, the demurrer of the defendants below to the bill was overruled, and the defendants answered the amended bill, denying the material allegations thereof. Replication was filed to said answer. On

July 27, 1896, one of the solicitors of the appellees filed an affidavit, stating that all the prosecutions theretofore brought by the town of Cicero against violators of said ordinance of May 23, 1896, which prosecutions were sought to be restrained by the appellant, had been dismissed; and that the said ordinance of May 23, 1896, had been repealed by an ordinance passed on July 27, 1896, by said board, and approved by its president, a copy of which was attached to said affidavit; and that, after the repeal of said ordinance of May 23, 1896, there was duly passed a new ordinance regulating the use of said boulevards in said town, a certified copy of which last-mentioned ordinance was also attached to said affidavit, and showed that said new ordinance of July 27, 1896, was substantially the same as the old ordinance of May 23, 1896, except that there was left out of it the clause objected to by appellant in its amended bill, to wit, "or upon special permission of this board." Thereupon appellant filed a supplemental bill, setting up the fact of the repeal of the ordinance of May 23, 1896, and of the passage of the new ordinance of July 27, 1896, and the fact of the dismissal of the prosecutions against its teamsters, as set forth in the affidavit of the solicitor of appellees. The supplemental bill then avers: "That said matters and things so set up in said affidavit are true; that complainant is advised by counsel that the dismissal of said suits and the repeal of said ordinance is, in effect and law, a confession by the said defendants that the material allegations in said amended bill are true, and charges that such action on the part of the said defendants is in fact and law such a confession; * * * that the action taken by said defendants in dismissing said suits and in repealing said ordinances finally puts an end to the causes of litigation and matters in controversy mentioned in said amended bill, and the same cannot be further prosecuted, and the same should and ought to be dismissed, at the cost of the said defendants." The supplemental bill then prays that the amended bill be dismissed without prejudice to the appellant, and at the cost of the defendants. The defendants below (the appellees here) demurred to the supplemental bill, but their demurrer was overruled, and the appellees were ordered to plead or answer in 10 days. In their answer to the supplemental bill the appellees denied that the dismissal of said prosecutions was a confession on their part of the truth of the allegations in the original and amended bills, but averred that the dismissal of said prosecutions was caused in order to save the appellant the expenses and annoyance occasioned thereby, and that it was the sole object of appellees to protect and preserve Austin boulevard as a pleasure driveway, and prevent the destruction of the pavement thereby. Said answer admits the repeal of the ordinance of May, 1896, and the passage of the

new ordinance of July, 1896, and insists that both ordinances were valid; and furthermore sets forth that since the filing of the bill the town of Cicero, at great expense, built a plank roadway upon Central avenue, connecting it with improved streets running east and west, by which the appellant has full and free access to all parts of the town, and in making the same expended the sum of \$1,800. Appellees furthermore insist in their answer that the only question involved is a question of costs, and that appellant should pay all the costs. The objections to the master's report were, by agreement, allowed to stand as exceptions thereto; and such exceptions, coming on to be heard, were sustained by the court. The court found that appellant was not entitled to the relief prayed in its bills, and ordered that the original, amended, and supplemental bills be dismissed for want of equity, and that the appellees recover from the appellant the costs, and have execution therefor. The present appeal is prosecuted from the order of the circuit court dismissing the original, amended, and supplemental bills at the costs of appellant, the complainant below.

Whitehead & Stoker and Cutting, Castle & Williams, for appellant. Geo. B. Finch and F. W. Pringle, for appellees.

MAGRUDER, J. (after stating the facts). As will be seen from the statement preceding this opinion, the only question involved in this case is a question of costs. The court below dismissed the original, amended, and supplemental bills at the costs of the appellant here, who was the complainant below. The appellant insists that the bill should have been dismissed at the costs of the present appellees, who were the defendants below. In order to determine whether the costs should have been paid by the appellant or by the appellees, it is necessary to consider whether the original and amended bills of the appellant presented such equities as entitled it to relief. *Booth v. Gaither*, 58 Ill. App. 263.

1. It is charged by the appellant in the original and amended bills that the act entitled "An act to provide for pleasure driveways in incorporated cities, villages and towns," approved March 27, 1889, in so far as it authorizes the corporate authorities of such municipalities to take public highways for pleasure driveways, and gives them power to prohibit traffic teams thereon, and to impose penalties for the violation of ordinances prohibiting the travel of such teams thereon, is unconstitutional and void; and that any ordinance passed by any city, village, or town under and in pursuance of said act is also illegal and void, as being based thereon. The first question, therefore, presented for our consideration, is whether or not the act of March 27, 1889, is constitutional. Section 1 of the act provides: "That

the city council in cities, the president and the board of trustees in villages, or the board of trustees in incorporated towns, whether incorporated under the general law or special charter, shall have the power to designate by ordinance the whole or any part of, not to exceed two streets, roads, avenues, boulevards or highways, under their jurisdiction, as a public driveway, to be used for pleasure driving only, and to improve and maintain the same, and also to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve and maintain not more than two roads, streets or avenues, and designate the same as pleasure driveways, to be used for pleasure driving only; provided, said powers shall only be exercised when said corporate authorities are petitioned thereto by the owners of more than two-thirds (2/3) of the frontage of land fronting upon said proposed pleasure driveways." Section 2 of said act provides that: "Said pleasure driveways may be laid out, extended and improved under the provisions of article 9 of an act to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872, and any and all amendments thereto." Section 3 of said act provides that: "Said corporate authorities may, by ordinance, regulate, restrain and control the speed of travel upon said pleasure drives, and prescribe the kind of vehicles that shall be allowed upon the same, and in all things may regulate, restrain and control the use of said pleasure driveways by the public or individuals, and may exclude therefrom funeral processions, hearses and traffic teams and vehicles, so as to free the same from any and all business traffic or objectionable travel, and make the same a pleasure driveway for pleasure driving only, and may prescribe in such ordinances such fines or penalties for the violation thereof as they are allowed by law to prescribe for the violation of other ordinances." Sess. Laws Ill. 1889, p. 83. The town of Cicero, one of the appellees herein, is an incorporated town, created by a special act of the legislature. 3 Priv. Laws Ill. 1869, p. 666. By its charter the town of Cicero has, among others, the following powers: "To control and regulate the highways, streets, alleys and public places and abate any obstructions, encroachments or nuisances thereon. * * * The board of trustees shall have power from time to time, first, to open and lay out any new street, alley or highway, and to cause any street, alley or highway to be altered, widened, extended, laid out, vacated, bridged, graded, macadamized, paved, planked, clayed, graveled or otherwise improved, and keep the same in repair." It will be observed that by section 1 of the act of 1889 not to exceed two streets or roads can be used for pleasure drives only; that is to say, the municipality may set apart and designate one or two streets as pleasure driveways, but not more than

two. This restriction as to the number of streets or roads to be designated as pleasure driveways leaves all the other streets and roads in the municipality to be used for general travel and for traffic teams. It is also to be observed that the power to set apart a street or road as a pleasure driveway can only be exercised when the corporate authorities are petitioned thereto by the owners of more than two-thirds of the frontage of land fronting upon said proposed pleasure driveways. The power of the corporate authorities is thus limited and restrained by the wishes of a large proportion of the property owners whose property fronts upon the road or street to be converted into a pleasure driveway.

Counsel for appellant take the ground that the right of each citizen to travel on and use the common public highways with an ordinary vehicle in the prosecution of his lawful business is a property right, of which he cannot be deprived without due process of law. They also contend that, when this right is taken from the citizen by the provisions of the above act, there is thereby a taking of private property for public use without just compensation. In other words, counsel invoke, in favor of their contention that the act is unconstitutional, Const. art. 2, §§ 2, 13; 1 Starr & C. Ann. St. (2d Ed.) pp. 100, 113. Counsel furthermore refer to many decisions which hold that the fee of the streets in cities or incorporated towns is held in trust by the corporation for the benefit of the public, and that a limitation of the use of such a street to the purposes of a pleasure driveway, instead of general traffic, is a violation of the trust. Such an act as the act of 1889 does not in any way deprive a citizen of his property without due process of law, or take or damage private property for public use without just compensation, or involve any violation of trust upon the part of the municipal authorities. "The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject * * * to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places." 2 Dill. Mun. Corp. (4th Ed.) § 656. "The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restrictions, vacate or discontinue them, or invest municipal corporations with this authority. Without a judicial determination, a municipal corporation, under the authority conferred by its charter to locate and establish streets and alleys and to vacate the same, may constitutionally order a vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public." Id. § 666. While it is true that the public highways are for the use of the general pub-

lic, it is at the same time true that the legislature is a representative of the public at large. As such representative, it may grant the use or supervision and control over the highways to a municipal corporation, so long as the highways are not diverted to some use substantially different from that for which they were originally intended. There is no special restriction in the constitution of this state upon the power of the legislature in this regard. A city or incorporated town not only bears a property or private relation to the state, but it also bears a political relation thereto. In its political relation it is merely an agency of the state. The municipal corporations of the state are the mere creatures of the state, and exist by the authority of the legislature, and subject to its control. Hence, when a city or incorporated town holds a street for the benefit of the public, it holds it for the benefit of that entire public of which the legislature is the representative. As the municipality is a mere agent of the state, the legislature can direct the manner in which it shall control the streets within its limits. The property rights and easements which the municipality has in public streets and ways are held by it at the will of the legislature. Of course, this statement is subject to the further statement that such property as the municipality holds in its private capacity is as much protected by the constitution as the property of the private citizen. But, so far as it holds property as a mere agency of the government of the state, the constitutional provisions above referred to have no application, because the state can control the agencies created by it for the purposes of government. An act which limits the use of a street to the purposes of a pleasure driveway is in no sense class legislation. All the citizens are entitled to the use of the street for the purpose of a pleasure driveway. Neither the act of 1889 nor the ordinances passed by the town of Cicero in pursuance thereof unjustly discriminate between the rights of citizens to travel over Austin avenue or other streets of the town. The act is general in its operation upon all citizens who may think proper to employ their vehicles for other than traffic purposes over the street or streets of the city or town designated as pleasure boulevards. When an ordinance imposes restrictions upon citizens of a particular part of the city, or grants a particular privilege to a particular part of the citizens, not given to all others, then it may be obnoxious to the charge of making an unjust discrimination between the citizens; but the act here under consideration is not subject to any such charge.

Section 22 of article 4 of the constitution provides that the general assembly shall not pass local or special laws "vacating roads, streets, alleys and public grounds." This provision of the constitution recognizes the right of the general assembly to vacate roads and streets, provided that it does so by general laws, and not by local or special laws.

Of course, the right of the legislature to vacate streets is subject to the condition that such vacation is not for the benefit of private parties, or for the purpose of devoting the streets so vacated to private uses. The right of the municipality to vacate the street is to be exercised only when the municipal authorities, in the exercise of their discretion, determine that the street is no longer required for public use and convenience. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141. The power to vacate or discontinue a street, qualified in the manner thus stated, necessarily involves the power to change the use of the street. The greater power of absolutely vacating necessarily includes the lesser power of regulating or restraining. If, therefore, the legislature had the power to confer upon the town of Cicero the authority to vacate one of its streets, it certainly had the power to confer upon that municipality the power to limit the use of a street to a particular purpose benefiting all the public, and not exclusively shared by any class of the citizens. In *People v. Walsh*, 96 Ill. 232, it was held that it is competent for the legislature to transfer the control of a street in a city or village to park commissioners, to be by them improved and controlled for boulevard and park purposes, where such purposes are not inconsistent with their use for ordinary travel. In *People v. Walsh*, supra, the case of *People v. Kerr*, 27 N. Y. 188, was referred to with approval, and the following quotation was made therefrom: "So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways, a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway, and relinquish altogether its use by the public; or it may regulate such use, or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit." *City of Chicago v. Rumsey*, 87 Ill. 348; *Same v. Union Bldg. Ass'n*, 102 Ill. 379. It is said by Dillon, in his work on *Municipal Corporations* (4th Ed., § 657): "As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted." This court held to the same effect in *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. 651; *True v. Davis*, 133 Ill. 522, 22 N. E. 410; *Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. 1096; *Simon v. Northrup*, 27 Or. 487, 40 Pac. 560. This court has in many cases recognized the power of the city of Chicago to turn over a particular street to the control of park commissioners, and to permit the use of the street to be regulated

and governed by such commissioners. These cases concede the power of the legislature over the public streets, and its right to change the possession and control of the same when private rights are not violated. Ordinarily, such private rights are the rights of abutters, or property owners owning property fronting upon such street, and not the rights of citizens as to the character of the vehicles which they may drive over the streets. *McCormick v. Commissioners*, 150 Ill. 516, 37 N. E. 1075; *Commissioners v. McMullen*, 134 Ill. 170, 25 N. E. 676. There is nothing unreasonable in excluding traffic teams from a street designated and intended to be a pleasure driveway. Such a driveway must be constructed and paved in a particular manner; and, if heavy teaming is allowed, injury would result, and frequent repairing would be made necessary. Neither can it be said that pleasure and recreation are not as much for the good of the people as business and traffic. *Barrows v. City of Sycamore*, supra. The legislative authority to do what is here objected to was conferred upon the town of Cicero under its charter before the passage of the act of 1889. But the act gave further protection to the rights of the people by requiring the assent of the owners of more than two-thirds of the frontage upon the street. Our conclusion is that the act of 1889 is not unconstitutional for any of the reasons here urged against its validity.

2. It is next insisted by appellant that the ordinances of January 16, 1892, and of May 23, 1896, passed by the board of trustees of the town of Cicero, were illegal and void upon the alleged ground that no petition was presented to the corporate authorities of the town by the owners of more than two-thirds of the frontage of the land between the termini mentioned in said ordinances; and that the said ordinances are uncertain, unreasonable, not general, and not impartial, as reserving to the corporate authorities the privilege of enforcing them or not, at their pleasure.

The exhibits attached to the affidavits and answers show that petitions were filed for converting Austin avenue into a boulevard between the termini named in the ordinances; that these petitions were referred to a committee for verification; that such committee reported that all the signatures thereto had been verified, and that the signatures of the petitioners represented more than two-thirds of the frontage. The act of 1889 does not specify any particular kind of petition, and does not require that the petition shall be a single document. It appears here that the town board was petitioned by the owners of more than two-thirds of the frontage of land fronting upon the driveway; and we are inclined to the opinion that the town board was sufficiently and legally petitioned to designate Austin avenue as a pleasure

driveway between the termini mentioned in the ordinances.

But the other ground upon which the ordinance of May 23, 1896, is attacked as invalid is of a more serious character. By the ordinance of May 23, 1896, all persons are forbidden to take any omnibus or heavy vehicle or any traffic vehicle upon either of the boulevards therein named, except private wagons conveying families, "or upon special permission of this board." The meaning of this provision is that all traffic vehicles, except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the special permission of the board of trustees. In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is in itself, and as a general thing, perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured. This position is sustained by the weight of authority. *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Rich v. City of Naperville*, 42 Ill. App. 222; *In re Frazee*, 63 Mich. 396, 30 N. W. 72; *City of Plymouth v. Schulthels*, 135 Ind. 701, 35 N. E. 14; *State v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Commissioners, etc., of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Austin v. Murray*, 16 Pick. 126; *Landis v. Borough of Vineland*, 54 N. J. Law, 75, 23 Atl. 357; *State v. Mahner*, 43 La. Ann. 496, 9 South. 480; *State v. Dulaney*, 43 La. Ann. 500, 9 South. 481; *Wo Lee v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Newton v. Belger*, 143 Mass. 508, 10 N. E. 464; 1 Dill. Mun. Corp. (4th Ed.) § 321; *Baltimore v. Radecke*, 49 Md. 217. It is insisted by appellees that the ordinance

of May 23, 1896, is not void, in the respect here indicated, as to the whole of the ordinance, but only void as to the part of it which makes the use of traffic teams upon an avenue or boulevard dependent upon the special permission of the board of trustees. In support of this contention the well-known rule is invoked that, where certain provisions of an ordinance are void, the court will not declare void those provisions relating to the subject-matter of the ordinance which are distinct and separate from the void provisions. If an ordinance, or even the same section of an ordinance, contains two separate provisions, relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that part of it which is valid. When an ordinance consists of several distinct and independent parts, although one or more of them may be void, the rest are equally valid, as if the void clauses had been omitted. But where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void if the void and valid parts are so connected as to be essential to each other. 1 Dill. Mun. Corp. (4th Ed.) § 141. We are inclined to think that the objectionable clause is here so intimately connected with the other portions of the ordinance as to permeate the whole, and make the whole void. The ordinance does not positively and absolutely exclude all traffic teams, but it only excludes such traffic teams as the board of trustees may not specially permit to pass over the avenue. But if it were true that the void portion of the ordinance can be separated from the valid portion, so as to permit the latter to stand, it is nevertheless the fact that the portion of the ordinance which confers upon the board of trustees the discretionary power already referred to is the portion thereof which applies to the appellant in this case. The prosecutions were instituted against it or its employés because it was driving traffic vehicles over the boulevard, and not because it was driving private wagons containing families. The arrests of appellant's employés were made because of a violation of that part of the ordinance which confers the discretion upon the board, and which is, therefore, void. Our conclusion upon this branch of the case is that the ordinance of May 23, 1896, must be regarded as having been invalid, because of the discretionary power conferred upon the board of trustees.

3. It is claimed by the appellees that a court of equity had no jurisdiction in such a case as was made by the bill and amended bill of the appellant herein. The want of jurisdiction is sought to be established on two grounds. In the first place, it is said that the appellant did not allege in its bill any special damage to itself, different in de-

gree and in kind from that suffered by the public at large. The general rule is that, when the duty about to be violated by the corporation or its officers is public in its nature, and affects all the inhabitants alike, one not suffering any special injury cannot, in his own name, or by uniting with others, maintain a bill for injunction. A private individual cannot maintain a bill to enjoin a breach of public trust without showing that he will be specially injured thereby. Where no injury results to the individual, the public only can complain. Hence, in the declaration or bill the party complaining must allege and prove some special damage, different in kind and degree from that suffered by the general public. City of Chicago v. Union Bldg. Ass'n, supra; Barrows v. City of Sycamore, 150 Ill. 588, 37 N. E. 1096; Field v. Barling, 149 Ill. 556, 37 N. E. 850; Smith v. McDowell, supra. If the rule thus announced is applied to the allegations of the bill in this case, it will be seen that facts are set up which show a special injury to the appellant different in kind and degree from that suffered by the general public. The complaint made is not of the inconvenience suffered from being forbidden to travel upon the boulevard with traffic wagons. Such inconvenience is suffered by all other persons using traffic wagons in common with the appellant. But the bill shows that there were only two avenues in the town of Cicero, running north and south, which could be used by the appellant for the purpose of delivering its lumber and building material to the persons to whom it was sold. These two avenues were Central avenue and Austin avenue. The bill alleges that Central avenue was rendered impassable by the building of a sewer therein, and a trench for the sewer, and the throwing up of dirt upon the sides of the trench. It also avers that the appellant was forbidden to use Austin avenue by the town authorities under the ordinances in question. It was thus shut off from the use of any avenue, and thereby prevented from delivering the lumber and other material sold by it to the parties entitled to receive it. Its business was in this way injured and destroyed. The appellant, therefore, suffered a special injury, different from that which was sustained by the general public. In *Shero v. Carey*, 85 Minn. 423, 29 N. W. 58, which was an action for obstructing a highway, a complaint was held to be insufficient in the necessary averments of special damage, which alleged generally that the plaintiff was compelled to travel by longer and worse roads, and could only reach certain places by trespassing upon private lands, and was thereby prevented from marketing his produce. The decision in that case, however, was based upon the decision in the case of *Houck v. Wachter*, 34 Md. 265. Upon reference to the latter case, the declaration showed that, by reason of a certain obstruction in the high-

way, appellant was obliged to travel a longer and more circuitous route, and it was held that the declaration did not show such special damage as to entitle the appellant to maintain an action. It was, however, said in that case that the declaration did not aver that the highway which was obstructed was the only way to and from appellant's farm, or that such highway was necessary to enable him to pass and repass from his farm to mill and market. The plain intimation of the court there is that, if the allegation had been that the highway obstructed was the only way to and from the farm, there would have been a sufficient allegation of special damage. But the mere fact that appellant was obliged to proceed by a very circuitous route was not a statement of any other inconvenience suffered by him than that which was common to the rest of the traveling community. It was also therein said that when a plaintiff had been delayed for four hours by an unlawful obstruction in the highway, and was thereby prevented from performing his journey as many times in a day as if the obstruction had not existed, there was a sufficient special or particular injury to entitle him to maintain the suit, because it appeared that he was engaged in carrying coal upon the highway, and the damage he suffered was in the conduct of his business, and of a substantial nature, and was different in kind from that suffered by the public at large. So, in the case at bar, under the facts already stated, the appellant suffered damage of a substantial nature in the conduct of his business, which was different from that suffered by the general public.

In the second place, it is said that an injunction will not issue to prevent the enforcement of an invalid ordinance, and that no case was made by the bills which justified the appellant in coming into a court of equity. It is true that, where an ordinance has been enacted by the proper authorities, a court of equity will not interfere by injunction to restrain its enforcement in the appropriate courts upon the ground that such ordinance is illegal, or upon the alleged innocence of the parties charged; nor will the court enjoin proceedings for the enforcement of such an ordinance for the purpose of determining the validity of the ordinance, when the defendant has an adequate remedy at law. But it is well settled that there are two exceptions to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise. These exceptions are: First, to prevent irreparable injury; and, second, to prevent a multiplicity of suits. It may be that the bills of appellant could not be sustained for the purpose of preventing a multiplicity of suits, because the suits sought to be enjoined were not between different persons assailing the same right and thing, but were cases where the right was

disputed between two persons only for themselves alone. However this may be, the bills were sufficient upon the other ground; that is to say, for the purpose of preventing irreparable injury. The appellant showed that it had no means of transacting its business without the use of Austin avenue, and that whenever one of its wagons went upon such avenue the driver thereof was arrested under the ordinance, and a number of prosecutions were instituted against it. The bill alleges that the officers of the town, instituting these prosecutions, were insolvent, so that no damages could be recovered against them in an action at law. In *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819, and *Stock Exchange v. McClaughry*, 148 Ill. 372, 38 N. E. 88, and *Commissioners v. Green*, 156 Ill. 504, 41 N. E. 154, there were no allegations in the bills that the parties charged with the trespasses were insolvent. In this respect those cases are different from the case at bar. In *Owens v. Crossett*, 105 Ill. 354, it was said (page 357): "It is first urged in affirmance of the decree dismissing the bill that it will not lie to enjoin a trespass. Such is undoubtedly the rule where it is a simple trespass to property, and is but a single act, and the person committing or threatening the trespass is able to respond in damages; but where he is insolvent, and repeated trespasses of a grave character are threatened to be repeated, equity will interfere to prevent the wrong by restraining the threatened trespass." This language expressly fits the facts in the case at bar. Our conclusion is that a court of equity had jurisdiction to entertain the bills filed by the appellant, both upon the ground that the bills showed a special damage to the appellant different in kind and degree from that suffered by the general public, and also upon the ground that appellant, according to the showing of the bills, had suffered irreparable injury.

Inasmuch as the appellant was properly in a court of equity, and inasmuch as the ordinance under which its employes were prosecuted was void by reason of the discretion vested in the board of trustees, a case was made by the original and amended bills which entitled the appellant to relief, even though its charge that the act of 1889 was unconstitutional was not sustained. The original, amended, and supplemental bills, therefore, should have been dismissed by the circuit court at the costs of the appellees, and not at the costs of the appellant. Of course, after the ordinance of May 23, 1896, was repealed, and the new ordinance of July 27, 1896, was passed, without the objectionable clause, and after all the prosecutions against appellant's employes were dismissed, there was no longer a necessity for continuing the litigation between the parties to these suits, except so far as it was necessary to dispose of the question of costs. The prayer of the supplemental bill filed by the appellant

was for a dismissal of the suit at the costs of the defendants thereto, the present appellees. We are of the opinion that the prayer of the supplemental bill in this respect should have been granted, and that the court erred in requiring the appellant, instead of the appellees, to pay the costs of the proceeding. For the error thus indicated, the decree of the circuit court is reversed, and the cause is remanded to that court, with directions to dismiss the bills at the costs of the defendants below. Reversed and remanded.

(176 Ill. 54)

MORTON v. MURRAY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

STATUTE OF FRAUDS—EVIDENCE.

Letter to plaintiff containing an agreement as to real estate, signed in deceased's name, with a cross before it, "by" his wife, will be held his act, so as to satisfy the statute of frauds, though there was no direct proof that he was present and dictated it; it appearing that he sometimes signed papers with a cross; it having, after stating that he wanted her to write and that this was what he said, proceeded, as if coming directly from him: "As I have always promised to give you a farm, I have bought the S. farm * * * for you; I will make you a deed to it; I think this will pay you for all the work you have done for me," etc.; it appearing that he rarely did any writing, and that she was in the habit of doing it for him, and that, before the letter was written, he spoke of writing to plaintiff about the matter, and afterwards repeatedly spoke of having written to plaintiff about conveying the land to him; it not being pretended that he wrote more than one letter on the subject; it being clear that he knew of the letter and its contents, and regarded it as his own, and expressed his intention of complying with its terms; and the testimony tending to prove that he mailed it himself.

Magruder, J., dissenting.

Appeal from circuit court, McDonough county; Charles J. Scofield, Judge.

Bill by Joseph R. Morton against Anna Murray and others. Decree for defendants. Complainant appeals. Reversed.

This bill for specific performance was brought by appellant, Joseph R. Morton, against the heirs at law of John F. Murray, deceased, to compel them to make him a deed to the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 18, in township 5 N., and range 3 W., in McDonough county. The bill alleged that appellant, in August, 1873, being then 14 years old, went to live and work for John F. Murray, whose wife was appellant's aunt, and that he so lived with and worked for Murray on his farm, as a farm hand, until August, 1880; that the work he did was reasonably worth \$20 a month, and that all he ever received for such work was just enough to clothe him,—about \$25 or \$30 a year; that, when he quit working for Murray, he complained to him that he had not been paid enough for his work; and that then Murray, for the purpose of quieting and satisfying him, told him that, whenever he got married and settled down,

he would give him a piece of land that would more than recompense him for all he had ever done for him, and that he (appellant), believing and trusting in such promise, let the matter of his wages pass; that afterwards he went to Nebraska, and there farmed, and while living in Nebraska, and still being a single man, Murray wrote, or caused to be written, and sent to him by mail, his (Murray's) contract, as follows:

"Colchester Ill Febuary the 4 1886.

"Dear nephew wee are all well ase i hope this will find you the same well Joe your uncle John wanted mee to rit to you for him this is what he sed well Jo ase I have always promest to give yo a farm I have bought the Billey O Stevens farme and the Dan Clark forty for yo I want you to get you a wife and come home and tind it and give me the tofths ase long as I live then to Lisey as long as she lives and at oure deth the land shall be yours I will make you a deed to it I think this will pay you for all the work you have don for mee I will tile it out and help you to fix up the house and barn and ase mutch other improving as I see fit to do but dont marry some one that you dont like just to get the land for if you will take it thataway and be satisfied I will cheep it five years for you if you want mee to for the rent I get from others will be the same ase what you would pay me for the land but if not I will sell the land I want to give Wib the same eind of a canche on a pece of land no more at present I will close hoping to her frome you soon from X J. F. Murray

"by Mrs. John Murray."

The bill further alleges that Murray seldom did any writing, except sometimes signing his name, and that his wife was in the habit of doing his writing for him, and signing his name to all papers, and that she wrote the foregoing letter, and signed his name to it at his instance; that the words "nephew" and "Jo," in the letter, referred to appellant, and "Lisey" to Mrs. Murray, and that the land referred to was the land above described; that appellant notified Murray that he would take the land and accept the proposition made in said contract in full satisfaction of all claims against him. The bill further alleged, that the complainant was married in March, 1889, and that, on account of the land being then rented, he did not move into the house then on the premises until March, 1890, and that he then took possession for the purpose of complying, and in compliance, with the terms and conditions of the contract; that he remained on the land, and farmed it, until March 1, 1893, and paid Murray two-fifths of all that was raised and grown on the land, and also for the use of the pasture, all to Murray's entire satisfaction, and that he made lasting and valuable improvements on the farm; that, wishing to farm more land, he rented 80 acres about three miles distant, and farmed it for several years; that in the spring of 1895, after consultation with and

on the advice of Murray, he rented a quarter section in another township, and moved on the same, in order to save the loss of time in going to and from his house; that it was then understood between them that he should move back on the Murray land in the fall of 1896, and farm it, and hold it just the same as before, and that Murray would, before his death, convey the same to him; that he had made all arrangements and did intend to move back into the house in October, 1896, when tenant was to move out, but that the heirs of Murray (Murray and wife having died), in order to hinder and prevent him from taking possession, surreptitiously procured one Stoneking to move into the house before the tenant had vacated the same; and that Stoneking was now unlawfully in possession, under one Wilbur Sutton, who claimed the land. The bill further alleged that Murray died, testate, April 9, 1896, and, by his will, devised certain lands to said Wilbur Sutton, but the parcel of land here in controversy was not mentioned in said will; that said Murray left no widow, child, or children surviving him. The bill prayed for specific performance of the contract, and for general relief. Defendants, in their answer, denied all the material allegations in the bill specifically, claiming that appellant's possession was only that of a tenant, and not in pursuance of any agreement that the land was to be his, and set up and pleaded the statute of frauds as to any such agreement. On the hearing, the bill was dismissed for want of equity, and appellant has appealed to this court.

C. F. Wheat, for appellant. Neece & Son, for appellees.

CARTER, C. J. This was a bill for the specific performance of a contract to convey 80 acres of land. We are satisfied that the principal allegations of the bill were sustained by the evidence, and that the decree appealed from is erroneous. The complainant, Morton, who was a nephew of Murray's wife, from the age of 14 lived in the family of Murray, and worked for him for upward of 6 years, performing for the greater part of the time the labor of a hired hand, but received for his services little more than his clothing. Murray regarded him with affection, and considered himself indebted to Morton, and promised to convey to him a tract of land, to become his property at his (Murray's) death. It was proved beyond dispute that Murray repeatedly said that he purchased the two 40-acre tracts, constituting the land in controversy, for Morton, and that he intended to convey them to him. It was also clearly proved that the letter set out in the preceding statement was written, at the request of Murray, by his wife. The contention that it was not shown to have been written in the presence of Murray, at his dictation, so as to avoid the application of the statute of frauds, will be noticed at another

place. It was also sufficiently proved by statements of Murray that Morton had written a letter accepting the propositions contained in Murray's letter, and his acceptance was also otherwise shown. One witness testified that he heard a letter from Morton to Murray read in the presence of Murray and his wife, accepting the proposition. He returned from Nebraska, where he was living when the letter was written, got married, and moved upon, cultivated, and improved the land for five years, and paid to Murray two-fifths of the crops, as stipulated in the letter. Much evidence was introduced on the hearing tending to prove that the letter dated February 4, 1886, was dictated by John Murray. Jane Hilgen, witness for complainant, testifies and says: "Am a sister of complainant. John F. Murray's wife was a sister of our mother. Have known Mr. Murray ever since I can remember. I will be forty years old next birthday. I resided with the Murrays. Went there in 1873, and lived there until 1877, when I was married. They never had any children. Mrs. Murray died December 19, 1894. Mr. Murray died April 16, 1896. Mr. Murray did not do his own writing when I stayed there. He was very nervous. I do not remember of any letter or other paper he wrote while I was there. He made a mark,—kind of a cross. I saw him sign papers that way. It is on my deed that I have. While I lived there, I never saw him make his cross to any papers where his name was signed; only to letters. I have seen them to letters. Mrs. Murray wrote the letters. I am acquainted with Mrs. Murray's writing. Would know it anywhere I saw it. While I was there, she always did his writing." Witness was here shown a paper, a letter dated April 25, 1885, and said it was in the handwriting of her aunt, Mrs. Murray. Witness was now shown a paper, a letter dated February 4, 1886, and said it was in Mrs. Murray's handwriting, and that the cross is something like she has seen him (Mr. Murray) make. "I have written letters for him myself, and he signed his mark on the letter." Edgar Sutton testified: "I have seen Uncle John F. Murray write some, but not very much. I never saw him write a letter, but I think I would know his handwriting. I never saw him write anything but his name. I have heard Mr. Murray request his wife, Elizabeth, to write letters for him. During the time I resided there, he always got his wife, Elizabeth, to write such letters as he wished to have written. I have looked at the paper now shown me, dated February 4, 1886. I know the writing. It is in Elizabeth Murray's handwriting,—except I do not know whose handwriting the cross is in. I can recollect of Murray telling his wife to write to Jo; but I do not recollect of him telling her what to put in the letter. I heard him tell her to write to Jo something about the place. I don't know what they put in the letter about the place. The place he

spoke of was the Clark forty and the Billy Stevens place. It was about 1886, I refer to. I can recollect him telling her to write to Joseph R. Morton, but I don't think she wrote right at the time. I was not in there at the time the letter was written, for a couple of days afterwards. The writing of the letter was spoken of along in the evening. I was in the house. I did not see her write any that night. Two or three days afterwards I knew of his going to mail a letter. If he had only one, that one was to Joseph R. Morton, for he had her write one to him. All I heard Murray say was that he had got the place for Jo. He told her to write to him that he had got the place for him; if he wanted it, to come back. I did not know whether he meant for him to farm it, or what he meant." T. J. Ridden testified that he had a conversation with Murray, in which he said "he had got Aunt Liza—he called her—to write a letter to Jo to come back again; he had bought a piece of land, and he wanted him to come back and farm it long as Mr. Murray and his woman lived; then it was to fall back to Jo. His woman wrote it." McGan testified that he and his wife visited Murray about the time of Jo's marriage. "Murray and I were in the house, and he spoke about it. I told him I noticed Jo had got married. He laughed, and said: 'I expect he is aiming to hold me to my contract.' I had never heard of this contract, and I asked him what he meant. He said: 'I had Aunt Eliza write a letter to Jo, in Nebraska, telling him, if he would come home here and marry, I would buy him a place; and he just came back, and did exactly what I wanted him to, and,' he says, 'I am able to do my part of the contract.' He said: 'I bought that Billy Stevens forty and that Clark forty.' He says: 'Jo can't go on this year, because it is rented. He will go on it next year.'"

The record contains other evidence of a similar import, but it will not be necessary to repeat it here. The facts that Morton moved off the land in 1895, and that Murray paid him for some improvements which he had made, we do not, in view of the explanatory proofs, regard as of controlling importance. Morton needed more land, and had for a year or two been cultivating another tract a few miles distant; and it seems to have been agreed between them that too much time was lost in passing back and forth, and that it would be better for Morton to rent another farm of 160 acres, and move onto it for two seasons, and for Murray in the meantime to rent the 80 acres in question to others, for the same part of the crops Morton had been paying. It was proved by different witnesses that, after Morton moved off the land, Murray repeatedly said that he was to move back in the fall of 1896, and that he intended to convey the land to him as he had agreed. Murray died in April, 1896, and Morton was prevented by those succeeding Murray in the

control of the property from taking possession. There was a sufficient consideration for the agreement to convey, and Morton entered upon and performed his part of the contract.

The only question upon which any doubt can arise is whether or not the statute of frauds must operate to prevent the specific performance of the contract. The second section of the statute provides that "no action shall be brought to charge any person upon any contract for the sale of lands * * * unless such contract, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." It is insisted by counsel for appellees that, in writing the letter and signing Murray's name, Mrs. Murray acted as the agent of Murray, and, it not appearing that she had any authority in writing signed by Murray, the statute applies, and the suit cannot be maintained,—citing *Bissell v. Terry*, 69 Ill. 184, *Albertson v. Ashton*, 102 Ill. 50, and *Edwards v. Tyler*, 141 Ill. 454, 81 N. E. 312. These cases do not reach the question as presented by this record. It is not pretended that Mrs. Murray had any written authority from Murray to write the letter or to sign his name to it, but it is contended that the letter was the letter of Murray himself,—that it was written in his presence, by his dictation, and in his name; and we are of the opinion that this view is fully sustained by the evidence. It is true, as contended by counsel for appellees, that there is no direct evidence that Murray stood by and dictated the letter, or directed his wife to sign his name to it when it was written; but such a fact may be proved by indirect as well as by direct evidence, and we think this fact was sufficiently shown by the circumstances, and Murray's statements and admissions proved on the hearing. It was shown that he rarely did any writing, but that his wife was in the habit of doing his writing for him. He spoke of writing to Morton about the matter before the letter was written, and afterwards repeatedly spoke of having written to Morton about conveying the land to him, and it is not pretended that he wrote or had written more than one letter on this subject. The evidence was clear that he knew of the letter and its contents, and regarded it as his own, and that he expressed his intention of complying with its terms. The testimony tended to prove that he mailed the letter himself. This proof had a further effect than to show a mere parol ratification,—it tended to prove that the act was his own. If it had been proved that, after the letter was written, he stated to others that his wife had written and signed his name to it in his presence and by his direction, it would not be denied that such proof would have been competent to prove that instrument was his own individual act, and not that of an agent. So, too, then, was it proper to prove

the same fact indirectly, and there was practically no evidence to the contrary.

Considering the letter, also, in connection with the circumstances and Murray's admissions proved, it contained some inherent evidence of the fact contended for by appellant. After the first few lines from Mrs. Murray, the language changes, as if coming directly from Murray in the first person, and in substance says: "As I have always promised to give you a farm, I have bought the Billy O. Stevens farm and the Dan Clark forty for you. I want you to get you a wife, and come home and tend it, and give me the two-fifths as long as I live, then to Lisey as long as she lives, and at our death the land shall be yours. I will make you a deed to it. I think this will pay you for all the work you have done for me. I will tile it out, and help you fix up the house and barn, and as much other improving as I see fit to do," etc. It was then signed, "from X J. F. Murray, by Mrs. John Murray." From an inspection of the original letter it would seem that the cross preceding Murray's name was placed there after the name was written; and, while there was no direct evidence that he made this cross, it was proved that he sometimes signed papers in that way.

Without considering whether or not, under the facts of this case, a parol ratification of the act of Mrs. Murray, as Murray's agent, in writing the letter, acted upon in part by both parties, would be sufficient to take the case out of this statute, we are satisfied that from the proof it should have been found that the instrument or letter was that of Murray himself, and that no authority in writing to Mrs. Murray, signed by him, was necessary. One may write and execute an instrument by the hand of another when done in his presence and by his direction, and the fact may be proved by parol evidence, and an action may be brought upon the instrument without violating the statute of frauds. See 1 Am. & Eng. Enc. Law (2d Ed.) 956, and cases there cited; Meyer v. King, 29 La. Ann. 567; Railroad Co. v. Shunick, 65 Ill. 223; Ball v. Dunsterville, 4 Term R. 313; Truman v. Lore, 14 Ohio St. 154; Gardner v. Gardner, 5 Cush. 483; Videau v. Griffin, 21 Cal. 392; Bartlett v. Drake, 100 Mass. 175. We see no reason why the fact of execution cannot be proved by parol evidence on the statements of the party to be charged, and of facts and circumstances tending to prove the principal fact as in other cases. Treating the letter as a contract in writing to convey the land, as it was, the statute of frauds was not a defense to the case established by the evidence. Finding the decree to be against the evidence, it is accordingly reversed, and the cause is remanded to the circuit court, with directions to enter a decree for the specific performance of the contract, as prayed in the bill. Reversed and remanded, with directions.

MAGRUDER, J., dissenting.

(175 Ill. 242)

DUNN et al. v. BERKSHIRE et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

STATUTE OF FRAUDS—PART PERFORMANCE—PRESUMPTION ON APPEAL—ATTORNEY'S FEES.

1. Promise by owner of land, to a child, to convey it to him, is taken out of the statute of frauds by his acting on the promise, and taking possession and making improvements.

2. There being sufficient competent evidence on which to base the decree, it will be presumed that the court considered only such.

3. Defendant cannot be charged with part of the fees of complainant's attorney in partition, where he successfully maintains his contention that he is the sole owner of a tract included in the bill.

Error to circuit court, Champaign county; Francis M. Wright, Judge.

Bill by Mary F. Dunn and others against Jesse B. Berkshire and another. From an adverse decree, complainants bring error. Affirmed.

This was a bill in equity, filed by plaintiffs in error, praying for the partition of certain lands lying in Champaign county, Ill. The bill set forth that Elizabeth Berkshire died seised of an undivided one-half interest in certain lands about 1863, and that in February, 1896, Greenbury Berkshire, her husband, died, testate, seised in fee simple of the other one-half interest, and also of other lands, including the 40 acres in controversy. The bill alleges further that Greenbury Berkshire left an instrument in writing purporting to be his last will and testament, but that at the time of its execution he was not of sound mind and memory, and prayed that it be set aside, and for division and partition of the premises. The inability of the testator to execute a will was admitted by all parties interested, and did not become a contested issue. An answer was filed by the defendant Jesse B. Berkshire, admitting the material allegations of the bill as to the death, heirship, and rights and interests of the parties, but averring, as to the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, township 20 N., range 10 E. of the third P. M., that Greenbury Berkshire at the time of his death had no interest whatever in said lands, but that the same belonged to him (the defendant). Thereafter he filed his cross bill, which, as counsel for plaintiffs in error say, "contains the following averments, which constitute, with the answer thereto, the only controversy in this cause." These averments were that at the time of his death Greenbury Berkshire had no interest in this land, but that it belonged to defendant in error, and that he obtained title thereto by paying for it with his own money; that in the year 1873 he was requested by his father to take possession of, cultivate, improve, and purchase said 40 acres; that he was then residing in the state of Missouri, and at the request of his father he came to Illinois, and settled upon and took possession of this 40 acres, and paid his father the purchase price thereof, and continued in possession until the

time of the filing of the answer and cross bill; that the father, Greenbury Berkshire, told the defendant in error, his son, repeatedly, that the land belonged to the son, and that he would make him a deed for it, but that defendant in error, being in no hurry for the delivery of the deed, allowed the matter to run along until his father unexpectedly and unfortunately became deranged, and his mental condition so much impaired as to render him incompetent to transact ordinary business, wherefore he could not deliver to defendant in error a deed for such land. An answer was filed to this cross bill, denying the material allegations of it, and specially pleading the statute of frauds and the statute of limitations. Replications being filed, the cause was referred to the master in chancery to take proof and report his conclusions of law and fact. The master's report found the rights and interests of all the parties as set forth in the amended original bill, and recommended partition and division of all the premises, including the 40 acres claimed by Jesse B. Berkshire, and recommended also that the cross bill be dismissed for want of equity. Objections were filed to this report by the defendant in error, he contending that the master should have found him to be the owner of the 40 acres in question. These objections were overruled by the master, and were renewed by way of exceptions on a hearing of the cause. The circuit court sustained the exceptions, and overruled the report of the master in so far as it related to this 40 acres, and found that defendant in error Jesse B. Berkshire was entitled to the relief prayed for in his cross bill, and by decree ordered that the master in chancery execute a deed to him for this land, and directed that the remainder of the premises be partitioned among the parties as prayed for in the original bill. Commissioners were appointed to make partition and assign dower. Upon the coming in of the commissioners' report making partition, complainants' solicitors moved that their fees be assessed by the court, and apportioned among the parties as a part of the costs of such proceeding, which motion was overruled by the court, and a decree entered approving the report of the commissioners and confirming title. To reverse the finding and decree of the circuit court in so far as the same relates to the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 8, and to the overruling of the motion for the taxing of solicitors' fees, this cause is brought to this court by plaintiffs in error.

Cunningham & Boggs, for plaintiffs in error. F. M. Green, for defendant in error.

PHILLIPS, J. (after stating the facts). It is urged first by plaintiffs in error that the evidence does not sustain the cross bill, and the decree entered by the trial court. The evidence was of a voluminous and varied character. A full discussion of it would re-

quire much space, and serve no better purpose than a brief statement of its substance.

Defendant in error in the year 1873 resided in the state of Missouri, and in the fall of that year, at the request of his father, returned to Champaign county, Ill., and took possession of the 40 acres in question. At that time the improvements were meager, and the land not valuable. This land had been purchased from the Illinois Central Railroad Company about the year 1869 for \$390, to be paid in annual installments. The payments were completed in 1869, and a deed issued at that time. The deed was executed to Greenbury Berkshire. It is contended by defendant in error that he advanced much of the money to his father to make these payments, with the understanding the money should be repaid to him, or that he should have a deed for the land; and, as corroborative of these facts, reference is made to a number of receipts given by the railroad company for annual payments, from which a portion had been torn off, and it is stated the part torn off contained the words, "Paid by J. B. Berkshire." Whether or not defendant in error advanced to his father the whole or part of the money necessary to purchase this land, with the understanding it should be repaid to him, or a deed executed to the son for the land, is not necessarily material in this case. It appears from uncontradicted evidence that, after the defendant in error had taken possession of the land, buildings were constructed by him, additional land broken from the sod, and other improvements of a valuable and lasting character were made. Defendant in error paid all the taxes each year on this land from about the year 1876 up to the time of the filing of this bill, except for the year 1889, when they were paid by the father, but out of money belonging to the son. The premises were insured by defendant in error, and the insurance paid by him. The improvements made by him on the land he also paid for. A large number of witnesses were called, who testified as to assertions and declarations made by Greenbury Berkshire, in his lifetime, regarding the title of this land. Some 14 witnesses, mostly neighbors and acquaintances, testified, in substance: That the father had on frequent occasions stated the 40 acres belonged to defendant in error; and also to the fact that the father, during the period of time since 1873, had exercised no acts of ownership over the land. On different occasions he refused to have anything to do towards the making of payments for improvements on the land, stating it belonged to defendant in error. At one time the father thought of removing from that section of the country, and attempted to dispose of his farm. To those to whom he tried to sell he made no mention of this 40 acres. The testimony of all the witnesses, together with other facts and circumstances, indicates, without doubt, the existence of a contract be-

tween the father and the son showing defendant in error to have certain rights in this land. The conclusion from all the testimony could be only that arrived at by the trial court, viz. that the father had promised to convey this land to the son, who, acting upon that promise, was in possession of the land and had made the improvements under such contract.

It is contended by plaintiffs in error that the rights, if any, of the defendant in error, would be barred by the statute of frauds, there being no memorandum in writing showing or tending to show the contract. It is true, the statute of frauds is a defense to a verbal contract for the sale or conveyance of lands; but, where there has been a performance or part performance of a contract between the parties, equity will enforce it, and the statute of frauds will not be a bar. *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537; *Bright v. Bright*, 41 Ill. 97; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792. Where the owner of land makes a parol promise to a child to convey to it such land, and, relying on such promise, the child takes possession of the land and makes valuable improvements, the promise will be held to have been based upon a valuable consideration, and a specific performance may be decreed. There is no important distinction between a promise of this character, with part performance, and a sale absolutely. Where the possession is so taken by the child, and the improvements made under the agreement or contract, it is sufficient to take the case out of the operation of the statute of frauds. *Bright v. Bright*, supra; *Kurtz v. Hibner*, 55 Ill. 514.

Defendant in error Jesse B. Berkshire also relies upon his right to the land in question by virtue of the continuous, uninterrupted, and adverse possession thereof for the period of 20 years under claim of title. Under our view of this case, it is unnecessary to discuss that question, or his rights, if any, thereunder. The evidence produced in support of the cross bill was sufficient on which to base a decree of specific performance under a parol contract, where there had been a part performance of such contract, and it is therefore immaterial whether or not the statute of limitations would bar complainants' action.

It is assigned as error, and insisted and argued by plaintiffs in error, that defendant in error Jesse B. Berkshire was not a competent witness, and it was error in the trial court to admit his evidence. It is unnecessary, also, to discuss this question. The cause was heard before the chancellor, and it is presumed he considered only competent evidence in rendering the decree. The record shows there was sufficient competent evidence upon which to base the decree, irrespective of the testimony of defendant in error, and in such a case, if any error, it was a harmless one.

It is also insisted the chancellor erred in refusing the motion of plaintiffs in error to assess a fee for complainants' solicitors. The bill for partition, as filed, sought the partition of 200 acres of land, including the 40 acres in question. It is true, 160 acres of this was partitioned without question, but the inclusion of this 40 acres made it necessary for the defendant to present his defense. Where a defense in a proceeding for partition is substantial, and not frivolous, it was not the intention of the legislature that the defendant should be compelled to bear the burden of any portion of the opposite party's solicitor's fees. In this case the defense interposed by Jesse B. Berkshire was not only substantial, but meritorious, and resulted in the decree complained of by plaintiffs in error. In such a case solicitors' fees are not proper to be allowed to the complainants' solicitors. *Habberton v. Habberton*, 156 Ill. 444, 41 N. E. 222; *Walker v. Tink*, 159 Ill. 323, 42 N. E. 773; *Metheny v. Bohn*, 164 Ill. 495, 45 N. E. 1011. Perceiving no error in this record, the decree of the circuit court is affirmed. Decree affirmed.

(174 Ill. 561)

SLINGLOFF et al. v. BRUNER et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL AND ERROR—WILLS—VALIDITY—TESTAMENTARY CAPACITY—EVIDENCE—WITNESSES—INSTRUCTIONS—REVERSIBLE ERROR—BURDEN OF PROOF.

1. In an action to set aside a will for lack of testamentary capacity of the testator, there was evidence that, at the time of its execution, testator was very ill; that he was incapable of transacting business on account of the frequent administration of morphine given to allay pain. Experts gave as their opinion that testator was not in a condition to transact business. Testator had given his attorney, who drew the will, directions as to the disposition of his property; had caused the will to be drawn so as to express his intention; directed what was to be done with the residue of his estate; and called attention to the fact that no executor was appointed, saying he desired his partner to act as executor. *Held*, that a verdict establishing its validity would not be disturbed.

2. Proponents, to establish the validity of a will, called expert witnesses in rebuttal, who gave their opinions as to the testamentary capacity of the testator, based on hypothetical questions. *Held* that, though the evidence was improper in rebuttal, there was no reversible error.

3. To establish the validity of a will in equity, the certificate of the oath of witnesses at the time of the first probate was admissible, under Rev. St. c. 148, § 7.

4. In an action to set aside a will for incapacity of testator and for undue influence, extracts from letters written by testator to one of the legatees were admissible, as showing the intimate relations between testator and the legatee.

5. The certificate of the oath of a subscribing witness at the time of the first probate of a will was put in evidence to establish its validity. The witness was the husband of a contestant, who was a sister of the testator, but such contestant was not named in the will in any capacity. *Held* not error, as the certificate under Rev. St. c. 148, § 7, was admissible, and

the husband was a competent attesting witness.

6. The testimony of one subscribing witness and the certificate of the oath of the witnesses at the time of the first probate of a will are sufficient to make a prima facie case as to its validity in equity.

7. The court instructed, in suit to set aside will, that the burden of proof would be on proponents to establish its validity, but, having made a prima facie case, the burden would shift to the contestants, and, unless the evidence offered by the contestants overcame the prima facie proof, the will should be held valid. *Held*, that the instruction was technically inaccurate, since the burden does not shift in such case, but there was no cause for reversal.

Appeal from circuit court, McLean county; John H. Moffett, Judge.

Bill by John W. Slingloff and others against Mabelle Bruner and others. From a decree in favor of defendants, complainants appeal. Affirmed.

Tipton & Tipton, for appellants. Frank B. McKennan and McGlosson & Beitler, for appellees.

PHILLIPS, J. This was a bill in chancery, filed in the circuit court of McLean county, to set aside the will of Nicholas R. Slingloff, deceased. The bill charges lack of testamentary capacity on the part of the testator, and undue influence exerted upon him by the appellee Mabelle Bruner. Issues in chancery were made as provided by the statute, submitting to the jury the two questions of testamentary capacity and undue influence; and, upon the trial of the cause, a verdict was returned finding in favor of the validity of the will. A motion for new trial was overruled by the court, and a decree entered finding that the will in question was the will of Nicholas R. Slingloff, whereupon this appeal was prosecuted.

The principal reason urged by appellants for the reversal of the decree of the chancellor in this case is that the testator, at the time of the execution of the will in question, did not possess sufficient testamentary capacity to execute such will. Nicholas R. Slingloff was an unmarried man, aged about 39 years, who had resided most of his life in or near the village of Arrowsmith, in McLean county. The will in question bears date October 13, 1897. The testator died unmarried and without issue, on the 3d day of November of the same year. The testator had been for a number of years in poor health. About 19 years before his death, he received a severe injury to his side, which, as time progressed, necessitated three surgical operations,—two in Bloomington, and one in Chicago. This left him for a number of years prior to his death much reduced in strength and emaciated in appearance, and for some time previous to his death he was not physically capable of giving his personal attention to his business. He was a druggist, owning a one-half interest in a drug store in Arrowsmith, the other half interest of which was owned by George F. Lester, one of the appellees herein.

The three surgical operations mentioned had all been performed in the winter and summer of 1897,—one in February, one in June, and the last one the 15th day of October, two days after the will in question was executed. The testator left, at the time of his death, his mother, two brothers, three sisters, and some nephews and nieces, all complainants in the original bill. By his last will and testament, the validity of which is questioned, he devised one-half of his interest in the drug store to his partner in business, George F. Lester, in consideration of the payment to his estate of \$2,300; and, after the settlement of all his indebtedness, his estate, both real and personal, was to be divided equally between his mother and Mabelle Bruner. The latter was not related to him, but it is apparent from the record that he entertained for her feelings of affection, although it is not certain from this record that an engagement of marriage existed between them. She was with him most of the time during his last illness. The will in question was prepared by Hubert J. Thompson, an attorney, at the home of the testator, a short time before the performance of the last operation, which resulted in his death. It was witnessed by Thompson and David L. Snoddy, the husband of a sister of the testator, and these two parties and George F. Lester were the only ones present at the execution of the will.

The proponents, in order to establish the validity of the will, offered the testimony of Hubert J. Thompson, whose evidence was that he was called to the house where the testator was lying ill, and received from him directions as to the disposition of his property, and that George F. Lester was present at the time, with other persons during a portion of the time. He testifies that he told the testator that he was called there, and, as he states, the testator said he wanted Lester to take his interest in the drug store at \$2,300, and wanted a mortgage on his father's farm paid, and the interest thereon, and the expenses of his sickness, and the balance was to be equally divided between his mother and Mabelle Bruner. He states there was some conversation between the testator and himself as to whether a bill of sale of the drug store should be made, or whether the terms should be incorporated in the will, and it was put in the will, and the will drawn as directed by the testator, and read to him. He also directed who should be the executor, and said he wanted his partner to attend to his business, and be appointed executor. There was also offered the certificate of the oath of the witnesses at the time of the first probate. This evidence was objected to, and the objection overruled, and the complainants excepted. Certain letters were offered in evidence, which we apprehend to be in the handwriting of the testator, and extracts therefrom were read. These letters were addressed to Mabelle Bruner, one of the legatees. This was substantially

all the evidence offered by the proponents in support of the validity of the will.

The testimony of the attending physician, and of a consulting physician, who was called in, in the afternoon of the day on which the will was drawn, and who described the testator's physical condition and the fact of the frequent and long-continued administration of morphine to allay pain, was that, at the time of the execution of the will, the testator was incapable of transacting business or of reasoning on business matters; that his temperature was very high, which had a depressing effect on his brain, tending to cause an exhaustion and enfeeblement of the entire intellectual powers, with the physical. Eleven other witnesses were called who testified as to his physical condition. Many of these witnesses had, just prior to the time of the execution of this will, called at the house where the testator was lying, and from their testimony it is apparent he was at the time suffering great pain, and made no attempt to engage in conversation in any manner. Some of the testimony is based on the opinions of the witnesses as to his condition without conversation with him. Some testified they did not believe he was in a condition to transact business. Others found him suffering pain, and did not engage in conversation, and say he was effusive in his manner towards them, which caused them to reach the conclusion that he was in very poor condition, and unable to transact business. Others had but little conversation with him, and saw that he was in an enfeebled condition, lying quietly, and they formed an opinion that he was in a poor condition, and unable to transact business. Certain witnesses were called by the complainants as experts, who, on a hypothetical question stating his condition being put to them, testified that, in their opinion, he would not be in a condition to transact business. George F. Lester, who was appointed executor, testified that, at the time testator made the will, he did not think he was in a condition to transact any business or make a will.

This testimony as to the testamentary capacity of the testator, offered by the complainants, is exceedingly unsatisfactory and uncertain, as against the fact, clearly appearing, that the testator, when roused up, not only thoughtfully inquired of his partner if he would take his interest in the store at \$2,300,—a matter on which they had previously conversed, and substantially agreed as to the terms,—but also suggested the reciting in the will of the terms on which the store was to be taken by his partner, after discussing with the attorney who drew the will whether a bill of sale would be necessary. It appears, he also recollected and provided for the payment of a mortgage resting upon the farm of his father, and determined the description of the land, and caused the will to be drawn so as to express his intentions, and directed what was to be done with the

residue of his estate, and called attention to the fact that there was no executor appointed, saying that he desired his partner, George F. Lester, to be executor of his will. In a contested will, under the provisions of the statute, the verdict of a jury rests upon the same basis, and is to be treated by an appellate court in the same way, as the verdict of a jury in a common-law case, and should not be set aside by an appellate tribunal, unless it is manifestly against the weight of the evidence. *Shevaller v. Seager*, 121 Ill. 564, 13 N. E. 499; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 708; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Buchanan v. McLennen*, 105 Ill. 56.

Certain expert witnesses were called by the proponents of the will in rebuttal, and a hypothetical question was put to them, on which they based an opinion that the testator was competent to execute a will. A principle is that the proponents of a will should offer all their testimony in support of their contention that is matter in chief, in the first instance; and, after the contestants have closed their proof, the proponents may offer testimony only to the extent that it rebuts the testimony of their adversaries. This testimony offered in rebuttal was the opinions of witnesses as to the testamentary capacity of the testator, based on a hypothetical question, and should have been given in chief. While it was improper to offer it as evidence in rebuttal, still that fact, of itself, is not reversible error. *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361. On contesting the validity of a will by a proceeding in chancery, under section 7 of chapter 148 of the Revised Statutes, the certificate of the oath of the witnesses at the time of the first probate should be admitted as evidence, and have such weight as the jury should think it may deserve, by express direction of the statute. It was not error to overrule complainants' objection to that evidence on that ground.

Complainants objected to the admission in evidence of the letters shown, which had been written by the testator to one of the legatees, Mabelle Bruner, and the reading of extracts therefrom. The letters in their entirety were offered, but all of the letters were not read. Where a letter is offered in evidence, particular parts of which are desired by the party offering the same to go before the jury, he may read that part of the letter to the jury, and is not required to read the whole letter. The other party has the right to read the entire letter, if he so desires. These letters were properly admissible as evidence to show the relations existing between the legatee and the testator. The affections of the latter for the former may be shown, as the presumption is in favor of the validity of the will when the person provided for therein is one with whom the testator has maintained intimate and affectionate relations during his life. *Harp v. Parr*, 168 Ill. 459, 48 N.

E. 113. These letters, showing the affection and intimate relations existing between the testator and the legatee Mabelle Bruner, were properly admitted in evidence; and the reading of extracts therefrom by the proponents of the will, and their failure to read the whole of the letters, was not error, as the contestants had the right to read the other parts of the letters if they so desired, as the whole of the letters were in evidence before the jury.

David L. Snoddy, one of the subscribing witnesses to the will, was the husband of Sarah E. Snoddy, one of the contestants; and, although not called as a witness in this proceeding, the certificate of the oath of the witnesses at the time of the first probate—and he was one—was admitted in evidence; and it is insisted by contestants that this was error, the contention being that the evidence of the husband could not be received as against the wife. The principle is that the competency of a witness to a will, like evidence of the capacity of the testator, is tested by the status of the witness at the time the will was executed. The weight of modern authority is in favor of the proposition that the competency of a witness attesting a will is to be tested by a state of facts existing at the time of the attestation, and not by the state of facts existing at the time the will is presented for probate, nor by the state of facts existing at the time when interested persons may, by a bill in chancery, seek to contest the validity of the will. *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 814. By this will the testator sought to dispose of his property and effects of every character, making his mother and Mabelle Bruner the legatees, and making Lester the executor. The complainant Sarah E. Snoddy, although a sister of the testator, was not named in the will in any capacity. He sought to dispose of his property by devising it, and leaving nothing to descend to an heir; and, so far as the will was concerned, Sarah E. Snoddy had no interest as legatee or heir, nor did she appear as executrix. Her husband, David L. Snoddy, was therefore a competent witness at the time of the attestation of the will, and at the time it was admitted for probate. The statute expressly provides that the certificate of the oath of the witnesses on the first probate of a will is competent evidence on a contest of the will in a court of chancery. The only way in which David L. Snoddy is connected with this record is as a witness. We are of the opinion, therefore, that it was not error to admit the certificate of his oath in evidence, and that he was a competent attesting witness to the will.

It is urged that the testimony of one subscribing witness and the certificate of the oath of the witnesses at the time of the probate are insufficient to make a prima facie case as to the validity of the will. The general rule in this country is that a will may be established by only one of the attesting witnesses, if he can testify to a compliance with

the statute relating to its execution. In re Page, 118 Ill. 576, 8 N. E. 852, and authorities cited. The contention of appellants that this evidence was not sufficient to make a prima facie case was expressly decided adversely to them in *Buchanan v. McLennen*, supra. See, also, *Harp v. Parr*, supra.

It is insisted by appellants that the first instruction for the proponents was error. That instruction states that the burden of proving the testamentary capacity of the testator is primarily upon the proponents, and they are required to show, by a preponderance of the evidence, that the instrument offered in evidence was signed by the testator, or by some person in his presence by his direction, and that, in his presence and by his direction, it was attested by two or more witnesses; and when the testimony of the subscribing witnesses is given in, or the oath of the subscribing witnesses is attached to, the writing, and offered in evidence, the competency of the testator, and the fact of so signing and attesting, are established by the evidence, and a prima facie case is made out; and the burden of proof then shifts to those who seek to contest the validity of the will, and, unless the evidence offered by the contestants overcomes the prima facie proof thus made, the will must be held valid. The burden of proof does not shift on the trial of a bill contesting a will, and this instruction was technically inaccurate. The jury are to determine from the whole evidence whether the instrument offered was the will of the testator. While the instruction is technically inaccurate, it is apparent it could not have misled the jury, and is not cause for reversal.

Appellants say in their brief: "Other of proponents' instructions are objectionable. The court refused several instructions asked by complainants that should have been given." They do not point out which of proponents' instructions are objectionable, or any objection thereto, nor show wherein there was error in the reversal of instructions. This general objection thus made in the brief does not present for our consideration which of the eleven instructions given for proponents was erroneous, or why the refusal of the six instructions was error.

The evidence of the proponents of the will, standing alone, was sufficient to authorize this verdict; and the evidence of the contestants is so unsatisfactory that we are satisfied the verdict should not be disturbed. We find no reversible error in this record, and the decree of the circuit court of McLean county is affirmed. Decree affirmed.

(175 Ill. 430)

CAYWOOD v. FARRELL.

(Supreme Court of Illinois. Oct. 24, 1898.)
GARNISHMENT—APPEAL—FINDING OF FACT—SUFFICIENCY.

Defendant sold land, and, after part payment, gave a bond for deed. The vendee, be-

ing unable to comply with his contract, canceled it, and gave a quitclaim back to defendant. Defendant was afterwards garnished by the vendee's creditors. Judgment against defendant was reversed in the appellate court, whose only finding of facts was that "it does not appear from the evidence that [garnishee] was indebted in any sum to [vendee] when the writs of garnishment were issued, nor at any time afterwards before the rendition of the judgment in garnishment proceedings." *Held*, that the finding included all ultimate facts in controversy, and was sufficient, under *Prac. Act*, § 87, which provides that if the final determination, as the result of the findings of fact "concerning the matter in controversy," is different from the findings of the court below, the appellate court shall recite in its judgment "the facts as found," which shall be conclusive as to all matters of fact in controversy.

Error to appellate court, Third district.

Garnishment proceedings by James Caywood, for the use of others, against Felix G. Farrell. From a judgment of the appellate court reversing a judgment for plaintiffs, they bring error. Affirmed.

R. W. Mills, for plaintiffs in error. W. P. Callon, for defendant in error.

PHILLIPS, J. James Caywood, as the nominal plaintiff, for the use of certain judgment creditors, garnished defendant in error. On trial in the circuit court, judgment was entered against defendant for \$1,028.23, which judgment was reversed by the appellate court, with the following finding of facts: "The court finds that it does not appear from the evidence that the said Felix G. Farrell was indebted in any sum to said James Caywood when the writs of garnishment were issued, nor at any time afterwards before the rendition of the judgment in garnishment proceedings." The error assigned on the prosecution of this writ of error is that the appellate court did not make "a sufficient special finding of facts." It is urged such order states a mere conclusion from the facts, which is said not to be in compliance with section 87 of the practice act, which provides that if the final determination of the cause, as the result, wholly or in part, of the finding of the facts "concerning the matter in controversy," is different from the finding of the court below, the appellate court shall recite in its final order or judgment "the facts as found," and such judgment shall be final and conclusive as to all matters of fact in controversy in such cause. This section has been construed to mean: (1) "That the facts recited should include the facts concerning any material issue submitted to the trial court." *Insurance Co. v. Scammon*, 123 Ill. 601, 14 N. E. 666; *Morris v. Wilboux*, 159 Ill. 627, 43 N. E. 837. (2) That such facts should be recited and set forth as in decrees in chancery. *Tibballs v. Libby*, 97 Ill. 552; *Neer v. Railroad Co.*, 138 Ill. 29, 27 N. E. 705. (3) The facts to be so recited are to be ultimate, and not evidentiary, facts; that is, they may be "conclusions of fact," "or, in other words, infer-

ences drawn from the subordinate or evidentiary facts." "Ultimate facts * * * are, when considered with reference to the facts or evidence by which they are established or proved, but the logical results of the proofs, or, in other words, mere conclusions of fact" (*Brown v. City of Aurora*, 109 Ill. 165); as, in an action for negligence, a finding that the plaintiff did not use ordinary care to avoid the injury, or that the defendant was not guilty of willful or wanton injury (*Rogers v. Railroad Co.*, 117 Ill. 115, 6 N. E. 889); or, in an action for fraud, a finding that the evidence does not show fraud (*Hayes v. Insurance Co.*, 125 Ill. 626, 18 N. E. 322). See, also, *Siddall v. Jansen*, 143 Ill. 537, 32 N. E. 384. It is clear that the appellate court, on finding the facts differently from the lower court, is only required to recite in its order or judgment of reversal the ultimate facts in issue as made by the pleadings, or the conclusion of such ultimate fact or facts from the evidentiary facts. Such recital of ultimate facts must include or cover all the material issues made by the pleadings vital to determine a right of recovery. In an action for negligence, for fraud, or for money claimed to be due, these are, respectively, the ultimate facts in such cases, and a finding of such facts by the appellate court is sufficient under the statute, conclusive on this court, and not subject to revision. *Railroad Co. v. Pennell*, 110 Ill. 435; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463. The finding of the appellate court, as set out in this record, was of an ultimate fact, and sufficient, under the statute, if it covered or included all the ultimate facts "concerning the matter in controversy."

The only matter in controversy in this case of garnishment was whether Farrell was indebted to Caywood, either expressly or impliedly. The facts, in brief, are: Farrell, on December 21, 1892, sold to Caywood certain land, and gave a bond for a deed on the making of certain payments, reserving the title to the land and to the crops raised thereon, to secure the payment of interest and principal. In June and July, 1894, two judgments were obtained against Caywood; and, by virtue of executions issued thereon, a levy was made on the crops raised on said land, which crops Farrell claimed and replevied, and on trial recovered judgment for the same April 10, 1895. October 26, 1894, Caywood, not being able to comply with his contract, by agreement with Farrell canceled the contract, and, as it had been recorded, quit-claimed the land back to Farrell. On January 15, 1895, Farrell sold the land to George W. Chittick. Farrell was garnished by the judgment creditors of Caywood; when, the record does not state, but does state the garnishee summons, etc., was omitted from the record by agreement.

The claim is made that a statement of the account between Farrell and Caywood shows the former was indebted to the latter on Oc-

tober 26, 1894, when the quitclaim deed was made, in the sum of \$1,028. Farrell and Caywood both deny such indebtedness, and so testified in the court below. The appellate court found, and recited in its order or judgment, the ultimate fact that Farrell was not, at the time of the service of the garnishee process or thereafter, indebted to Caywood. Complaint is made of this conclusion or finding of the ultimate fact. It is said: "The conclusion is not the controlling fact. It is the fact or facts found which lead the court to that conclusion." In this, counsel are in error, as this court has several times held the conclusion from the evidentiary facts is all that is necessary. It is said, however, Farrell and Caywood might have fraudulently settled. If that was made an issue, necessarily the finding of the fact that there was no indebtedness would include it.

It is also suggested that after the creditors obtained judgment, which became a lien on Caywood's equity in the land, Caywood could not convey away his interest, to their detriment. If so, that is immaterial in this case. If such interest could not be so sold, then it is there yet. If Farrell did not give or owe Caywood anything for such interest at the time of the service of this process, or thereafter, then, of course, there was nothing to reach on that account. Had Caywood, in order to get out of the contract, sold his interest in the land to some third person, in consideration solely that such person should assume his contract, certainly such person would not be liable to garnishment merely because Caywood had paid something on his contract to Farrell. The finding of the appellate court, therefore, having included all the ultimate facts in controversy, its judgment is conclusive, and not a matter for review in this court. The judgment of the appellate court is affirmed. Judgment affirmed.

BOGGS, J., took no part in the decision of this case.

(175 Ill. 224)

McCOY v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

HOMICIDE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—MALICE—INTENT—REASONABLE DOUBT—SELF-DEFENSE—ACTUAL DANGER—MANSLAUGHTER—EVIDENCE—THREATS—TAKING REVOLVER TO JURY ROOM.

1. Deceased and the brother of defendant exchanged angry words in a depot, and went out to the edge of the depot platform. As deceased went out, defendant came into the depot, but immediately went out again. Some one was seen back of deceased and between him and the depot. The fatal shot was fired from behind. Defendant told the coroner that he was only about four feet away when the scuffle began on the platform between his brother and deceased, and that the shot came from behind. The wound was powder-burned, and no other person was shown to have been near the parties. Defendant afterwards said that he heard his brother and deceased quarreling, and that he had "a right to help his brother." The only help the brother received

was from the person who fired the shot. Defendant had a revolver of the caliber of the one with which deceased was shot, and a few days before had remarked that if deceased "monkeyed with him he would throw a ball at him." No weapon was found on deceased, and there were no signs of a scuffle between him and defendant's brother. Defendant ran away from the depot after the shooting, and was not seen again that night. Held to sustain a conviction of murder.

2. An instruction that malice includes not only anger, hatred, and revenge, "but every other unlawful and unjustifiable motive," is not subject to the objection that the words quoted broaden the instruction to include every motive, whether or not growing out of the evidence in the case on trial.

3. An instruction stating that the intent in the indictment must be shown by positive testimony, or may be inferred from all the facts and circumstances shown by the evidence, and further stating "that if you believe from the evidence, beyond a reasonable doubt, that the firing of the revolver was the act of defendants as alleged in the indictment, and that it was done deliberately, and was likely to be attended with dangerous consequences, the malice or intent to make out the case as charged will be presumed," is not objectionable as failing to require the intent to be shown beyond a reasonable doubt.

4. Giving an instruction that, if a person kills another in self-defense, it must appear that his danger was such that the killing of the other was "absolutely necessary," which followed the words of Cr. Code, § 149, is not error where the jury were further instructed that: "Actual or real danger is not indispensable to the defense of one's relatives. Persons threatened with danger, or their relatives, must judge from appearances, and determine therefrom the actual state of things surrounding them or their relatives. If such persons act from honest fears, induced by reasonable evidence, they are not responsible for a mistake as to the extent of danger." And where the jury were further instructed, they must consider the instructions as one entire series, since the combined instructions fairly present the law to the jury so as not to mislead them.

5. An instruction that no provocation by words only, addressed to the person killing, or to another in his presence, however opprobrious, will reduce an intentional killing to manslaughter, and, though opprobrious epithets were used by deceased to defendant W. in defendant B.'s presence, yet if defendants immediately, or soon thereafter, revenged themselves by the use of a dangerous weapon, in a manner likely to cause the death of deceased, and did thereby cause his death, then defendants are guilty of murder, and the jury ought so to find, "unless they shall further believe that said killing was reduced to manslaughter, or was justifiable on other grounds, or by other than the use by deceased of such opprobrious language," is not objectionable as directing the jury to find defendants guilty of murder, instead of allowing them to pass on the question whether defendants were guilty of murder or manslaughter.

6. An instruction which recited certain facts, which, if believed by the jury, must have excluded every possible element of manslaughter or self-defense, and further stated that if the jury believed that defendant was present, and knew his brother was not in danger of his life, nor in danger of receiving great bodily harm, and that, knowing said facts, defendant interfered with a "deliberate mind and formed design to kill deceased, and did, with a revolver, shoot deceased, then defendant is guilty of murder," is not objectionable, as confining the jury to the crime of murder, where the jury were, in other instructions, told that they could find defendants guilty of murder or of manslaughter,

and were instructed as to the form of their verdict in both murder and manslaughter.

7. It is not error to refuse to instruct that, if there is a reasonable doubt in the minds of the jury as to which one of several persons, or which one of defendants, fired the fatal shot, then they must acquit defendants, where the court instructed that, if the shot was fired by one of the crowd, or if the jury had any reasonable doubt from the evidence as to who fired it, their verdict should be, "Not guilty."

8. Previous threats by defendant, shortly before the homicide, are admissible to show the animus with which the killing was done, and that an unfriendly feeling existed on the part of defendant against deceased.

9. The revolver which was admitted in evidence, together with the bullet taken from the brain of deceased, may be taken to the jury room.

Error to circuit court, McLean county; Colquh D. Myers, Judge.

Benjamin McCoy was convicted of murder, and he brings error. Affirmed.

Frank Gillespie and A. W. Peasley, for plaintiff in error. R. L. Fleming, State's Atty., and E. C. Akin, Atty. Gen. (O. R. Trowbridge, of counsel), for the People.

CRAIG, J. Wilbur McCoy and the plaintiff in error, Benjamin McCoy, were jointly indicted and tried in the McLean circuit court for the murder of John Bullock, the trial resulting in the acquittal of Wilbur McCoy and the conviction of Benjamin McCoy. Motions for a new trial and in arrest of judgment having been overruled, the court, in pursuance of the verdict of the jury, entered judgment on the verdict, and sentenced Benjamin McCoy to imprisonment in the penitentiary for 14 years. He brings this writ of error, and asks to have the judgment reversed.

Plaintiff in error contends that the evidence will not sustain the judgment of conviction against him. The evidence in the record shows substantially the following facts: The two defendants, Wilbur McCoy and Benjamin McCoy, were aged, respectively, 21 and 19 years, and lived with their father in Shirley, a small town in McLean county, Ill., on the line of the Chicago & Alton Railroad. At the time of the homicide the deceased, John Bullock (sometimes called John Smith), and plaintiff in error, Benjamin McCoy, both worked for J. L. Douglass on his farm close to Shirley. It appears there were several young men living in Shirley who frequently congregated at the railroad depot in the evening. On the evening of the homicide it was wet and misting. There was a church festival at a house not far from the depot, and deceased was dressed to attend the festival. He came into the depot waiting room shortly after 8 o'clock, and was waiting for his employer's son to bring him some money. The platform lamp hung between the window and the waiting-room door. There was a target light and another light outside, a light in the office room, and a lamp was on a shelf in the waiting room. One door opened into the ticket

office, and there were two outside doors to the waiting room, and one window opening on the platform, and a south window. There was a pile of car doors at the south end of the depot, about five feet high. There was at that time almost incessant lightning. There is an elevator opposite the depot. The light of the platform lamp was thrown against the elevator, and a person passing between the elevator and depot could have been recognized. Shortly after Bullock entered the waiting room, the witness Willie Dunk entered, and saw Bullock, who was the only person there. Soon Wilbur McCoy and one Mack Roberts came in, followed by Nels Souders and Willie Zeigler. Bullock, in talking with Willie Dunk, said that one Bruno Warlitz had told lies on him, and that he could whip him and all his friends. On hearing this, Wilbur McCoy said that Warlitz had done nothing of the kind; that he attended to his own business. Bullock replied that he had told lies on him, and that he could whip Warlitz and all his friends. Some further words passed, when Nels Souders took Bullock by the arm, and they went out of the waiting room together, and walked to the south end of the platform. As Souders and Bullock went out, Benjamin McCoy, plaintiff in error, came into the waiting room, but immediately went out. Souders and Wilbur McCoy came out then with Mack Roberts. Willie Dunk was on the platform. As Wilbur McCoy came out of the depot he said to Bullock, "Now, if you want anything, you can get it right here." He had gone about a quarter of the way from the door to the corner of the depot. Wilbur McCoy and Bullock were near the edge of the platform. Wilbur was facing the depot, and Bullock was facing Wilbur, with his back towards the depot building. Souders, after entering the waiting room, looked through the window, and saw a person near Bullock and Wilbur. A shot was fired from behind, the bullet entering Bullock's head three inches below and one-quarter of an inch back of the opening of the left ear. Death was produced instantly, the body falling on the rail of the track.

The defendants introduced no testimony, but statements made by the defendants after the homicide were testified to by witnesses for the people. The plaintiff in error told the coroner, James Hare, that he was only about four feet away when the scuffle began on the platform between his brother, Wilbur, and Bullock; that the shot came from behind; that he was that far away when Wilbur and Bullock went off the platform. The wound was powder-burned, showing the person who fired the shot was close behind Bullock. This admission of plaintiff in error shows he was near enough to have fired the shot, and no other person was proven to be near Wilbur McCoy and Bullock. Sally Anthony, on the Sunday evening after the homicide, was walking with plaintiff in error. She testified he said to her, in substance, that he had been

at home until after supper, and came up with Shelby Newby to the festival to get cream, and take some home; that he went over to the depot, and went in; that the boys were talking; that pretty soon they went out on the platform; that he followed them out, and stayed at the corner of the depot where the car doors were; that he heard them talking, and heard Smith (Bullock) quarreling with Wilbur; that Wilbur was his brother, and he said he had a right to help him; that before he reached them Smith (Bullock) fell on the track; that he expected they would watch him pretty close; that he did not know who fired the shot, and he supposed it never would be known. The only help Wilbur, the brother of plaintiff in error, received, as shown by the evidence, was from the person who fired the fatal shot. The admission of plaintiff in error that he helped him, in connection with the other circumstances in evidence; his proximity to the deceased; the fact that he was possessed of a borrowed revolver of the kind and caliber of the one with which Bullock was shot, and that he bought and paid for it after the homicide; the fact that within a few days before the shooting plaintiff in error used expressions showing ill will towards Bullock, using the expression, "If he monkeys with me I will throw a ball at him," and at another time saying, when Bullock got angry at something, "If he monkeys with me, I will fix him;" the fact that no weapon was found on deceased; the condition of the clothing on the body after deceased was shot, his overcoat being buttoned up, kid gloves on his hands, and a buttonhole bouquet on, which the witnesses stated looked as though just put on, which showed that there could not have been much of a scuffle, and certainly not one which required the use of a deadly weapon upon a person unarmed; the fact that Wilbur McCoy and the other young men present assisted to carry the body of deceased into the depot, while the plaintiff in error ran away from the depot, and was not seen again that night,—must have satisfied the jury beyond a reasonable doubt of the guilt of Benjamin McCoy. All this testimony stands undisputed, and yet plaintiff in error insists that the evidence is not sufficient to sustain a conviction. The law has placed the determination of that question with the jury, and it is only when this court is satisfied, from a careful consideration of the whole testimony, that there is a reasonable doubt of the guilt of the accused, that it will interfere with the verdict of the jury on the ground that it does not support the verdict. *Galney v. People*, 97 Ill. 270. We are satisfied the evidence sustains the verdict of the jury, and that the jury would have been justified in inflicting, under the evidence in the record, a much heavier punishment.

It is next insisted that the third instruction given on the part of the people is erroneous. It is as follows: "Malice includes not only anger, hatred, and revenge, but every other

unlawful and unjustifiable motive. Malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive,—a thing done with a wicked mind,—where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned or malignant heart." The objection is made that the words "every other unlawful and unjustifiable motive" broaden the instruction to include every motive, whether growing out of the evidence in the case on trial or not. We do not think the instruction is subject to the criticism. The instruction is a literal copy of an instruction given in *Jackson v. People*, 18 Ill. 269, which was one of a series of instructions approved by this court.

The objection to the fourth instruction—that it does not require the intent to be shown beyond a reasonable doubt—is not tenable. The instruction, in the beginning, states that the intent in the indictment is necessary to be shown by direct and positive testimony, or it may be inferred from all the facts and circumstances shown by the evidence. It then expressly states: "That if you believe from the evidence, beyond a reasonable doubt, that the firing of the revolver was the act of the defendants, as alleged in the indictment, and that it was done deliberately, and was likely to be attended with dangerous consequences, the malice or intent to make out the case as charged will be presumed."

Plaintiff in error complains of the people's thirteenth instruction as using the words "absolutely necessary." The people's eleventh instruction was a literal copy of section 148 of the Criminal Code. The thirteenth adopted the language of section 140. Undoubtedly, this instruction, considered independently, and not as a part of a series of instructions, might be objectionable, as ignoring the doctrine of apparent danger, as held in *Campbell v. People*, 16 Ill. 17. In the case at bar the people's twenty-eighth instruction expressly told the jury they should take all the instructions together, and they were to be construed as one entire series. At the request of plaintiff in error the trial court gave the following, defendants' twelfth instruction: "Actual or real danger is not indispensable to the defense of one's relatives. Persons threatened with danger, or their relatives, must judge from appearances, and determine therefrom the actual state of things surrounding them or their relatives. If such persons act from honest fears, induced by reasonable evidence, they are not responsible for a mistake as to the extent of danger." This instruction expressly told the jury that "actual or real danger is not indispensable to the defense of one's relatives. Persons threatened with danger, or their relatives, must judge from appearances, and determine therefrom the act-

ual state of things surrounding them or their relatives." This instruction, considered in connection with the other instructions, fairly presented the law to the jury. In *Gainey v. People*, supra, this court said (page 277): "But it is a familiar doctrine that in passing upon a single instruction it must be considered in connection with other instructions bearing upon the same subject, and if, when thus considered, it appears the law has been fairly presented to the jury, the court will not reverse because such instruction does not contain all the law relating to that particular subject, unless, under the peculiar circumstances of the case, the court is of opinion the jury may have been misled by it." *Klinney v. People*, 108 Ill. 519; *Appleton v. People*, 171 Ill. 473, 49 N. E. 708.

There was no error in giving the people's fourteenth instruction, under the foregoing authorities.

Objection is made to the people's twelfth instruction, in that it is claimed it directs the jury to find the defendants guilty of murder, instead of allowing them to pass upon the question whether the defendants were guilty of murder, or of the lesser offense of manslaughter. The instruction is as follows: "No provocation, by words only, addressed to the person killing, or to another in his presence, however opprobrious, will mitigate an intentional killing so as to reduce the killing to manslaughter; and although the jury may believe, from the evidence, that opprobrious epithets were used by the deceased to the defendant Wilbur McCoy in defendant Benjamin McCoy's presence, yet if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendants immediately or soon thereafter revenged themselves by the use of a dangerous and deadly weapon in a manner likely to cause the death of the deceased, and did thereby cause his death as charged, then the defendants are guilty of murder, and the jury ought so to find, unless they shall further believe, from the evidence, that said killing was reduced to manslaughter, or was justifiable upon other grounds, or by other than the use by the deceased of such opprobrious language." The objection is not well taken. This instruction obviates the objection urged by adding the words, "unless they shall further believe, from the evidence, that said killing was reduced to manslaughter, or was justifiable upon other grounds, or by other than the use by the deceased of such opprobrious language." Besides, the instruction is almost a literal copy of the instruction given in the series in the case of *Jackson v. People*, supra, which was approved by this court without the qualification contained in the foregoing instruction.

A similar objection is urged against the eighteenth instruction. The instruction begins, "If the jury believe, from the evidence, beyond a reasonable doubt," etc., and then recites certain facts which, if believed by the jury, must have excluded every possible ele-

ment of manslaughter or self-defense: "And if you further believe, from the evidence, that Benjamin McCoy was then and there present, and that he knew that his brother, Wilbur McCoy, was not in danger of his life, nor in danger of receiving great bodily harm, and that, knowing said facts, the said Benjamin McCoy interfered, and, with a deliberate mind and formed design to kill the deceased, did, with a revolver, shoot the deceased, then the defendant Benjamin McCoy is guilty of murder, and the jury should so find." The jury were instructed by the people's eighth and ninth instructions as to the statutory law concerning manslaughter, and were informed in the instructions as to the form of their verdict as to both murder and manslaughter, and were instructed in other instructions that the defendants could be found guilty of murder or of the lesser crime of manslaughter. Section 140 of the Criminal Code, defining murder and malice, was given, in the language of the statute, in the people's second instruction. This section defines express malice as follows: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof." The instruction in the case at bar requires the jury to believe that the homicide was deliberately and intentionally done, for it uses the words, "with a deliberate mind and formed design to kill the deceased," which is, in effect, with malice aforethought, and constitutes murder. In the case of *Peri v. People*, 65 Ill. 17, this court sustained an instruction which recited the facts in evidence, and which concluded, "Then the defendant is guilty of willful murder, and the jury should find him guilty of murder." In this case the jury were instructed, in other instructions, that they could find the defendants guilty of murder, or could find them guilty of manslaughter, and could not have been misled.

It is insisted that the trial court erred in refusing defendant's first, second, twelfth, and thirteenth instructions. The first and second refused instructions are embodied substantially in the twenty-sixth, twenty-seventh, and seventh of defendants' given instructions. The defendants' seventh modified instruction was as follows: "When a man's conduct may as consistently and as reasonably, from the evidence, be referred to one of two motives, one criminal and the other innocent, it is your duty to presume that such conduct is actuated by the innocent motive, and not the criminal." This covered sufficiently the idea embraced in the twelfth refused instruction. The thirteenth refused instruction is, in effect, that if there is a reasonable doubt in the minds of the jury as to which one of several persons, or which one of the defendants, fired the fatal shot, then they must acquit the defendants. The seventh instruction given for the defendants covers substantially the same legal principle,—that, if the shot was fired by one of a crowd, or if the jury

had any reasonable doubt, from the evidence, as to who fired it, their verdict should be not guilty. The threats made by plaintiff in error, shortly before the homicide, against deceased, were competent for the purpose of showing the animus with which the killing was done, and that an unfriendly feeling existed on the part of plaintiff in error against the deceased. Whether the threats were the result of momentary anger,—a slight difference on some trifling matter, such as would be likely to leave behind no trace of ill will,—or were the expression of a deliberate intention, was for the jury to determine, under all the circumstances.

The remarks made by the state's attorney, as found in the abstract, are not sufficient to warrant a reversal of the judgment.

The plaintiff in error claims it was error to allow the revolver to be taken by the jury. The revolver, and the bullet taken from the brain of the deceased, were both introduced in evidence. The defendants made nothing but a general objection, which was overruled, and the revolver and bullet were admitted in evidence. It was proper for the court to allow the revolver and bullet introduced in evidence to go to the jury. In the case of *Yates v. People*, 38 Ill. 528, cited by plaintiff in error, the pistol had not been introduced in evidence, and was sent to the jury to experiment with, without the knowledge of the court, the counsel, or the prisoner,—an entirely different state of facts from the case under consideration.

After a careful consideration of the entire record, and believing that substantial justice has been done, and finding no substantial errors in the proceedings of the circuit court, the judgment will be affirmed. Judgment affirmed.

(175 Ill. 562)

ILLINOIS CENT. R. CO. v. TOWN OF NORMAL.

(Supreme Court of Illinois. Oct. 24, 1898.)

EMINENT DOMAIN — MUNICIPAL CORPORATIONS — RAILROADS — CONDEMNATION PROCEEDINGS — RIGHT OF WAY — STREET CROSSING — DAMAGES — EVIDENCE.

1. A section house on the right of way of a railroad company presents no obstacle to the condemnation of the land on which it is situated for a street crossing.

2. In a proceeding by a city to condemn land for the opening of a street, it is not necessary that the cost of such improvement shall be estimated by a commission.

3. A railroad company, on whose right of way was located a section house, had no ground of complaint because the occupant of such house was not made a party to a proceeding to condemn the land on which it was situated for the opening of a street across such right of way.

4. Where the testimony as to the value of the property taken under condemnation proceedings was conflicting, and the amount of compensation allowed by the court was supported by the evidence, the judgment will not be disturbed, on appeal.

5. In the condemnation of a railroad right of way for a street crossing, the market value

of the land for general purposes cannot enter into the estimate of compensation, as the railroad company continues to own such property, and the public acquires only the right to use it jointly with such company, and only as a crossing.

6. The fact that a portion of the right of way of a railroad company, required for a street crossing, was occupied by a section house and its appurtenances, did not entitle such company to any more compensation for the land taken, aside from the structures and other improvements thereon, than for any other part of its right of way, where the evidence showed that such particular location was not necessary for the use thereof by the company.

Appeal from McLean county court; R. A. Russell, Judge.

Proceeding by the town of Normal to ascertain the amount of compensation to be made by it for the opening of a street across the right of way of the Illinois Central Railroad Company. From the judgment rendered, the railroad company appeals. Affirmed.

Williams & Capen (C. V. Gwin, of counsel), for appellant. R. L. Fleming (O. R. Trowbridge and J. A. Bohrer, of counsel), for appellee.

CARTER, C. J. This is an appeal from a judgment of condemnation entered on a petition filed by the town of Normal, asking that the just compensation to be made by it for the opening of Poplar street, across appellant's right of way, according to an ordinance passed by the town authorities, be ascertained by a jury. Appellant filed a cross petition, claiming damages for a car house or out house that would be cut in two by the opening of such street, and also for a section house standing on the land to be taken, and for a well appurtenant thereto, but not on the line of the proposed street crossing. Appellant also made a motion to dismiss the proceedings—First, because the property, having been appropriated to a public use by the erection of the section house, was exempt from condemnation; second, because the commissioners appointed by the town to estimate the cost of the improvement had not taken into consideration the value of the improvement; and, third, because the occupant of the section house was not made a party to the suit. The court took the motion under advisement, and, after hearing the evidence, a jury having been waived, overruled the motion, found the just compensation for property taken to be \$225, and the damage to property not taken nothing.

The first alleged error in overruling the motion to dismiss is not seriously urged, and we are referred to no authorities. This house was not necessary for the operation of the railroad, and required no particular location either on or off of its right of way, and the railroad company could not have condemned land for such a use. *Lewis, Em. Dom.* § 170. It follows, therefore, that the erection of such a house by the company pre-

sents no obstacle to a condemnation for a street crossing.

The second reason urged for dismissal is also untenable. Section 5 of article 9 of the act for the incorporation of cities and villages specifies what such petitions shall contain, viz. a copy of the ordinance, certified by the clerk under the corporate seal; a reasonably accurate description of the property to be taken or damaged; and the names of the owners or occupants thereof, so far as known to the board or officer filing the petition. No estimate of cost is necessary. This point has been expressly decided adversely to appellant's contention in *City of Danville v. McAdams*, 153 Ill. 216, 88 N. E. 632.

The third ground is not supported by the evidence. It is not clear whether the alleged tenant moved in before or after the filing of the petition. At any rate, the court below was justified, from the evidence, in finding that the board or officer filing the petition did not know the name of the occupant, if there was any, although proper diligence was used to ascertain the fact. In the motion to dismiss, no one is named as tenant, and it does not appear from the petition that any party has been omitted. The statute does not require that persons whose interests are subsequently discovered shall be made parties on motion of the petitioner. It provides that the jury shall ascertain the compensation to be paid them, whether named in the petition or not, provided such person files a statement of his interest, and is admitted as a party to the suit. This was not done here, and appellant certainly cannot complain, as its interests are not affected thereby. The motion was properly overruled.

The judgment of the court as to the compensation and damages to be paid is assigned for error. It is contended that the compensation for taking the section house is inadequate, and not warranted by the evidence, and that the court should have allowed something as damages to property not taken. The testimony as to the value of the car house and section house was conflicting. The court heard the evidence, and saw the witnesses, and we think the amount of the compensation found is supported by the evidence. It was for the court, sitting as a jury, to weigh the conflicting statements, and the amount allowed is not so inadequate as to justify a reversal on that account. *Braun v. Railroad Co.*, 166 Ill. 434, 46 N. E. 974; *West Chicago St. R. Co. v. City of Chicago*, 172 Ill. 198, 50 N. E. 185.

Appellant claims that it should have been allowed a sum equal to the value of a town lot situated in the vicinity of this street crossing as compensation for the land taken, because it occupied the land with a section house, which had formerly been used as a dwelling house for its employes, and which it intended again so to use. In the condemnation of a railroad right of way for a street

crossing, the market value of the land as land cannot enter into the estimate of compensation, for the reason that such property cannot be sold for general purposes, and by the condemnation the public acquires only the right to use it jointly with the railroad company, and only as a crossing. *Chicago & N. W. Ry. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *Illinois Cent. R. Co. v. Village of Lostant*, 167 Ill. 85, 47 N. E. 62. Notwithstanding the condemnation, the company continues to own it, with the right to use it for its corporate purposes, not inconsistent with its use as a street crossing. *Chicago & N. W. Ry. Co. v. Town of Cicero*, supra. The evidence shows that that particular location for the section house was not necessary for its use by the railroad company. The company was not therefore entitled to any more compensation for the land taken, aside from the structures and improvements, than for any other part of its right of way. The well (or cistern) was not itself taken or damaged, but it was appurtenant to the section house, and whatever damages appellant may have sustained on account of the separation of the well from the section house was properly included in the compensation for the property taken. *Railway Co. v. Ward*, 128 Ill. 349, 18 N. E. 828, and 21 N. E. 562. The evidence tended to show that it would still be of use to appellant. No propositions to be held as law in the decision of the case were submitted by the petitioner, and we find no error in the ruling of the court in modifying or refusing propositions submitted by the defendant. The judgment of the county court will be affirmed. Judgment affirmed.

(176 Ill. 40)

BOYD v. BOYD et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

TENANCY IN COMMON — GUARDIAN AND WARD — ADVERSE POSSESSION.

1. Where one co-tenant in possession obtains a deed to the common property from one claiming an adverse interest, the interest so acquired inures to the benefit of the co-tenants.

2. A co-tenant in possession may, after notice to his co-tenants, assert an adverse holding.

3. An infant 11 years old inherited an interest in land as co-tenant of his guardian and the latter's children, who, without notifying the ward of his (the ward's) interest, entered into possession, and afterwards obtained an adverse title, through a deed from an adverse claimant, and also through a tax deed. The ward failed to assert his interest for 18 years after the guardian entered into possession. Held, that he had not lost his rights.

Appeal from circuit court, Pike county; Jefferson Orr, Judge.

Bill for partition by James Boyd against John W. Boyd and another. Decree for defendants, and plaintiff appeals. Reversed.

A. G. Crawford, for appellant. Matthews, Higbee & Grigsby and Doocy & Bush, for appellees.

PHILLIPS, J. This was a proceeding in partition, begun October 5, 1889, by certain heirs of James Boyd, who died intestate in June, 1863, the owner of certain lands, leaving a widow, but no children. He left, surviving him, a father, John Boyd, two brothers, Robert and William Boyd, one sister, Sally A. Crook, and the children of a deceased brother, John Boyd, who died in the army, intestate, April 2, 1862, among which children was appellant, then seven years old, and the other minor children, for which minors Robert Boyd was appointed guardian about the year 1869, in the state of Indiana, where he and they at the time resided. The record is not clear, but it is understood that he removed from Indiana to Pike county, Ill., where the land in controversy is situated, bringing these minor children with him, about that time. Whether he removed to Illinois to look after his interest in the estate of his brother James as well as that of his wards is not stated, neither is it stated whether any letters were taken out on the estate of James Boyd. The widow inherited one-half of the real estate, the father two-twelfths, the three brothers and a sister one-twelfth each. The maiden name of the widow was Williams. She, after marrying a man by the name of Smith, who died, married John Brawley, who survived her, she dying, intestate, February 14, 1868, without children. Brawley inherited one-half of her estate which had not been conveyed by her before her death, and the remainder passed to her brothers and sisters. The only real defendants in this case, as stated by both parties, are John W. and David Boyd.

The bill alleges that James Boyd died seised in fee of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 5, the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 6, also the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the N. W. subdivision of the S. W. $\frac{1}{4}$ of section 6, said to contain 58 acres, all in township 5, range 6 W. of the fourth P. M., in Pike county, Ill. The answer of defendants admits that James Boyd died seised in fee of all of said lands except the N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 6, which, it is alleged, he never owned, but that it was owned by one James R. Dutton, who conveyed the same to the defendants June 4, 1887. It avers that the widow of James Boyd, and her surviving husband, John Brawley, conveyed certain of the lands, which title, by mesne conveyances, came to the defendants; that John W. Boyd owns in fee simple, with a perfect chain of title, certain of said lands, and that the lands of which James Boyd died seised are held in fee by John W. and David Boyd and two others, who afterwards conveyed to them; that complainants do not now have, and never had, any interest in said lands, etc. The answer does not set up the statute of limitations. It is observed that the answer admits James Boyd was seised in fee,

at the time of his death, of all of said lands except the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6. The evidence shows, as to this tract, that James Boyd was in possession of it at his death, under claim of deed from the swamp-land commissioners; that his widow took possession thereof immediately after his death; that she conveyed an undivided $\frac{1}{2}$ of it January 14, 1864; and that John Boyd, the father of James Boyd, deceased, and William Boyd, the brother, quitclaimed the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, November 24, 1868, to Robert Boyd, who took possession, and died in 1887 or 1888. John W. Boyd now claims to own the N. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, and David Boyd the S. $\frac{1}{2}$ of the same tract, both claiming title, as is understood, through judicial sales made to the latter in 1887, on sale of interest of one Kern, whose interest therein does not appear, or how he acquired it; to the former, John W. Boyd, through a sheriff's sale of interest of one Purcell, who by mesne conveyances had acquired the interest of the widow. This latter deed was made in 1881. In this proceeding, these appellees do not claim title to the said tract through their father, but through these deeds, a deed from one Dutton of June 4, 1887, and the statute of limitations. The title to the other tracts they claim by adverse possession for 20 years, and by color of title, possession, and payment of taxes for 7 years, etc. This defense was not set up in the answer, and leave is asked to file an amendment setting up such defense here, on leave taken in the court below at the time of trial, but not made. The case seems to have been tried below as if this defense was interposed, and, as we understand the effect of the request of the appellant, the case is so to be heard here.

It appears that in the year 1868 one Purcell and Robert Boyd obtained a deed from the heirs of James Boyd, deceased, other than these complainants, to the land now under consideration; that on September 20, 1871, Purcell, who in the meantime had acquired the undivided one-half interest of Robert Boyd, conveyed by quitclaim deed to John W. and David Boyd, the sons of Robert, and at Robert's request, all his interest in and to the undivided three-fourths of said land, which was the full interest he then claimed to own, and thereupon they entered into possession of the same. In 1878, John W. Boyd, who in the meantime had acquired the interest of David Boyd in the said lands, permitted the undivided one-fourth interest thereof to be sold for taxes, on the advice of his attorney, who bought the same in for him, but in the attorney's name, and thereafter, on March 4, 1881, obtained a tax deed therefor, and on the same day quitclaimed it to John W. The explanation of this proceeding is that, years before, the Williams heirs, who inherited from the widow of James Boyd, deceased, had agreed to make a deed of their interest, but had failed to do so. It further

appears that John W. and David Boyd had continued in possession of these premises from the time they took possession, in 1871, had paid the taxes, and received the rents according to their respective interests, and had made improvements in the premises. The evidence shows that in 1863, when James Boyd, the owner of the common source of title to the land last above described, died, under which title Robert Boyd as well as these defendants took possession, this appellant and his uncle Robert Boyd, resided in Indiana. After the death of appellant's father, John Boyd, and when appellant was about 11 years of age, Robert Boyd was appointed his guardian. His mother had died some time before, in 1861, and his father had remarried. When asked his stepmother's name, he replied: "I think her name was Sarah. My uncle [Robert Boyd] was our guardian, and took us away when I was not very large, and I have not seen her since." The appellant was born in 1856, and therefore was not of age until 1876. The guardian, as understood, brought the children to Illinois, when he removed from Indiana, and, as inferred, continued to exercise some sort of parental control over them until they were of age. John W. Boyd, one of these defendants, testified he was their guardian during their minority. There is no evidence in this record that he, or these defendants, their cousins, ever informed these wards of their interest in any of this land, and there is no evidence to show when they discovered it. This guardian, as well as his sons, evidently knew that these children of John Boyd inherited the interest of their father, who was a brother of James Boyd, deceased, under whose claim of title, directly or indirectly, they, the said John Boyd and sons, had taken possession, and it would require harsh criticism if we were to assume that this guardian, or his sons, intended to take advantage of their dependent condition and ignorance. They resided in Indiana at the time of their uncle's (James Boyd's) death. It appears from the evidence they had never seen him, and, of course, knew nothing in regard to his property or their relation to or interest in it. They were brought to Illinois by their guardian when mere children, and had no one to look after their interests, other than their guardian and these cousins, their father and mother both being dead. The fact that as late as 1878 the interest of the Williams heirs in this land, who stood in no such relation to them as did this appellant, was attempted to be obtained, avowedly through a tax deed, on a failure to comply with an agreement made on a consideration passed, as claimed, indicates a recognition of an outstanding interest in these heirs, for concededly their interest had never been acquired, nor an agreement made to acquire it. If, therefore, this appellant, who alone appealed, was a co-tenant of appellees, the tax deed would be void (*Bracken v. Cooper*,

80 Ill. 221), and the other deeds, obtained from strangers to the common title, under which they took possession, would be considered as obtained for his interest.

In *Freeman on Co-Tenancy* (2d Ed., § 152) the rule is laid down that, where one comes into possession of lands under a common title with others, such title cannot be assailed while he so remains in possession, the principle being the same as that a tenant cannot assail the landlord's title. Nor, as laid down in section 154, can such co-tenant so holding possession purchase an outstanding title, and assert it against his companion in interest. This rule as to taking possession under common title is approved in *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674. It is further said by the above author (section 154) that, if such co-tenant enters into possession under an outstanding title, the rule is different, and in such case he can invoke the statute of limitations as a bar. This section 154 is quoted with approval in *Montague v. Selb*, 106 Ill. 49. Where one alone so takes such possession, pays taxes, receives rents, and makes some improvements, it will not be presumed to be adverse, but will ordinarily be held to be for the benefit of all. *Sontag Case*, supra, and cases there cited. As held in *Bracken v. Cooper*, supra, it is not necessary, in order to enforce the above rules, that the interest of the co-tenant should accrue under the same instrument or act of the law. This doctrine is approved in *Montague v. Selb*, supra. It is true, the law recognizes that a co-tenant does not always continue to remain in possession as a co-tenant only, but may assert, with direct or implied notice to the co-tenant, an adverse holding. Whether he has declared by words or acts that he holds adversely is a question of fact. That is often a difficult matter to determine, when the original entry was apparently or confessedly that of a co-tenant. As is said by *Freeman* (section 232): "In such cases, as there is nothing to give notice that the entry was hostile, in order to show that a subsequent possession became adverse a state of facts must be proved from which an actual ouster is directly established, or from which such ouster may be inferred." Manual ousting, by the denial of the rights of a co-tenant, made to him directly or brought to his knowledge, when accompanied by an exclusive possession, is sufficient to warrant a finding of ouster. *Freem. Co-Ten.* §§ 237, 238. It is said in section 242 that "the facts which will sufficiently prove such ouster and adverse possession [by inference] will vary according to the different circumstances of the parties, and no definite rule can be laid down by which all cases can be governed."

It is said, however, as a rule, long-continued possession, uninterrupted, with the knowledge of the other co-tenants, and without claim or demand for possession or participation in profits, will ordinarily furnish sufficient evi-

dence of ouster. This doctrine, however, is not based on a legal, but on a natural, presumption,—that one will assert his rights. But he must first know his rights. This rule is recognized in *Littlejohn v. Barnes*, 138 Ill. 478, 28 N. E. 980, and *Baldwin v. Ratcliff*, 125 Ill. 376, 17 N. E. 794. In the latter case, the one setting up the bar of the statute first entered as absolute owner, and in the former case the grantor of the appellee took possession under his grantor, who claimed to be the owner at the time. In both these cases the important element existed that the claimants knew their rights at the time, and knew of the attitude the parties in possession always had assumed towards the land. There was no such relation between those parties as existed between the parties in this case. There is no evidence, as heretofore stated, that the appellant, though brought from Indiana by Robert Boyd, his guardian, when a mere child, was informed of his interest in this land, which information it was both a moral and legal duty to impart to him. He not having this knowledge, and it not appearing that the assertion of title made by appellees was absolutely hostile to his title, he is not precluded from having his interests protected under the decree of the court. There was error in the decree of the circuit court of Pike county. That decree is reversed, and the cause is remanded. Reversed and remanded.

(174 Ill. 323)

PEOPLE v. MIDKIFF et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL—JURISDICTION—SUPREME COURT.

In an action on a bond sounding in damages, where a judgment entered in favor of defendant for costs is affirmed in the appellate court, an appeal will not lie to the supreme court in the absence of a certificate of importance.

Appeal from appellate court, Third district.

Action by the people of the state, for the use of the Phoenix Nursery Company, against Harry K. Midkiff and others. From a judgment in favor of defendants, affirmed in the appellate court (71 Ill. App. 141), plaintiff appeals. Appeal dismissed.

A. E. De Mange, for appellant. Mills Bros. and J. M. Gray, for appellees.

PHILLIPS, J. This is an action of debt on the official bond of Harry K. Midkiff, constable, of Decatur, Ill. The declaration alleges he wrongfully misused a writ placed in his hands, to the injury of the plaintiffs, by levying on their property a writ of attachment while it was issued against one D. G. Owens. The action of debt was for \$2,000, the penalty in the bond, and the damages were alleged to be \$1,000. Issue was made, and a trial had before a jury in the circuit court of Macon county, and verdict and judgment rendered in favor of the defendant. An appeal was prosecuted to the appellate

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court for the Third district, where that judgment was affirmed.

The action sounds in damages, and the only judgment entered against the plaintiffs was for costs in the circuit court. There is no certificate by a majority of the judges of the appellate court that this case involves questions of law of such importance, either on account of principal or collateral interests, that it should be passed upon by the supreme court. There is therefore no jurisdiction in this court on this appeal. *Baxtrom v. Railway Co.*, 117 Ill. 150, 7 N. E. 268; *Tucker v. Board*, 154 Ill. 598, 39 N. E. 563; *Fisher v. Enamel Co.*, 163 Ill. 387, 45 N. E. 249; *Smith v. Harris*, 113 Ill. 136. It is not requisite that we should repeat the reasoning contained in the opinions in support of this proposition. The appeal from the appellate court for the Third district is dismissed. Appeal dismissed.

BOGGS, J., took no part in the decision of this case.

(175 Ill. 585)

PEOPLE ex rel. AKIN, Attorney General, v. LOEFFLER, City Clerk.

(Supreme Court of Illinois. Oct. 24, 1898.)

STATUTES—IMPLIED REPEAL—VALIDITY—MUNICIPAL CORPORATIONS—CIVIL SERVICE—CLASSIFICATION—JUDGMENT—ESTOPPEL.

1. City and Village Act, art. 7, § 22 (1 Starr & C. Ann. St. [2d Ed.] p. 732), permitting a city clerk to appoint his subordinates, was by implication repealed by Civil Service Act March 20, 1895, providing that the subordinates of city officers shall be chosen from persons selected by civil service commissioners after an examination as to their qualification.

2. Civil Service Act March 20, 1895, does not require an illegal test of applicants for office, within Const. art. 5, § 25, which, after prescribing the oath to be taken by civil officers, provides that no other oath, declaration, or test shall be required.

3. Civil Service Act March 20, 1895, does not, as an amendment to Incorporation Act 1872, by omitting to mention each section of the act repealed, conflict with Const. art. 4, § 13, providing that no law shall be repealed or amended by reference to its title only, but that the section amended or repealed must be inserted in the new act, as the constitutional provision does not apply where the new act does not refer to the old law and is clear and complete in itself.

4. Civil Service Act March 20, 1895, does not, by creating a different tenure of office, conflict with Const. art. 5, § 24, which provides that officials shall hold their office during the pleasure of the appointing power or for a fixed period.

5. Civil Service Act March 20, 1895, does not abridge the privileges or immunities of citizens in violation of the fourteenth amendment of the United States constitution, on the ground that it allows only persons applying therefor to obtain an office, and does not permit public officers to select the assistance necessary to the performance of their official duties.

6. A classification under Civil Service Act March 20, 1895, is sufficient if, after designating what office shall belong to the unclassified service, it provides that all other offices or employment, permanent, temporary, or substitute, shall constitute the classified service, and divides the classified service into grades and divisions, covering all subordinate positions.

7. An official who made a requisition upon the civil service commission for persons to fill positions in his office cannot afterwards claim that the classification made by the commission does not include subordinate positions in his office.

8. A judgment rendered in a submission by the city clerk and his employés and the comptroller, ordering the city comptroller to audit and allow salary claims of the city clerk's employés not appointed under Civil Service Act March 20, 1895, does not estop the people, on their petition for mandamus, to compel the city clerk to make appointments in conformity with the civil service act.

Original petition for a writ of mandamus by the people of the state of Illinois, on the relation of Edward C. Akin, attorney general, against William Loeffler, city clerk of the city of Chicago. Writ awarded.

This is an original petition for mandamus filed in this court by the people, on the relation of the attorney general, against William Loeffler, city clerk of the city of Chicago, alleging that the city clerk has neglected to notify the civil service commissioners of vacancies in the positions or places of certain clerks and other employés and subordinates in his office, and to make requisitions on said commissioners for the names of persons to fill such vacancies, as required by the civil service law and the rules made in pursuance thereof; that the city clerk claims that such places and positions where vacancies have occurred, and the other places and positions in his office, are not within the scope and meaning of the civil service act, and that he has the sole power and authority to fill all vacancies in said places and positions, and to determine what persons shall be appointed to fill said positions and vacancies, and to select such persons, without complying with the civil service law in force in the city of Chicago; that, in violation of the civil service act, he has assumed to fill some of the vacancies by appointing persons not on the eligible lists prepared by said commissioners, and not designated or certified by them for appointment or promotion; that he has attempted to appoint one Nathan Aronson and one Philip Klein as clerks in his office, neither of whom has been examined or certified, or is on any eligible list or register, or otherwise entitled to such appointment; that the said offices and places under said city clerk are within the classified service of said city. The petition further alleges that the respondent, the city clerk aforesaid, in April, 1897, made requisitions on the civil service commissioners for the names of certain persons to be appointed or employed by him as clerks and other employés and subordinates in his office, and to fill vacancies therein; that having been informed by said commissioners in each of said cases that there were no eligibles with whom to fill said vacancies, and having been authorized by said commission to make temporary appointments under said act and rules, he appointed and employed certain persons to fill said places and positions or vacancies;

that 60 days have long since expired since said appointments, and that regular appointments can be made under said act; that said commissioners have had, during the last 10 months, lists and registers of persons who have passed the examinations as candidates for certain positions or vacancies, from which said commission could and would certify the names of persons to fill the same, if notified thereof or called upon to make such certifications; that no requisition has been made to them to fill said vacancies since April, 1897, and no certification of the persons so appointed by the city clerk has been made by the commission to fill the same, but that said commissioners have certified the names of persons as required by the act to said city clerk for appointment to several of said places, who were not accepted or appointed by him; that he has made no report of the same, as required by the rules, and that said places are occupied by parties appointed contrary to the act and rules; that said city clerk threatens to, and will, appoint clerks and other employés and subordinates without reference to the registers or lists of positions or places prepared by the civil service commission, and without making requisitions upon the commission for the names of eligible candidates for such positions. The petitioner prays that a writ of mandamus may issue to the clerk, directing him to notify the civil service commission of the city of Chicago of all vacancies existing, or which at any time shall exist, in places, positions, or offices of deputy city clerk, clerks, or other employés or subordinates in his office, and to make requisitions upon the civil service commission of said city for certifications of persons to fill such positions (including vacancies), etc., and directing him to appoint to such offices, positions of employment, and to vacancies therein only such persons as shall be certified to him by such civil service commissioners, and to make no appointment except under and according to the provisions of the civil service act and the rules of said commissioners, etc. An answer has been filed by the city clerk to the petition for mandamus, and a replication has been filed to said answer by the petitioner. The answer sets up matters of fact and matters of law in defense. The nature of these defenses appears in the opinion of the court.

Edward C. Akin, Atty. Gen. (John W. Ela, Newton A. Partridge, and Edwin Burritt Smith, of counsel), for petitioner. Charles S. Thornton and Edward J. Hill, for respondent.

MAGRUDER, J. (after stating the facts). 1. It is claimed by the respondent that the civil service act has no application to the various clerks and subordinates in the office of the city clerk of Chicago; that the clerks and subordinates in that office can be appointed by the city clerk himself, without reference to the requirements of the civil

service act. This contention is based upon section 22 of article 7 of the city and village act. That section is as follows: "The comptroller (if there shall be one), the clerk, treasurer and collector, shall, severally, appoint such various clerks and subordinates in their respective offices as the city council or board of trustees may authorize, and shall be held, severally, responsible for the fidelity of all persons so appointed by them." 1 Starr & C. Ann. St. (2d Ed.) p. 732. It is claimed on the part of the respondent that section 22 is still in force, and was not repealed by the civil service act passed in 1895.

It may be said that, in a certain sense, the power to appoint these clerks and subordinates still remains with the city clerk. The civil service act does not take away the power of appointment absolutely, but qualifies such power by requiring appointments to be made from persons who have been ascertained to be competent by examinations under the civil service act. Under the provisions of the civil service act, the city clerk still appoints his clerks and subordinates, and, as the power of appointment thus remains with him, it cannot be said that it has been altogether taken from him by the civil service act, even if that act applies to positions in his office. Neither the city clerk, nor any other public officer, should appoint men to subordinate positions in his office, unless they are qualified to perform the duties of such positions. The civil service act merely substitutes the results of the examinations required by such act for the uncontrolled will of the appointing officer in the matter of selecting those who are to perform the required duties. We are of the opinion that the civil service act applies to the clerks and subordinates in the office of the city clerk, because section 22, above referred to, has been repealed by that act, so far as the mode of selecting appointees is concerned.

The provisions of the civil service act are in conflict with section 22 of article 7 of the city and village act. Under section 22, the city clerk had the power to appoint his employes, and such appointments were during his pleasure. But the civil service act establishes a new system, by which all city employes are to be selected on account of their fitness and merit, as ascertained by examinations held under and in pursuance of the law. The act, which requires appointments thus to be made, is necessarily in conflict with an act which left such appointments to the uncontrolled will and discretion of the appointing power. It is true that there is no express repeal in the civil service act of said section 22. It is also true that repeals by implication are not favored. But the civil service act is subsequent in date, by a period of more than 20 years, to the city and village act; and, where there is an irreconcilable inconsistency between an older act and a later act, it will be presumed that the legislature intended by the latter to repeal the former.

A subsequent statute, which revises the whole subject of a former one and is intended as a substitute for it, operates as a repeal of the former, although there are no express words of repeal. The object of section 22, above referred to, was to designate a particular mode for the appointment of the employes of the city comptroller, city clerk, city treasurer, and city collector. That mode may be termed the pleasure of the appointing power. The object of the civil service act is to designate another and different mode of appointing such employes, and that mode is fitness and merit, as ascertained by free and public and competitive examinations. Where, by the language used in a statute, a thing is limited to be done in a particular manner, "it includes a negative that it shall not be done otherwise." Where the appointments to all subordinate positions under the city government are required by an affirmative enactment to be made upon the basis of merit and fitness as ascertained by examinations, there is necessarily included in such enactment a prohibition against appointments made at the will of the appointing power. The two methods of appointment thus indicated are so inconsistent with each other that section 22 and the civil service act, considered with reference to the positions therein named, cannot stand together, and therefore the repeal of section 22 is inferred from necessity. Section 87 of the civil service act provides that "all laws or parts of laws which are inconsistent with this act, or any of the provisions thereof, are hereby repealed." Laws Ill. 1895, p. 94. The insertion of this provision in the civil service act assumes that the new rule as to appointments is to some extent repugnant to some law enacted before the civil service act. Of course, there must be repugnancy between an older and a later act in order to make the latter operate as a repeal of the former, whether such a provision as section 37 is inserted in the later act or not. But, where such a provision as section 37 is inserted in a subsequent law, courts are less inclined against recognizing repugnancy between such subsequent law and another prior law upon the same subject. The principles thus announced are sustained by the following authorities: *People v. Nelson*, 156 Ill. 364, 40 N. E. 957; *Suth. St. Const.* §§ 137, 138, 140, 143, 146, 147.

That there is such repugnancy, as is above referred to, between said section 22 and the provisions of the civil service act, will appear from an examination of the law. Section 8 of the civil service act provides that "said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act." The city comptroller, the city clerk, the city treasurer, and the city collector are city officials and a part of the city government. Therefore the subordinate positions and places of employ-

ment under these officials come under the designation of "offices and places of employment in such city." All the offices and places of employment in such cities, and not a part of them, except those mentioned in section 11, are to be classified under the civil service act. It necessarily follows that the subordinate places under the city clerk fall among the places of employment which are subject to classification. By the terms of section 11, the four officials named in section 22 are not included in the classified service, but the exceptions mentioned in section 11 do not include clerks and subordinates in the offices named in section 22. It is difficult to see how an act which provides that all offices and places of employment in the city, except those named in section 11, shall be classified by the civil service commissioners, can be consistent with section 22 of the city and village act, which provides, in substance, that the clerks and subordinates of four particular city officials shall be appointed in a different mode from that contemplated by such classification. A subsequent law, which states that all of certain offices and places shall be classified, is certainly inconsistent with a prior law, which provides for appointments to a few of such offices and places, without mentioning classification. It being true that all city offices and places of employment are subject to classification, and it being also true that the clerks and subordinates under the four officials named in section 22 hold city offices and places of employment, it necessarily follows that the latter are subject to classification under the civil service act.

Section 3 further provides that "the offices and places so classified by the commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." If no appointments to any of such offices or places shall be made except under and according to the civil service rules, and if the positions under the four officials named in section 22 are included in such offices or places, then the prohibition against any appointments being made, except under and according to such rules, applies to the subordinates and clerks mentioned in section 22, as well as to all other clerks and subordinates in the city departments.

Again, section 29 of the civil service act provides: "No accounting or auditing officer shall allow the claim of any public officer for services of any deputy or other person employed in the public service in violation of the provisions of this act." The officers named in section 22 of the city and village act are public officers of the city, and therefore the prohibition against the allowance of the claim of any public officer for services of any deputy, or other person employed in the public service, applies, as a matter of course, to the clerks and subordinates under said four officials.

Section 31 provides: "No comptroller or other auditing officer of a city, which has adopted this act, shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employé of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor." Section 32 also provides: "No paymaster, treasurer, or other officer or agent of a city, which has adopted this act, shall willfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employé of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor." The expression in sections 31 and 32, "according to the provisions of law," does not refer to any law generally, but refers to the provisions of the civil service act. An examination of these sections in connection with the rest of the act can lead to no other conclusion. "Statutes must be so interpreted as to give effect to every part thereof, and leave each part some office to perform; and any construction which deprives any part of a statute of effect and meaning, when it is susceptible of another interpretation, is held without support of any authority." *People v. Angle*, 109 N. Y. 564, 17 N. E. 413; *Wilcox v. People*, 90 Ill. 186; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73. If, under section 29, no claim for services of any deputy or other person employed in the public service can be allowed in violation of the civil service act, then the payment of such claim is equally forbidden. It is absurd to say that a claim shall not be allowed, and, at the same time, to say that the payment of such claim may be made. The prohibition contained in sections 31 and 32 must be read in connection with the prohibition contained in section 29. The prohibition against a payment, or the approval of a payment, to an employé in the public service, unless such person is occupying his office or place according to "the provisions of law," is wholly unnecessary, unless the word "law" refers to the civil service act. His office or place in the public service could not exist, unless there was some law providing for it. Therefore, to give to sections 31 and 32 such a meaning as is consistent with the other provisions of the act, the persons to whom payment is therein denied must be persons not occupying their offices or places according to the provisions of the civil service act, and who are not entitled to payment for their services under that law. This being so, sections 31 and 32 refer to the clerks and subordinates in the employment of the city clerk, comptroller, collector, and treasurer, as well as to all other city clerks and employés. It is unnecessary to continue the examination of the civil service act, as what has already been said sufficiently indicates that the provisions of that act were intended to supplant and be

substituted for section 22 of the city and village act.

Section 12, which has reference to the removal or discharge of officers or employes in the classified service of any city, closes with these words: "Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe keeping of which another person has given bonds." It seems to be contended by the respondent that, in view of the language thus quoted from section 12, the legislature intended that the clerks and subordinates named in section 22 of the city and village act should not be covered by the civil service act. But it is clear that the words thus quoted from section 12 refer to removals or discharges, and not to appointments. Appointing officers are thereby allowed greater freedom as to the removal of subordinates and clerks, but their appointment is not thereby affected. While an appointing officer may have the right to discharge such persons as are above named, yet, when the vacancy is made by a discharge, it must be filled with a person who has been examined under the provisions of the act. The words quoted directly recognize the fact that those persons in the service of the city who have the custody of public money are included in the provisions of the act. If they were not to be included in the classified service, such a provision would be unnecessary. Persons not embraced within the provisions of the act can be removed without regard to any of its provisions. What persons should be embraced within the terms of the act, whether persons having the custody of public money or otherwise, is a matter of policy, to be decided by the legislature. Our conclusion upon this branch of the case is that the clerks and subordinates in the respective offices of the city clerk, comptroller, treasurer, and collector, are subject to classification under the civil service act.

2. It is contended that the civil service act is invalid, as being in conflict with the constitution of Illinois. This court held the law to be constitutional in the case of *People v. Kipley*, 171 Ill. 44, 49 N. E. 229. Many of the grounds upon which the constitutionality of the law is here attacked are the same as those which were considered in the *Kipley* case. We have no disposition to review the conclusion there reached, and decline again to discuss the questions there settled. One or two points, however, are made by counsel which were not suggested to the court in the *Kipley* case, and these will be briefly discussed.

In the first place, it is said that the act is unconstitutional as requiring tests for appointment of applicants to positions in the public service which are prohibited by the constitution. The constitutional provision which is thus alleged to be violated is section 25 of article 5, which provides that all civil

officers, except members of the general assembly and such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe an oath, which is set forth in said section, which section contains these words: "And no other oath, declaration or test shall be required as a qualification." The meaning of the word "test," as here used, was considered in *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, and 8 N. E. 788. The meaning of the word is also discussed in *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274. The examinations provided for in the civil service act are not such tests as are contemplated by the constitutional provision here referred to. Upon this subject we content ourselves with quoting what is said in *Rogers v. Common Council*, supra: "In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our constitution."

In the second place, it is said that the civil service act is an amendment of the general incorporation act of 1872, and, as such, is in violation of that part of section 13 of article 4 of the constitution which reads as follows: "No law shall be repealed or amended by reference to its title only, but the law repealed or the section amended shall be inserted at length in the new act." The contention of counsel for the respondent is, as we understand such contention, that all the sections of the incorporation act of 1872, here alleged to have been amended, should have been repeated, as required by section 13. The contention thus made is without force. The mischief intended to be remedied by the provision of the constitution above quoted is that of the amendment of statutes by reference to their titles only, where the amendment in many cases cannot be understood without looking into the section amended. But where a new act on a subject is complete in itself and entirely intelligible, showing upon its face just what it is, and where its enactment has no reference to any prior law, it will not contravene any constitutional provision. An act complete in itself is not within the mischief designed to be remedied by the provision in question. *People v. Wright*, 70 Ill. 388; *Timm v. Harrison*, 109 Ill. 593; *English v. City of Danville*, 150 Ill. 92, 36 N. E. 994. The civil service act is complete in itself, and shows just what it is, so that in its enactment there is no contravention of the constitutional provision named.

In the third place, the act is said to be unconstitutional, upon the alleged ground that it is in violation of section 24 of article 5 of the constitution. Said section 24 is as follows: "An office is a public position, created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or ap-

pointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished." The position taken by counsel is that, under our constitution, there can be no office, unless the appointee holds the same during the pleasure of the appointing power or unless the appointee holds the same for a definite and fixed term of years. It is argued that, under the civil service act, offices may be held during good behavior, or until removal or discharge for cause, and that such a tenure of office is not recognized in our constitution. Counsel take the ground that, in view of the definition of "office" contained in section 24, no office in this state, state or municipal, can be held during good behavior, or until discharge or removal for cause, but must be held either during the pleasure of the appointing power or for a definite period of time. The civil service act has to do particularly with subordinate places of employment in the public service. It also concerns only the public service in cities, towns, and villages, and has no reference to the public service of the state at large. It particularly exempts from the classified service in cities elective officers and heads of the principal departments of the city. In a certain sense, therefore, the positions to which the civil service act has reference in the city government are places of employment rather than offices, in the strict meaning of the latter term.

Independently, however, of this consideration, the definition of "office," as contained in section 24, refers only to offices under the state government. This will be manifest from a consideration of all the sections of article 5 of the constitution, which is entitled "Executive Department." Constitutions, as well as statutes, are not to be interpreted according to the words used in particular clauses, but the whole instrument must be considered with a view to ascertain the sense in which the words are employed. *Wilcox v. People*, 90 Ill. 186. Section 10 of article 5 provides that "the governor shall nominate, and by and with the advice and consent of the senate (a majority of all the senators selected concurring, by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly." In *People v. Morgan*, 90 Ill. 558, we held that section 10 referred to officers or persons performing duties for the state, as contradistinguished from county, city, township, or other municipal officers. It cannot be doubted that the words "office" and "officer," as used in all the subsequent sections of article 5, refer to state officers. Section 23, immediately preceding section 24 containing the definition of "office," contains these words: "And all fees that may hereafter be payable by law for any services performed by any officer provided for in this article of the con-

stitution, shall be paid in advance into the state treasury." The requirement that the fees shall be paid into the state treasury amounts to a description of all the officers referred to in article 5 as officers of the state government, and not of county or municipal governments. In *People v. Morgan*, supra, we said (page 586): "When the general assembly creates a body of that character [a municipal government], it has the power to provide the manner of filling the offices for its government. The constitution having prescribed no particular mode, that body is left to select any means for the administration of government it thinks best adapted to that end. It may provide for election by the people, or may authorize any officer or person to fill the offices by appointment. That power has not been placed beyond legislative domain." Inasmuch as the definition of "office" in section 24 refers to state, and not to municipal, officers, there is no provision in the constitution prescribing any particular mode for the appointment of officers in municipal corporations. The legislature, therefore, may provide for the appointment of officers in the municipal government in the mode adopted by the civil service act. In the absence of any constitutional restriction, the power of the legislature is ample to provide the mode of appointment to be adopted in selecting municipal officers.

It is true that the definition given of an office in section 24 of the constitution may in some cases apply to an officer of a county or city or other municipality. The offices of city clerk, city treasurer, and city collector come within the definition laid down in said section 24. *Wilcox v. People*, supra; *City of Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363. But, so far as the definition given in section 24 operates as a restriction upon the mode of appointment to office, it has reference only to state officers.

We are, however, of the opinion that the definition of "office," as given in section 24, does not admit of the construction put upon it by the counsel for respondent. In section 24 an "office" is considered as the antithesis of a mere employment. The first sentence of the section states what an office is, while the second sentence refers to an employment as a mere agency. The words of section 24 were evidently inserted in the constitution of 1870 because of the decision of this court in *Bunn v. People*, 45 Ill. 397. In the *Bunn* Case the legislature passed an act appointing certain persons as commissioners to superintend the erection of a new state house, and the question arose whether or not such commissioners were officers, within the meaning of the constitution of 1848. It was there held that such commissioners were not officers, but mere agents or employes for a single and specific purpose, whose functions were at an end upon the completion of their work. An "office," as defined in section 24, is a public position which continues, and which does not end up-

on the performance of a particular duty. The words are, "continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed." In other words, an office is a position which does not end with the termination of the term of the person filling it, but its duties continue to be performed by the successor of such person, whether elected or appointed. The duties are continuing, and not temporary, like those of a mere employment or agency. In section 24 appointments during the pleasure of the appointing power are also placed in antithesis to appointments for a fixed time. But the words "fixed time," as here used, do not necessarily mean a definite period, as, for instance, one year, two years, or three years. On the contrary, they refer to a term of office which is established or settled, as contradistinguished from a term which depends upon the mere will or pleasure of the appointing power. A man who is appointed to hold his office during good behavior, or until removal or discharge for cause, occupies it for a settled and established term; and the time for which he occupies it is in a certain sense a fixed time, because it does not end at the pleasure of the appointing power. Even, therefore, if the definition in the constitution should be held to apply to offices in the municipal government, it cannot be said that appointments made under the provisions of the civil service act are not appointments made for a fixed time. Every person occupying a place or position under the terms of the civil service act is a person whose term of office is followed by a successor.

Counsel for respondent fail to distinguish between offices created by the constitution and offices created by statute. It is asserted that a right defined by the constitution is in the nature of a constitutional grant, and cannot be taken away by any authority known to the government. It is sought to apply this principle to the definition of an "office" contained in said section 24. In support of this position three cases are referred to, to wit: *Com. v. Gamble*, 62 Pa. St. 348; *Com. v. Mann*, 5 Watts & S. 403; *People v. Dubois*, 23 Ill. 547. By reference to each of these cases, it will be seen that the officers whose rights were therein considered were judges of courts, holding their office by virtue of constitutional provisions; and, by reason of this fact, it was held that the legislature had not the constitutional power to deprive a judge of his office and compensation, or to diminish his compensation during his continuance in office, or to limit or restrict his tenure of office. When an office is created by a statute, it is wholly within the control of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished and the compensation taken away from the incumbent, unless forbidden by the constitution. *People v. Lippincott*, 67 Ill. 333; *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704; *Crook*

v. People, 106 Ill. 237. As is well said by the learned author of the article on "Public Officers" in 19 Am. & Eng. Enc. Law, p. 418: "Where the manner of filling an office is prescribed by constitution, a different mode cannot be provided by legislative enactment; but if the manner of filling it is not prescribed, or if it is not an office of constitutional origin, it is competent for the legislature to declare the manner of filling it, either through the agency of an election by the people, or by appointment by such authority as it may deem just and proper, and in like manner to change from time to time the mode of election or appointment." In the absence of constitutional provision on the subject, the power of prescribing the manner of making appointments to office falls naturally and properly to the legislative department, and may be exercised by it. Id. pp. 421, 423, 428, 552; *Cooley*, Const. Llm. (6th Ed.) p. 228; *Tugman v. City of Chicago*, 78 Ill. 406.

Under the civil service act, all the offices and places of employment, which are provided for, are those of cities, towns, and villages, and are created by statute or ordinance, and not by special constitutional provision. The mayor of a city, and the city clerk, and the other officers of a city, are not officers of the state, within the meaning of the constitutional provision. The duties of state officers concern the state at large or the general public, although exercised within defined territorial limits, but the functions of municipal officers relate exclusively to the particular municipality. Although the statute grants the charter under which a city is organized and acts, yet "those elected in obedience to that charter perform strictly municipal functions, and do not act in obedience to state law, in the manner enjoined upon state officers." *Britton v. Steber*, 62 Mo. 370. The city and village act, which constitutes the charter of the city of Chicago, provides, in section 3 of article 6, that all officers of any city, except as therein otherwise provided, shall be appointed by the mayor, by and with the advice and consent of the city council. The power of the mayor to appoint is thus restricted and limited by the consent and action of the common council. It is difficult to see what difference there is in principle between such a restriction upon the power of appointment vested in the mayor and the character of the restrictions imposed by the civil service act. In the one case, the common council must, by its official action, consent to the appointment; in the other case, the civil service commissioners must certify to the eligibility of the applicant after examination, in accordance with the provisions of the civil service act.

3. It is next urged by counsel for respondent that the civil service act is in contravention of the constitution of the United States. The principal provision of the federal constitution, alleged to be violated by the act, is the fourteenth amendment, which is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Counsel for respondent have attached to their brief, addressed to this court, a brief addressed to the supreme court of the United States, wherein it was sought to review the case of *Kipley v. People*, recently decided by this court, and reported in 171 Ill. 44, 49 N. E. 229. Much of the brief addressed to the federal court is in review of conclusions already reached by this court in the *Kipley Case*, and, as presented here, amounts to nothing more than a petition for rehearing. We cannot consider an application for rehearing laid before us in this manner. With some difficulty we have endeavored to pick out the portions of the attached brief which discuss other positions than those already decided. Most of the brief of counsel, alleging a violation of the fourteenth amendment, proceeds upon the theory that public employment is property; but, as we have already held that public office is not property, we deem it unnecessary to further consider this view of the case.

As we understand counsel, they claim that the fourteenth amendment is violated by the civil service act in the following respects: First. It is said that the act "abridges the privileges and immunities of citizens of the United States, in that it renders all citizens who do not apply for office, or for place of employment, ineligible to appointment or for selection therefor, whereas it is the right and privilege of every citizen to hold office and serve the public." Second. It is said that the civil service act "deprives a duly elected and qualified officer of the right to select his subordinates, and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges, and immunities belonging and guaranteed by said constitutions, respectively, to every citizen thereof." Wherever civil service acts are in force, they provide for applications to be made by those seeking employment in the public service, and no question has ever been made that such acts violate any constitutional provision by reason of this feature. *Opinion of Justices*, 145 Mass. 587, 13 N. E. 15; *Foreman v. Advertiser Co.*, 83 Hun, 385, 31 N. Y. Supp. 947; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005; 6 Am. & Eng. Enc. Law (2d Ed.) pp. 90-92, and cases in notes; 19 Am. & Eng. Enc. Law, p. 414, and cases referred to in notes; *Throop*, Pub. Off. § 95, and cases referred to in notes. The only way by which a citizen can manifest his desire to hold a public position which is subordinate in character is by making application therefor. It is true that men are some-

times called to public positions by the unsought suffrages of their fellow citizens, or by the unsolicited selection of an appointing officer. All elective positions in municipal governments under the present act, whether derived by election of the people or by election of the city council, are exempt from the provisions of the civil service act. If a citizen is called upon to serve the public in a subordinate position by any appointing officer, he undergoes no hardship by submitting to an examination which shall determine whether he is qualified for such position or not. It is a mistake to suppose that every citizen has the right to hold office; it is only every citizen having the proper qualifications for the office who has the right to hold such office. The mode of determining whether such qualifications exist, as established by the civil service act, applies to all citizens alike, and therefore the rights and privileges of none in that regard are abridged.

The right of an elected and qualified officer to select his own subordinates is not a vested or private personal right. In *Butler v. Pennsylvania*, 10 How. 402, where the state of Pennsylvania, in 1836, passed a law declaring that canal commissioners should be appointed annually by the government, and that their term of office should commence on the 1st of April every year, the pay being four dollars per diem, and afterwards, in April, 1863, certain persons being then in office as commissioners, the legislature passed another law, providing, among other things, that the per diem should be only three dollars, the reduction to take effect upon the passage of the law, and that in the following October commissioners should be elected by the people, and where the commissioners claimed the full amounts during the entire year, upon the ground that the state had no right to pass a law impairing the obligation of a contract, the supreme court of the United States held that there was no contract between the state and the commissioners, within the meaning of the constitution of the United States, and said: "The appointment to, and the tenure of, an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good." In *Newton v. Board*, 100 U. S. 548, the supreme court of the United States said: "The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service, and it may in-

crease or diminish the salary or change the mode of compensation. The police power of the states, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character." The federal supreme court has thus recognized the power of the state to regulate and control municipal offices, and the terms and conditions upon which they may be held. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Cooley*, Const. Lim. (6th Ed.) p. 331.

The first paragraph of section 2 of article 4 of the federal constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The fourteenth amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." There is a difference between the privileges and immunities belonging to the citizens of the United States as such, and those belonging to the citizens of each state as such. The privileges and immunities of the citizens of the several states are those which concern the personal private rights of the citizen. The supreme court of the United States has said that "they may all * * * be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraint as the government may prescribe for the general good of the whole." *Slaughter-House Cases*, 16 Wall. 36. The privileges and immunities of the citizens of the several states "do not include within their meaning the right to hold office." "They mean that all citizens of the United States shall have the right to acquire property and hold it, and that this property shall be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected; that this property shall not be subject to any burdens or taxes not imposed on the property of citizens of the state." 3 Am. & Eng. Enc. Law, p. 253; *Wiley v. Palmer*, 14 Ala. 627; *Campbell v. Morris*, 3 Har. & McH. 554. If, therefore, the rights and immunities, as referred to in the fourteenth amendment, are the same rights and immunities referred to in section 2 of article 4, they have no application to the questions now under consideration, as they do not include the right to hold office.

It has, however, been held that "the privileges and immunities of citizens of the United States" are those which arise out of the nature and essential character of the national government, the provisions of its constitutions, or its laws and treaties made in pursuance thereof, and that it is these rights which are placed under the protection of congress by this clause of the fourteenth amendment. *Slaughter-House Cases*, 16 Wall. 36. The

doctrine has been otherwise expressed thus: "Whatever one may claim as of right under the constitution and laws of the United States by virtue of his citizenship is a privilege of a citizen of the United States. Whatever the constitution and laws of the United States entitle him to exemption from he may claim an immunity in respect to: * * * And such a right or privilege is abridged whenever the state law interferes with any legitimate operation of the federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal constitution or laws." *Cooley*, Const. Lim. (6th Ed.) p. 489, note 3; *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Cruikshank*, Id. 542; *Hall v. DeCuir*, 95 U. S. 485; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Ex parte Virginia*, Id. 339; *Meriwether v. Garrett*, 102 U. S. 472; *Minor v. Happersett*, 21 Wall. 162. Under the definition of "privileges and immunities," as applied to citizens of the United States, the fourteenth amendment can have no application to the questions here involved. The rights of the subordinate employees in a municipal government as to the holding of office, and the rights of municipal officers as to the power of appointing their subordinates or employees, do not come within the meaning of "privileges and immunities of citizens of the United States," as those words are used in the fourteenth amendment of the federal constitution.

It is furthermore claimed that the civil service act denies to citizens the freedom of political action, and makes it highly penal for them to take part in politics. This contention has reference to sections 21 to 28, inclusive, of the civil service act. The design of these sections is to prevent the solicitation of political contributions, and the levying of political assessments, and the abuse of official influence, and the purchase of positions in the public service. The constitutionality of these sections is not directly involved in this litigation. It is not contended that the present respondent, the city clerk, has been guilty of any violation of the sections last referred to. It will be time enough to consider their validity when a case arises, under either of them, which calls properly for their consideration. If either one or more of them should be held to be invalid, they are not so intimately connected with the rest of the civil service act as to make the whole void. Either one of the sections could be eliminated from the act without destroying the symmetry or the validity of the balance of the act. In *Ex parte Curtis*, 106 U. S. 371, 1 Sup. Ct. 381, the sixth section of an act of congress of August 15, 1876, prohibiting, under penalties therein mentioned, certain officers of the United States from requesting, giving to, or receiving from any other officer money or property or other thing of value for political purposes, was held not to be unconstitutional, and in

that case Mr. Chief Justice Walte said: "The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power." Our conclusion is that the civil service act is not in violation of the fourteenth amendment of the federal constitution.

4. It is claimed that the classification made by the civil service commissioners does not cover the clerkships and subordinate positions in the offices of the city clerk and city collector, and is not such a classification as is required by the civil service act. We do not regard this contention as having any force. The classification quotes section 11 of the civil service act, and provides that the offices and places excepted in section 11 shall constitute the unclassified service. It then provides that "all other offices and places of employment in said city, under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service." The classified service is divided into classes, based mainly upon the nature of the employment, the positions in one class being chiefly those of a permanent character, while the positions in the other class are more in the nature of temporary employments. The classes are designated as the official service and the labor service. The official service is divided into divisions, based upon the character of the service to be performed; and each division is divided into grades, based upon the amount of compensation. Among the divisions of the official service is division C, designated as "clerical service," including all positions of clerks and other persons, of whatever designation, rendering service as copyists, recorders, bookkeepers, stenographers, pages, messengers, or any clerical, recording, or similar service, whether paid by time for work done, or by the piece, or in any other way. Among the divisions of the official service, also, is division L, designated "miscellaneous service," including all the offices and places of employment coming under the provisions of said act, whatever the character and designation of the same may be, which are not included in any of the foregoing divisions of the official service, nor in the labor service, nor in the unclassified service. By this method, the position of every person in the classified service of the city can be readily and exactly pointed out. The classification is of the positions and places of employment, and not of the persons. A table has been prepared by the commissioners, showing the class, division, and grade of every position in the service. The city clerk and the city collector have themselves recognized the fact that the positions in their offices are embraced within the classified service as made by the civil service commissioners. In April and May, 1897, they made requisitions on the civil service commissioners for

persons to fill positions in their offices. They addressed communications to the civil service commission, asking it to certify to them, in accordance with the civil service rules, the names of persons eligible for appointment to certain positions. The commissioners replied that they had no eligible list of examined men ready to certify from, and gave permission, under section 10 of the civil service act, to said city clerk and city collector to make temporary appointments, and notified them in such permissions that such appointments should be in force not to exceed 60 days, and only until regular appointments could be made of examined men, as provided in said section 10 of said act. Thereupon these officers appointed men to fill these places, and so reported to the commissioners; but without making any further requisitions or reports, or receiving any further permission, they have kept those men in their places ever since. It sufficiently appears that the rules and classification of the civil service commission were duly made and adopted and enforced. We do not deem it necessary to enter into a discussion of the evidence upon this question.

5. It is claimed that the people are estopped from maintaining this proceeding by reason of the submission made to a judge of the circuit court and a judge of the superior court, as hereinafter referred to. It seems that a controversy arose between the city comptroller and the city clerk and certain clerks and subordinates in the city clerk's office as to whether the comptroller should audit certain monthly pay rolls of the city clerk's office, and approve the same, and draw warrants upon the city treasurer therefor. These employees in the city clerk's office desired to have their salaries for the months of January and February, 1898, paid, although the persons demanding such payments had not been appointed to their positions in accordance with the civil service law. The judges to whom this submission was made decided that it was the duty of the comptroller to audit and approve said pay rolls, without any certifications by the civil service commission, if found to be otherwise correct, and to draw warrants therefor; and thereupon an order was made that the comptroller should immediately execute the proper vouchers for the payment of the January and February salaries of the employees mentioned in said proceedings. If anybody was bound by the decision so made, only the parties to the submission proceeding above referred to were bound thereby. No evidence has been introduced, showing that the city council of the city of Chicago gave the comptroller of the city any authority to enter into and make any submission of the foregoing matters in the manner in which such submission was made. The parties to the proceeding in question were the comptroller on one side, and the city clerk and certain of his employees on the other. The parties to the present mandamus proceeding are the people, acting upon the relation of the

attorney general, on the one side, and the city clerk on the other. The people cannot be deprived of their right to compel a public officer to obey the law by any such agreed submission between other parties as is here set up. The fact of such submission is, in no sense, a defense to this proceeding. Let the writ of mandamus be issued in accordance with the prayer of the petition. Writ awarded.

(175 Ill. 284)

JOHN HANCOCK MUT. LIFE INS. CO. v. SCHLINK.

(Supreme Court of Illinois. Oct. 24, 1898.)

LIFE INSURANCE—AGENTS—AUTHORITY TO WAIVE CONDITIONS—ACCEPTING PROPERTY IN PAYMENT OF PREMIUM—EVIDENCE.

1. Under Hurd's Rev. St. c. 73, § 203, defining "agents" of an insurance company as including an acknowledged agent, surveyor, broker, or any other person aiding in transacting the business of a foreign insurance company in the state, one who was by the state agent of such an insurance company appointed as "agent," with authority to procure applications and collect premiums, but not to alter or waive terms of policies, or to receive moneys, except on policies or renewal receipts signed by an officer of the company, and who then assumed to act as agent, and so represented himself, is the agent of the company, and not of its state agent.

2. Under a provision of an insurance policy that no person, except the president or secretary, was authorized to make alterations, discharge contracts, or waive forfeitures, an agent empowered to solicit insurance, receive applications, receive and deliver policies, and collect premiums, has authority, notwithstanding, to waive a condition that the policy shall not be effective unless the first premium was paid during the lifetime and good health of insured, by delivering said policy on an agreement to extend credit for the payment of the first premium.

3. An agent of a life insurance company, authorized to collect premiums, has the right to accept that portion which is equivalent to his commission in property instead of cash.

4. In an action on a life insurance policy, a letter relating thereto, written by a state agent to the soliciting and collecting agent after the death of insured had fixed the rights of the parties, is properly excluded.

Appeal from appellate court, Second district.

Action by Paulina Schlink against the John Hancock Mutual Life Insurance Company. A judgment for plaintiff was affirmed in the appellate court (74 Ill. App. 181), and defendant appeals. Affirmed.

Isaac C. Edwards, for appellant. John M. Niehaus and Page, Wead & Ross, for appellee.

CRAIG, J. This was an action brought by Paulina Schlink on a policy of insurance issued on July 22, 1893, by the John Hancock Mutual Life Insurance Company on the life of Frederick Schlink. In the declaration the policy was set out in *hæc verba*, and it was averred that the policy was delivered to Frederick Schlink on the 7th day of August, 1893, and that he died on the 12th day of the

same month. To the declaration the defendant pleaded the general issue, and also filed four special pleas, in which it set up a provision of the policy which reads as follows: "This policy shall not take effect until delivered, and the first premium hereon paid, during the lifetime and good health of the insured." Defendant averred that the policy was not delivered, and the first premium paid, during the lifetime and good health of the insured. To the pleas the plaintiff replied double: First, she traversed the facts set up in each plea; and, second, she confessed the allegations of fact set up in the pleas, and set up new matter in avoidance. In the replications confessing and avoiding it was averred that there was a waiver of the conditions of the policy on the part of the insurance company. To the replications rejoinders were filed, and on a trial before a jury the plaintiff recovered a verdict for \$2,175, upon which the court entered judgment, which on appeal was affirmed in the appellate court.

The appellant has assigned on the record six errors, three of which (the first, second, and fifth) involve questions of fact which have been settled by the judgment of the appellate court, and need not be considered here. The others (the third, fourth, and sixth) are as follows: "Third. The appellate court erred in holding that appellee's first, fourth, fifth, and sixth instructions, or either of them, were the law. Fourth. The appellate court erred in holding that the trial court properly refused each of appellant's first, second, third, fourth, and tenth refused instructions. Sixth. The appellate court erred in sustaining the rulings of the trial court in the admission and rejection of evidence."

In order to obtain a clear view of the questions of law presented by the record, a brief statement of the facts is required. In the opinion of the appellate court will be found a statement of the facts, which seems to be substantially correct, as follows: "Charles Ballance was acting as agent for appellant at Peoria under a contract with J. B. Pendergast, the state agent of the appellant for the state of Illinois. Ballance had an office in Peoria, which had upon it a business sign designating him as general agent of appellant, and upon the stationery used by him he so called himself. While purporting to act as such agent, Ballance solicited Frederick Schlink, appellee's husband, to take out a policy of insurance upon his life in appellant's company. After some negotiations between the parties, an arrangement was made between Ballance and Schlink for the issuance of a policy on the life of the latter for \$2,000, upon which the premium was to be \$63.70. In payment of this premium it was agreed by the parties that a certain indebtedness of \$18 owing by one Downey to Schlink should be assumed by Ballance and canceled, and that Ballance should take and receive from Schlink, in further part payment of the premium, a sewing machine to be selected by the wife

of Ballance from the machines which Schlink had on hand for sale, and the difference either way was to be paid in cash; that is, if the machine and the Downey indebtedness amounted to more than the premium, Ballance should pay the difference in cash to Schlink, and, on the other hand, if these two items did not pay the premium, Schlink should pay Ballance the difference in cash. In accordance with this agreement, Frederick Schlink made and delivered to Ballance a formal application for a policy of insurance upon his life for the sum of \$2,000, which was forwarded by said Ballance to appellant company, which accepted the risk, issued the policy, and forwarded the same to Ballance for delivery. After receiving the policy, Ballance saw the assured, Frederick Schlink, and notified the latter he had the policy, and was told to come and get the sewing machine and the money for the premium. Before the policy was actually delivered the assured became ill with typhoid fever, whereupon the agent, Ballance, called on George Schlink, a brother of the assured, and informed him about the agreement and the policy, and told said George Schlink that, if he would pay \$25, he (the agent) would put the policy in force. After seeing the attending physician, said George Schlink went to the office of Ballance to pay the money and get the policy. Ballance being absent, his clerk accepted the \$25 and delivered the policy. Three days afterwards the assured, Frederick Schlink, died from the effects of the typhoid fever." The contract under which Ballance was appointed agent contained these provisions: "The said J. B. Pendergast hereby appoints said Charles Ballance agent, with authority to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of said company. * * * The said party of the second part, as said agent, shall in no case alter, modify, waive, or change the terms, rates, or conditions of any paper or document issued by said company, nor receive moneys due or to become due to said company, except on policies or renewal receipts signed by an officer of said company."

It is contended in the argument of counsel for appellant: First, that Ballance was the agent of Pendergast, and not the agent of appellant, and hence he could not bind the company; second, that by the language of the policy, "No person except the president or secretary is authorized to make alterations or discharge contracts or waive forfeitures," although Ballance was the agent of the company he could not waive compliance with any of the provisions of the policy; third, that Ballance, although the agent of the company, could not accept anything in payment of the first premium but cash, nor could he waive performance of the rules of the company. In the giving and refusing of instructions the court held adversely to appellant on the propositions mentioned, and what will be said

in passing on the propositions will dispose of the third and fourth assignments of error, without setting out the instructions given for the plaintiff and refused for the defendant.

As to the first proposition, by the terms of the contract under which Ballance was appointed he was authorized to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of the company. He was intrusted with the power of delivering policies for the company. Clothed, therefore, with the power of soliciting insurance, delivering policies, and collecting premiums, Ballance was the agent of the insurance company, and not the agent of Pendergast. Hurd's Rev. St. c. 73, § 203; Insurance Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77. In the Ruckman Case it was said (page 376, 127 Ill., and page 82, 20 N. E.): "The general assembly, having power to impose upon foreign insurance companies coming into the state to do business such reasonable terms and conditions as it saw fit, had an undoubted right to make such companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business." The fact that the written contract under which Ballance was acting was made by Pendergast, state agent of the insurance company, did not constitute him an agent of Pendergast. Ballance advertised as general agent of the company. He acted for and in behalf of the company. The company accepted his acts, and forwarded policies to him, to be delivered in pursuance of contracts made by him.

As to the second contention, while it is true that the policy provides that no person except the president or secretary is authorized to make alterations, discharge contracts, or waive forfeitures, yet, if Ballance was the agent of appellant, as we think he was, with power to solicit insurance of Schlink, receive the application, forward it to appellant, receive the policy when issued, collect the premium, and deliver the policy, then he had power to waive a condition of the policy. In Richards on Insurance (2d Ed. § 95), the author says: "An agent of a life insurance company, who is intrusted with the business of closing the contract by delivering the policy, is held to have an implied authority to determine how the premium then due shall be paid,—whether by cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured and the debtor of insurer. In that event, though the agent subsequently defaulted, and the money never reached the company, the policy would still be binding. By the weight of authority, the agent is held to have this discretionary power, although the policy in terms denies it; but this is based upon his possession of the document for the purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to

subsequent premiums or premium notes." In *Insurance Co. v. Fahrenkrug*, 68 Ill. 463, it was said (page 467): "It is insisted * * * by the terms of the policy the agents are prohibited from altering or discharging contracts or waiving forfeitures. This objection we do not deem tenable. The question in cases of this kind is not what power did the agent in fact possess, but what power did the company hold him out to the public as possessing. * * * It is immaterial what may have been said in the policy in regard to the payment of the premium. It was within the power of the company, acting through its agents, to change entirely the mode of, or dispense with, the payments as provided by the policy, and adopt a different mode and time of payment." In *Insurance Co. v. Hart*, 149 Ill. 513, 36 N. E. 990, this court said (page 522, 149 Ill., and page 993, 36 N. E.): "The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this state, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent,"—citing *Insurance Co. v. Wright*, 22 Ill. 462, and *Insurance Co. v. Chesnut*, 50 Ill. 111. Also, in the same case it was said (page 524, 149 Ill., and page 993, 36 N. E.): "The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago was inserted for the benefit of the insurer, and, like any other clause or condition of the policy, might be waived by the company." See, also, *Terry v. Society*, 41 N. E. 18, 13 Ind. App. 1.

We now come to the third contention of appellant,—that the agent, in the absence of express authority, could not accept anything but cash in payment of the premium, or any part thereof. It will be remembered that the premium in this case amounted to the sum of \$63.70. Of this amount Ballance was entitled to retain as his commission 70 or 75 per cent., which would leave less than \$20 going to the company. Ballance received \$25 in cash,—enough to pay the company the amount it was entitled to receive, and \$5 in addition. The question then presented is whether Ballance had the right to receive of the insured the amount which was going to him in anything but money. The policy contained this provision: "This policy shall not take effect until delivered, and the first premium thereon paid, during the lifetime and good health of the insured." There are authorities which hold that an agent cannot accept the premium which the company is entitled to receive in anything but cash; but there are other authorities holding that a gen-

eral agent may give credit, and accept the note of the insured in lieu of cash, even when the policy provides for a cash payment. *Mechem on Agency* says (section 931, subd. 1): "The insurance agent, as thus distinguished from the broker, is ordinarily held to be a general agent of the company. As such general agent, it is held that he may waive forfeitures and conditions in the policy, notwithstanding a provision therein that no agent has such power; that he may waive prepayment of the premium, although the policy provides that it shall not take effect until the premium is paid." May on *Insurance* (volume 2, § 360b) says: "An agent authorized to take and approve risks and to insure may allow credit. A general agent may waive the condition as to the payment of the first premium, and give credit, even though the policy declares that the contract cannot be modified except by writing signed by the president or secretary." *Terry v. Society*, supra, is also a case in point. There the policy contained, in substance, the same conditions as here. One Carpenter, who was not a regular agent of the company, solicited the insurance. The policy was issued by the company, and sent to an agent, who delivered it to Carpenter to deliver to the insured and collect the premium. Carpenter delivered the policy, collected \$2.50 (one-half the premium) in cash, and gave credit for \$2.50, which was his commission. The cash premium failed to reach the company, and it canceled the policy; but, an accident having occurred, the company was held liable. In *Insurance Co. v. Ward*, 90 Ill. 545, where the agent accepted a part of the premium in goods, as a part of his commission, it was held the payment was binding on the company. Here Ballance was authorized to solicit the insurance from Schlink, and, although the policy required the premium to be paid in cash, Ballance had the right, so far as his commission was concerned, to waive the policy, and accept his commission in property, if he saw proper to do so.

We think the ruling of the court on the instructions was substantially correct.

After the death of the assured, it appears that Ballance wrote a letter to the state agent, Pendergast, which was read in evidence by appellee. Pendergast wrote a letter in reply, which the court refused to admit in evidence, and this ruling is relied upon as error. At the time this letter was written the assured was dead, and the rights and obligations of the parties under the policy had become fixed, and anything the state agent may have said in the letter could have had no bearing whatever on the rights of the parties. For this reason, if for no other, the court properly ruled that the letter was not competent evidence. We think the judgment of the appellate court was right, and it will be affirmed. Judgment affirmed.

(174 Ill. 609)

FEINBERG et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

CRIMINAL LAW—NEW TRIAL—ABSENT WITNESSES—DILIGENCE—POSTPONEMENT—ENGAGEMENT OF COUNSEL—APPEAL—HARMLESS ERROR—REMARKS OF COURT.

1. On a motion for new trial, accused claimed that he could have proved an alibi by fifteen witnesses. The names of only two were given, one of whom was in the court room at the trial, and was not called to testify, and no effort was made to subpoena the others. *Held*, that accused was not entitled to a new trial on the ground of absence of such witnesses.

2. It is not error to refuse to make a second postponement of a trial in a criminal case because defendant's counsel is engaged in another court.

3. A refusal of the request of accused's attorney for time to consult with his client and witnesses is harmless error, where the attorney had time for such consultation while another attorney was examining witnesses for a co-defendant.

4. A statement of the court, in a colloquy with defendant's attorney respecting the admissibility of certain evidence, that there was evidence to show defendant's guilt, is prejudicial error.

Error to criminal court, Cook county; Frank Baker, Judge.

Harry Feinberg and others were jointly indicted and tried for robbery. Defendant Burns was acquitted, and Harry Feinberg and another were convicted, and they bring error. Reversed.

At the October term, 1897, of the criminal court of Cook county, the plaintiffs in error, Harry and Joe Feinberg, were convicted of the crime of robbery. One Burns, who was jointly indicted and tried with them, was acquitted. The evidence showed that on the night of July 8, 1897, five men—four of whom wore masks—entered a street car in Chicago at the end of its run, and with drawn revolvers made an assault upon the prosecuting witness, Charles F. Freligh, who was the conductor, and forcibly took from him his gold watch and \$31 in money. Freligh identified Joe Feinberg at the trial as the one of the robbers who wore no mask, and it was shown that soon after the robbery Harry Feinberg had possession of the watch, and was arrested while endeavoring to dispose of it at a pawnshop. The defense disclosed by the cross-examination of the people's witnesses, the remarks of counsel, and affidavits for a new trial contained in the bill of exceptions (for no evidence was adduced by plaintiffs in error) was an alibi, and that the identification of plaintiffs in error was falsely or mistakenly made.

The indictment was returned at the July term, 1897. When the case was called for trial, at the October term, John C. King, who had been employed by plaintiffs in error as their counsel in the cause, was not present; but Frank C. Zink, an attorney, appeared in court at his request, and informed the court that King was then engaged in the trial of another cause, which had been entered upon

the previous day, and would continue to be so engaged for two days more, and moved the court to pass the case until King could appear for his clients. The attorney for the people informed the court that the case had been passed at a previous time because King was engaged in the trial of another cause, and the court denied the motion, and directed that the trial proceed, and Zink, for plaintiffs in error, excepted. The court announced that he would appoint Zink to defend plaintiffs in error, but Zink, stating that he was wholly unfamiliar with the case and had made no preparation, was permitted to decline. Zink again asked the court to pass the case until he should go to the circuit court and inform King of the court's decision, but his request was refused, and he left the court room, and the court directed a jury to be sworn to answer questions. The court then asked plaintiffs in error if they wanted a lawyer, and they replied that they wanted no one but their own lawyer to defend them. The jury were then sworn to answer questions, and thereupon the plaintiff in error Joe Feinberg protested against their being tried in the absence of their attorney, and stated to the court that they could not defend themselves. Mr. Ramsey, attorney for the other defendant, Burns, then stated to the court that he did not know what the defense of the Feinbergs was, and could not defend them, and moved the court, on behalf of plaintiffs in error, to pass the case until King should become disengaged. The motion was overruled, and an exception taken, and the court directed that the trial proceed. The court again asked plaintiffs in error whether or not they wanted counsel, and they replied that they did if they could not get their own lawyer; whereupon the court appointed Leon Hornstein, an attorney present in court, to defend them, who stated to the court that he knew nothing about the case, but would do the best he could under the circumstances. The jury were then examined, selected, and sworn to try the cause. The witness Freligh was called and sworn, whereupon J. E. Ingram, an attorney, came and stated to the court that he came at the request of King, who was then engaged in the trial of another cause in the circuit court, to ask that the case be continued until King should be disengaged; that plaintiffs had been in prison for some months, and that he understood that their evidence was not then in court; and that they could not safely go to trial without their counsel and without their witnesses. The court stated that he had been informed by the state's attorney that the case had been passed once for a similar reason, and that he would not grant a second continuance for the same reason. Ingram and Hornstein thereafter represented plaintiffs in error throughout the trial.

When the people rested their case, the record shows the following proceedings were had: "Mr. Ingram: If the court please, I see it is now about adjourning time, and as the

court appointed Mr. Hornstein to defend these boys this morning in court, and he informs me that he has not had an opportunity to examine them and see what their defense is, neither has he talked to any of the witnesses, and as I have already informed your honor that Mr. King is engaged in the trial of a case before his honor, Judge Dunne, in the circuit court, and I chanced to come in court where Mr. King was engaged, and he requested me to see if this case could not be passed until he finished the case in which he is now engaged, or, if the case was forced to trial, to proceed and assist in the defense, now, I would ask the privilege of the court for an opportunity to talk with the Feinberg boys, and also the indulgence of the court that I may talk to their witnesses, to see what they will testify to, and of what knowledge, in general, they possess of the facts of this case. The Court: You have been sitting with them in court all day, and had time enough to consult them, and I will not give you any time; so go ahead with your defense. You must finish this case right now. Mr. Ingram: But, your honor, I have not talked with the defendants, and must hear their side of the case before placing them upon the stand,—that is, if I do so at all; and I must have an opportunity to examine their witnesses, and it will only occupy the indulgence of the court but a very short time. Your honor can't conscientiously ask me to proceed under the circumstances under which Mr. Hornstein and myself are now placed in reference to a proper defense. The Court: You must proceed immediately. Mr. Ingram: I object to the ruling of the court, inasmuch as the constitutional rights of these defendants are jeopardized. The Court: Are you going to proceed, sir? Mr. Ingram: I understand that Mr. Ramsey is ready to put in his defense for his client. (Evidence for Michael Burns submitted by Mr. Ramsey.) The Court: Several witnesses for the Feinbergs were sworn this morning and excluded from the court room. The usual hour for adjournment has not yet arrived. I will permit the defendants Joseph and Harry Feinberg to-morrow to call and examine any witnesses not now in attendance, but I will not adjourn now, and permit witnesses now in attendance to be called and examined to-morrow. And thereupon the court had all the witnesses who had been sworn at the request of the defendants, and excluded from the court room, who had not been examined, brought to the bar of the court, and then said to the counsel for defendants: 'If you want to examine any of these witnesses, you must proceed with their examination now. Mr. Ingram: I do not wish to examine any of these witnesses. The Court: Then we will adjourn, and to-morrow you can call and examine any witnesses except these now present.' And thereupon the court adjourned until the following day. Court convened, pursuant to adjournment, on the 6th day of October, 1897, and the taking of testimony was be-

gun. Further testimony was offered on behalf of the defendant Michael Burns, and at the conclusion of the same the court, addressing counsel for Feinbergs, said: 'The Court: Do you want to proceed with the defense? Mr. Ingram: No, your honor; we rest our case.' After verdict, in support of the motion for a new trial affidavits of King, Hornstein, and the Feinbergs were filed, showing that King had been retained to defend plaintiffs in error, that he had consulted with them and talked with their witnesses, and had made preparation for the trial, and setting up, generally, the matters hereinbefore stated. Other affidavits set forth facts which, if true, would have shown that at the time of the robbery Joe Feinberg was at the home of his parents, where upwards of 15 persons were in attendance at a birthday party given for his sister.

Leon Hornstein and J. E. Ingram, for plaintiffs in error. E. C. Akin, Atty. Gen., and Charles S. Deneen, State's Atty. (Frank Crowe, Asst. State's Atty., of counsel), for the People.

CARTER, C. J. (after stating the facts). Inasmuch as it has been strenuously insisted upon by the plaintiffs in error in this court that by the method of procedure of the trial court they were deprived of the opportunity to make their defense in that court, a fuller statement of the proceedings below has been incorporated in the statement of the case foregoing than would otherwise have been necessary.

In respect of the motion for a new trial, based on the absence of witnesses to prove the alleged alibi, it is clear that the showing made in the affidavits was insufficient. No diligence in that regard was shown. The names of but two of such witnesses, said to have been fifteen in number, were given, by whom it was claimed plaintiffs in error could have proved that one of plaintiffs in error was at a birthday party given for his sister, at his parents' home, at the time the robbery was committed. None of these witnesses were called to testify, although one of them, the mother of plaintiffs in error, was present at the trial. No reason is shown why they had not been subpoenaed. If plaintiffs in error were attending such a party at the time of the robbery, they knew of the fact, and knew the names of the witnesses by whom they could prove it. No reason is shown why the attendance of such witnesses could not have been procured, even after the trial commenced. It does not even appear that any effort was made to subpoena such witnesses after the court adjourned in the afternoon of the first day of the trial. It is very clear, therefore, that no cause for a new trial existed on account of the absence of witnesses to prove the alleged alibi.

But counsel insist that the court erred in requiring plaintiffs in error to proceed at once with the trial on the call of the case, and in

refusing to postpone the trial until their counsel could be released from the other trial in which he was engaged in the circuit court, and in refusing, at the close of the people's evidence, to suspend the proceedings for a reasonable length of time to enable counsel who appeared for plaintiffs in error to consult with them and to talk with their witnesses, so that they might properly present their defense, and determine whether they should be called as witnesses in their own defense. The following rule of the criminal court was then of record and in force: "That no case shall be passed, continued, or postponed in this court by reason of the engagements of counsel in any other court." The trial of the case had been postponed at a preceding term on the same grounds urged for this postponement. It is evident there was no abuse of the discretion of the court in refusing to pass the case a second time for the reasons given. The ruling of the court did not operate to deprive plaintiffs in error of counsel. The court appointed Hornstein to represent them, and Ingram appeared in King's place, at his request, and it by no means appears that the accused were not ably represented. Neither of these attorneys, after the court refused to wait for King, asked for time to enable them to present the defense properly, until the people had rested. The court had, however, made it reasonably plain to them that no delay would be tolerated. It will be observed that when, at the close of the people's testimony, counsel for plaintiffs in error asked for the indulgence of the court for a short time to enable them to consult with their clients and talk with their witnesses, so as to make a proper defense in the case, while the request was refused, and they were directed to proceed immediately, they did not so proceed, and the ruling of the court was complied with by the other defendant, Burns, and plaintiffs in error were given an opportunity to proceed with their defense after court convened on the following morning,—at least as to the examination of such witnesses as were not in attendance the previous day. Had plaintiffs in error been compelled, by the ruling of the court and at the time it was made, to rest their defense for lack of opportunity of their counsel to consult with their clients and inform themselves concerning their defense, the action of the court would have been prejudicial error, and sufficient to reverse the judgment. Under the bill of rights, plaintiffs in error had the right to defend in person and by counsel, and the statute provides that "every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense" (Rev. St. 1893, p. 536, div. 13, § 2);

and in *North v. People*, 139 Ill. 81, 28 N. E. 966, this court said: "We are not to assume that this was intended to be a mere empty formality, and that the counsel thus appointed should be compelled to act without being allowed reasonable time within which to understand the case and prepare the defense." But the accused and their counsel had time for consultation, and, so far as the record shows to the contrary, sufficient time in which to procure their witnesses, and ascertain what pertinent facts were within their knowledge, before entering upon their defense the next morning. No witness, however, was called or offered, and plaintiffs in error rested their case without in any way making it appear to the court that they had not had sufficient time, since the adjournment the day before, to go on with their defense. Upon such a record it must be held the error of the court in the respect mentioned was not prejudicial, and cannot operate to reverse the judgment.

It is next urged that the court made improper and prejudicial remarks during the progress of the trial. During a colloquy between the court and Attorney Ingram in regard to the cross-examination of Sergeant Robinson, a police officer, occurred the following: "Mr. Ingram: I object to the ruling of the court, and take exception. Your honor will remember that in the entire testimony of these witnesses on behalf of the state there is no testimony whatsoever tending to show guilt against the defendant Joseph Feinberg, except that of Motorman Freligh, and I can show by this officer that this identification was procured by illegal means. The Court: Do you mean to say, sir, that there is no evidence here to show the guilt of the defendant? I say there is evidence. Mr. Ingram: I except to the remarks of the court, and also the court's ruling, and with all due respect must say, as well the court knows, you have no right to pass upon any matter of fact, or express any opinion as to the guilt of these defendants; and in answer to the court's question I shall not respond." This remark of the trial judge in the presence of the jury was serious error. It was somewhat, though not much, less forcible than to have said there was sufficient evidence to prove the defendant guilty. The evidence may have been sufficient to authorize a conviction, but that was a question for the jury, and not for the court, and it was clear error for the court to express any opinion in the hearing of the jury as to the force or effect of the evidence upon the question of the guilt or innocence of the accused. As the judgment must be reversed, we have not thought it necessary to consider other objections urged. The judgment is reversed, and the case remanded. Reversed and remanded.

(176 Ill. 69)

SUTTON et al. v. READ.

(Supreme Court of Illinois. Oct. 24, 1898.)

DESCENT — INTESTACY — HUSBAND AND WIFE —
DOWER — COUNTY COURT — RES JUDICATA — PARTITION — ADMINISTRATION — ASSETS — CLAIMS — SALES.

1. Where testator leaves his entire estate to his widow during life, and makes no disposition of the fee, he is intestate as to the fee, under 1 Starr & C. Ann. St. p. 879, c. 39, § 12, which provides that all such estate as is not devised in the will shall be distributed in the same manner as the estate of an intestate.

2. Under 1 Starr & C. Ann. St. p. 879, c. 39, § 1, par. 3, providing that, when there is a surviving spouse and no descendants of an intestate, one-half of the realty descends to such spouse as an absolute estate forever, where testator devised his entire estate to his widow during life, and died intestate as to the fee, she was entitled to one-half of his realty in fee, and this though the devise of the life estate was in lieu of dower.

3. Under 1 Starr & C. Ann. St. p. 903, c. 41, § 12, providing that if one die testate, leaving no descendants, the surviving spouse may, in lieu of dower, take one-half of testator's realty, a widow who takes under the will is not thereby barred from also taking under the statute, as in cases of intestacy, as to realty as to which testator dies intestate.

4. 1 Starr & C. Ann. St. p. 901, c. 41, § 10, providing that a devise to a surviving spouse shall bar dower unless the survivor renounces the devise, does not affect the statutory rights of husband or wife to inherit from the other in cases of intestacy.

5. Under the statute the county court has jurisdiction to determine all questions of conflicting or controverted titles.

6. The interest of heirs in realty is not affected by a decree in partition to which they were not parties.

7. The fact that the claim of one as heir is barred by decree in partition, to which she was a party, by her failure to assert the claim, does not affect the right of the administrator to sell the same land to pay a debt of the claimant regularly established against the estate.

8. A decree in partition is not conclusive as to one having a claim against decedent's estate, where she was made a party because of being in possession thereof and owing rents, she not being a necessary party to the partition, and the circuit court having no jurisdiction to settle the estate in such proceeding.

9. The fact that the claim of one intervening in a partition suit, and attempting to make a legacy in his favor a charge on the realty, is barred by the decree therein, does not affect his right afterwards, as administrator, to sell the same land for the payment of a claim regularly established by another against the estate.

10. A decree in partition is not res judicata as to the claim of a party against others not brought in.

11. Under 1 Starr & C. Ann. St. p. 219, c. 3, § 70, cl. 7, providing that claims against a decedent's estate, not exhibited within two years, may be prorated out of "subsequently discovered" estate,—i. e. estate not inventoried or accounted for by the administrator,—and is subsequently discovered estate where, under an erroneous construction of the will, it was treated for over two years by all the parties as not belonging to deceased.

12. In the absence of willful neglect or fraudulent purpose of the administratrix in failing to include land of testator in her inventory, she did not thereby lose her right to have such land, subsequently discovered to belong to the testator, subjected to her just claim against the estate.

51 N.E.—51

Appeal from Bureau county court; Richard M. Springer, Judge.

Petition by Henry B. Read, as administrator with the will annexed of the estate of Olivia Read, deceased, against William Sutton and others. There was a decree for complainant, and defendants appeal. Affirmed.

This was a petition to sell real estate to pay debts, filed in the county court of Bureau county by Henry B. Read, as administrator with the will annexed of Olivia Read, deceased. The facts appear to be as follows: Charles G. Read died testate about July 1, 1887, leaving Olivia Read, his widow, but no descendants, nor father or mother, surviving him, but leaving brothers and sisters, nephews and nieces, as his heirs. In his will, which was duly probated, he gave to his wife, Olivia, for her life, all of his property, both real and personal, of which he died seised, to be accepted by her in lieu of dower, and appointed her sole executrix. He also made numerous bequests of money, amounting in all to \$13,000, to various persons, some of them relatives and some of them strangers, among them one to Mary Wentworth of \$5,000 and one of \$3,000 to Henry B. Read, neither of whom was a relative, but who had been taken when quite young, and brought up as members of his family. The only provision of his will affecting his real estate was as follows: "First. I give and bequeath to my wife, Olivia Read, all of my property, both real and personal, of which I may die seised, to be accepted by her in lieu of dower during her natural life." He died seised in fee of the three tracts of land involved in this suit. His widow, Olivia Read, remained in possession of the premises until her death, June 15, 1893. She also left a will, which was as follows: "I, Olivia Read, being of sane mind, and in the possession of all my faculties, make and execute this instrument as my last will and testament: First. I give and bequeath to Mrs. Mary Wentworth all of my household and personal property, of whatsoever kind, that is or may be in the house where I now reside. Second. It is my will and purpose to give full force and validity to one certain certified promise given to Mrs. Mary Wentworth, of which the following is a true copy, viz.: 'This is to certify that I promise to pay Mrs. Mary Wentworth three (3) dollars per week for services rendered from September, 1885, as long as her services shall be given, in addition to what is given her in the last will of Charles G. Read. Olivia Read, Administrator of Said Will.' Third. It is my will that, in the event that the last will and testament of Charles G. Read shall at any time be by proper authority declared null and void, then whatever portion of said estate would belong to me shall be divided so that Mrs. Mary Wentworth shall have and receive the two-thirds (⅔) thereof, and Henry B. Read shall have and receive the one-third (⅓) thereof. Fourth. James P. Wentworth and Mary

Wentworth are hereby appointed and made my administrators and executors to carry out the provisions of this, my last will and testament. In witness whereof," etc. Her will was probated, and letters issued to the executors named therein, September 6, 1893. Olivia Read left, her surviving, no husband or descendants, and her heirs at law were her nephews and nieces. Some of the heirs of Charles G. Read on June 30, 1894, filed their bill for a partition of his said lands, but did not make any of the heirs of Olivia Read, or her devisees except Mary Wentworth, parties to the suit. The said Mary Wentworth was made a party, not because she was such devisee, but because it was alleged that she was in possession of one of said pieces of real estate, viz. a house and lot; and an accounting for rents was asked of her for the same. Henry B. Read intervened in the partition suit, and he and Mary Wentworth filed their pleas to the bill, setting up the legacies bequeathed to them, respectively, and alleging that they were charges upon said real estate. The circuit court overruled these pleas, and they appealed to the appellate court, and then to this court, with the result that the decree finding that the legacies were not, by the will, made a charge on the land, was affirmed (*Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777), and that was the only question passed upon on that appeal. The appellants therein claimed no interest except that their legacies were a charge upon the land. It was held otherwise, and that, having no such lien, they would not be heard to complain that other proper parties were not joined. Afterwards, upon report by the commissioners in partition that the premises were not susceptible of division, an order of sale was entered, and the property was sold by the master, and he conveyed the same to appellants, who were the purchasers. Notice on behalf of Mary Wentworth was given at the master's sale of the adverse interests now contended for by her. After the sale, on February 7, 1898, James P. and Mary Wentworth, the executors of the will of Olivia Read, resigned their trust, and Henry B. Read was appointed administrator with the will annexed. On June 12, 1897, Mary Wentworth filed her claim against the estate of Olivia Read for services rendered her in her lifetime, and it was allowed by the county court February 7, 1898, in the sum of \$1,209, as of the seventh class, to be paid in due course of administration out of assets to be inventoried or accounted for after the expiration of two years from the granting of letters testamentary. No inventory of said estate was filed until January 4, 1898. The administrator afterwards filed this petition to sell the real estate of the deceased to pay debts, showing that he had filed his just and true account, that said claim of \$1,209 was the only claim against the estate, and that there were no assets or personal property, and that Olivia Read died seised in fee, by inheritance from her hus-

band, of the undivided half of three certain tracts of land, and which was the undivided half of the same lands sold at the master's sale. The petition also alleged that appellants claimed to have some interest in the premises, but that such interest was subject to the rights of the heirs, devisees, and creditors of Olivia Read, deceased; and the prayer was that the court would settle the conflicting rights and interests, and order petitioner to sell the land, or sufficient thereof to pay the debts of the deceased. Mary Wentworth answered the petition, claiming that by virtue of the will of Olivia Read she was entitled to two-thirds of the estate of Olivia Read, and Henry B. Read to one-third, and praying the court, on final distribution of said estate, to allot and divide it accordingly. Appellants answered the petition, denying that Olivia Read died seised in fee by inheritance from her husband, as alleged in the petition, and alleging that she did not renounce the provisions made for her in her husband's will, but had accepted the same under the terms of the will, and held possession of all of the real estate during her natural life, and enjoyed the profits thereof, and thereby never became entitled to any portion of the same in fee. They also set up the partition proceedings, and alleged that Mary Wentworth and Henry B. Read were parties thereto, and that it was their duty to have there set up their interest in the lands in that proceeding, and that, having failed to set up any claim, right, or interest therein, except the alleged lien of said legacies, which had been finally settled adversely to them, they were now estopped from claiming any such interest; that appellants bought the whole title to these lands at the partition sale; and that the claim of Mary Wentworth, not having been filed or allowed until after two years after the issuance of the letters testamentary, it could not be collected out of any real estate, if any there was, of which Olivia Read died seised. The other defendants, being the heirs of Olivia Read, defaulted. The court found and decreed that Olivia Read died seised in fee of the undivided half of the lands, as alleged in the petition, and ordered the sale of the same, or so much thereof as might be necessary to pay the debts, etc. From this decree appellants have appealed to this court.

Milo Kendall, George M. Stipp, and Cairo A. Trimble, for appellants. D. B. Sherwood, for appellee.

CARTER, C. J. (after stating the facts). The motion of appellee to dismiss the appeal for want of jurisdiction in this court, reserved to the final hearing, will be first disposed of. In *Lynn v. Lynn*, 160 Ill. 307, 43 N. E. 482, where a similar question was raised, the whole subject was exhaustively considered, and the statutes carefully compared, and we there held that section 88 of the practice act, as amend-

ed, and section 8 of the appellate court act (1 Starr & C. Ann. St. p. 884), relating to the appellate jurisdiction of the appellate and supreme courts, controlled such appeals, and that under the present statute such a proceeding involved a freehold, and that the appeal was properly taken to this court. That decision is conclusive, for here, as there, the title is involved, and is the principal question in the case. The motion will be overruled.

Appellants contend: First, that Olivia Read took nothing by descent from Charles G. Read; second, that Mary Wentworth is estopped from setting up any claim against the lands of Charles G. Read, because of her failure to set up such claim in the partition suit, to which she was a party; and, third, that said real estate cannot be sold to pay her claim, for the reason that it was not presented or filed within the two years fixed by the statute, and also for the reason said real estate is not property inventoried or accounted for after the expiration of said two years, within the terms of her judgment allowing the claim. The will of Charles G. Read gave to his wife all of his property, both real and personal, of which he died seised, to be accepted by her in lieu of dower, during her natural life. There is no other disposition made of the real estate, and there is no residuary clause. The will nowhere attempts to dispose of the fee in the realty. It is not devised to any one. In such case the provisions of section 12 of the statute of descent must control, which provides that "all such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate." As to the fee of these lands, Charles G. Read died intestate, and the third paragraph of section 1 of the statute of descent became applicable, which is as follows (1 Starr & C. Ann. St. p. 879): "Third. When there is a widow or surviving husband, and no child or children, or descendants of a child or children, of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases where there is no child or children or descendants of a child or children." In cases where there is a widow, and no descendants of the deceased, the widow inherits one-half of the realty, and is entitled to dower in the other half. *Shoot v. Galbreath*, 123 Ill. 214, 21 N. E. 217. In this case the widow's dower in the other half was one-third, but her husband chose to give her, in lieu of that dower, a life estate in all of his real estate. While this was more than the statute gave, still he had the undoubted right to make such provision for his wife.

Appellants insist that section 12 of the dower act is applicable to the facts of this case, and that Olivia Read, by her acts, elected to take under the will, and was thereby barred

from taking under the statute. But section 12 of the dower act relates to cases in which the husband or wife dies testate, and not to cases of intestacy. The husband in this case died, as we have seen, wholly intestate as to the fee in his lands, and it is this fee only which is here involved. We are therefore of the opinion that this provision of the dower act has no application here. It is manifest that her failure to elect under the statute relating to dower could affect none of her interests except her dower, and, at most, her distributive share of her husband's personal estate. *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040. The same line of reasoning applies to section 10 of the dower act, which is also quoted by appellants. That section has no reference to the statutory rights of husband and wife to inherit from each other in cases of intestacy. *Gauch v. Insurance Co.*, 88 Ill. 251. As the statute now is, the county court was authorized to determine all questions of conflicting or controverted titles, and the decree was correct in finding that one-half of said real estate passed to Olivia Read upon the death of her husband, and that she died seised of said undivided one-half, and that appellants had no right, title, or interest in the same, but owned the other half according to their respective deeds. This half belonging to the heirs of Olivia Read remained unaffected, as to them, by the decree in the partition suit, because they were not parties to that case.

It does not appear that the county court expressly determined the question, raised by Mary Wentworth in her answer, that two-thirds of said one-half of said real estate was devised to her, and the other third to Henry B. Read, by the will of Olivia Read. Indeed, that question would not be material to the application to sell to pay debts, as the lands would be first subject to this charge, whether devised or not. The question would become important only in making an order for the distribution of any surplus, or in some other action for the recovery of any of such real estate that might remain unsold. It is manifest that, even if the effect of Mrs. Read's will was to devise to Mary Wentworth two-thirds of said one-half, and that she is now barred from asserting title thereto, because of her failure to set it up in the partition case, and by the final decree in that case, still the right of the administrator to sell to pay debts would remain unaffected, unless, as contended by appellants, that right is also barred by the decree in the partition case. The effect of the decree of the county court, however, in finding that appellants owned only one undivided half, was to find either that Mary Wentworth took no interest in the land as devisee of Olivia Read, or, if she did, that appellants' rights were not enlarged by virtue of any estoppel arising from the decree against her in the partition suit. It is not claimed by either party that the contingency upon which the devise of Olivia Read of the

land in question to Mary Wentworth and Henry B. Read was to take effect ever happened. It does not appear that the will of Charles G. Read was ever declared null and void, but, on the contrary, it was admitted to probate, and has been acted upon as valid by all parties. It simply contained no provision making any devise of the fee in the real estate, or any charge of the legacies upon the same. It has been construed, and its meaning interpreted and carried into effect. It seems clear, therefore, that Mary Wentworth did not take any interest in the real estate under Olivia Read's will, and, that being so, no such interest was barred, as against her, by the partition decree, and, so far as it related to that alleged interest, the order of the county court is right on the question of *res judicata* raised by appellants.

But it is also contended that the right of the administrator to sell the undivided half in controversy of this land to pay Mary Wentworth's claim is also barred by estoppel,—that that question is also *res judicata*, because they were both parties to the partition suit, and the question was not there raised, and is concluded by the decree. When that suit was begun, Olivia Read was dead, and her undivided half of the lands had descended to her heirs at law, but they were not made parties to the bill. The suit proceeded to a decree on the theory that Olivia Read, the widow, had been barred of her right to inherit one-half of the land by taking the provision made for her in the will, and not renouncing the same. The only allegation in the bill as to Mary Wentworth, and the ground on which she was made a party, was that she, with her husband, also made a party, was in possession of one of the pieces of real estate,—a house and lot,—and owed rents. Henry B. Read was not made a party, but came in, and, with Mary Wentworth, filed pleas claiming, as before stated, that their legacies in the will of Charles G. Read were a charge upon the land. As administrator, Henry B. Read was not a party to that suit, and could not have been, for he had not then been appointed as such. No question concerning the administration of the estate of Olivia Read was raised or determined in that suit. The administration of that estate was then properly pending in the county court, and the circuit court was not the proper forum to determine questions of the allowance of claims, and passing upon the accounts of the administrator. That in the exercise of their equitable jurisdiction circuit courts are authorized to take charge of the administration of estates in certain cases is undoubted, but it is well settled that they will not do so except in extraordinary cases. *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340. Mary Wentworth had no judgment, and, while she had the right to have this land

subjected to the payment of her debt through proper proceedings in the county court, she was not a necessary party in the partition suit, and her rights as such claimant were not barred by the decree in that suit. The circuit court could not have effected a settlement of Mrs. Read's estate by anything Mary Wentworth could have done in the case in that court. Besides, her claim was against the title of the heirs of Olivia Read, and they were not parties, and could not have been concluded by any decree in the case. The practice of taking decrees of partition and of sale in partition suits before it can be known whether or not they will be required to sell the land to pay debts is not unusual, but is to be deprecated. Courts of equity will not take the administration of estates from the county court simply to facilitate the partition of real estate, and purchasers at such sales must take notice of the rights of creditors of the deceased owner. And in this case actual notice was given at the sale. It is elementary that the decree of the court in the partition case that no other person has any interest in the property, except as alleged in the bill and found by the decree, would not affect the rights and interests of persons who were not parties to the suit. We hold that this cause, as an application to sell said undivided half to pay said debt, is not affected by the record or decree in the partition case, and that Mary Wentworth is not estopped thereby from asserting her rights as a claimant against the estate of Olivia Read.

The next contention of appellants is that the claim of Mary Wentworth was not a proper charge against the real estate of Olivia Read, because it was not presented within two years after the issuing of letters testamentary, and that she could not take advantage of her own delay or neglect in filing an inventory, and then, after the lapse of two years, treat this real estate as subsequently discovered property. It does not appear that any one discovered that Olivia Read owned the undivided half of the lands in question within two years after her death, and we see no evidence of willful neglect or fraudulent purpose in Mary Wentworth's failure to include it in her inventory. By the seventh clause of section 70 of the administration act (1 Starr & C. Ann. St. p. 220), the payment, pro rata, of demands not exhibited within two years, out of "such subsequently discovered estate,"—that is, estate not inventoried or accounted for by the executor or administrator,—is provided for. Her claim was a just one, as clearly appears from the record, and we are of the opinion that she had not lost the right to have the real estate of her debtor sold to pay it, neither by lapse of time (about four years) nor by her acts or omissions. The order and decree of the county court must be affirmed. Decree affirmed.

(174 Ill. 469)

LANTERMAN v. TRAVOUS et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

BANKS AND BANKING—INSOLVENCY—PREFERENCES.

Under Act June 4, 1879 (Myers' St. 444), for the protection of bank depositors, the depositor of a check with an insolvent bank, a few days before it made an assignment, cannot recover the deposit from the assignee, where the check passed out of the hands of the bank before the assignment, and was paid by the bank upon which it was drawn, in a clearance settlement between them, and the balance mingled with other moneys of the bank.

Appeal from appellate court, Fourth district.

Petition by Mary D. Lanterman against Charles N. Travous and others. From a judgment of the appellate court affirming an order of the county court denying plaintiff's petition (73 Ill. App. 670), she appeals. Affirmed.

John G. Irwin, for appellant. W. M. Warnock, for appellees.

CARTER, C. J. This is an appeal from a judgment of the appellate court affirming an order of the county court of Madison county denying the petition of appellant to be made a preferred creditor of the estate of J. A. Prickett & Son, bankers, who had assigned to appellees. The facts out of which this claim of preference arose are these: About noon on Friday, December 11, 1896, the appellant, Mary D. Lanterman, deposited a check for \$2,487.68, properly indorsed, drawn on the Bank of Edwardsville, with the banking firm of J. A. Prickett & Son. She received on it \$37.68 in cash, and a pass book, in which the balance, \$2,450, was entered to her credit. On the next day, about 4 o'clock in the afternoon, an employé of the bank took this check, together with other checks, to the Bank of Edwardsville for an adjustment of checks in the usual way, being in the nature of a clearing-house transaction. While there, another check on the Prickett bank for about \$1,600 came in, and was included in the settlement. The result was, Prickett & Son received a balance of over \$1,000, the exact amount not appearing in the evidence, which, with the checks taken up against their bank, was placed among the funds of the bank. On Monday, December 14, 1896, about 9 o'clock in the morning, the firm of J. A. Prickett & Son made an assignment to appellees for the benefit of their creditors. Appellant filed her claim for \$2,450 within the prescribed time, and a verified petition setting up these facts, and asked that it be made a preferred claim and be paid in full. The petition alleges that at the time the check was delivered to the bank the firm of J. A. Prickett & Son was insolvent, and had been for a long time prior thereto,—much longer than 30 days,—and that such fact of insolvency was well known to the person receiving her deposit at the time he so received it,

but was not known to appellant; that it was a fraud on her to receive such deposit, and that, by force of the statute, all the acts and transactions in the premises were null and void, and of no force or effect, in law or equity; that the money realized upon her check never became a part of the assets of the bank, and that the assignee never acquired any title thereto. The court denied the prayer of the petition, but allowed the claim generally.

The appellant claims that by virtue of the "Act for the protection of bank depositors," approved June 4, 1879 (Myers' St. 444), the whole transaction was rendered fraudulent ab initio, and that no title to the deposit passed to the bank or its assignees, and that she is entitled to reclaim it in the hands of the latter. Counsel for appellant has ably presented his views in support of this position, and cited as an analogous case *American Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227. The appellee in that case asked to have a certain check that it had deposited with appellant's assignor returned to it, said check being uncollected in the hands of the assignee. This court said (page 339, 150 Ill., and page 228, 37 N. E.): "We think it clear that the deposit was, in legal effect, a negotiation of the check, so as to vest the legal title thereto in Schaffner & Co., with the right on their part to charge it back to the petitioner's deposit account in case it should not be paid on presentment. * * * The transaction, then, was one which, in the absence of fraud, would have passed the title of the check irrevocably to Schaffner & Co., and the claim of the petitioner to relief must therefore rest solely upon its charge of fraud, thus enabling it to rescind the transaction and reclaim the check on that ground." See, also, *American Exch. Nat. Bank v. Loretta Gold & Silver Min. Co.*, 165 Ill. 103, 46 N. E. 202. In the case quoted from it was further said: "It seems plain that, if this statute can be held to apply to this case, it is proved, prima facie, that Schaffner & Co. received the check with intent to defraud the petitioner, and as their failure has resulted in a loss to the petitioner of the deposit, or at least of a considerable part of it, the fraud thus intended was accomplished; and, as no effort was made at the hearing to rebut the prima facie presumption raised by the statute, the legal proof of a fraud, both intended and consummated, must be deemed, for all the purposes of this proceeding, to be conclusive." And it was held that the statute in question was applicable to civil as well as criminal cases, and the judgment of the appellate court ordering a surrender of the check to the petitioner was affirmed.

It will be seen that the sole ground for relief in these cases is placed on the ground of fraud, thus enabling the depositor to rescind the transaction, and reclaim the check deposited. In the case above quoted from, the

check had been returned to the bank, and was in the hands of the assignee, and the rescission was rendered effectual by restoring the check to the depositor. But in the case at bar the check had passed out of the hands of the bank before the assignment was made, and had been paid by the bank on which it was drawn, and the money received in the clearing-house transaction mingled with the other moneys of the bank, if, indeed, it were shown that any money had been received for this identical check. A rescission, therefore, to enable appellant to recover her check was impossible.

Appellant claims that the proceeds of the check were mingled with the other money of the bank, and that it is only equitable that an equal amount of money should be taken from the money of the bank and be paid to her, and cases from other jurisdictions are cited in support of this contention, among others *Wasson v. Hawkins*, 59 Fed. 233. In that case the court said: "The mere fact that the plaintiff became a creditor of the insolvent bank through the fraud of its president, and that the bank became a trustee *ex maleficio*, would give him no right to preference over other creditors, unless he can trace and identify his money as a part of the common mass. But when it is shown by indubitable proofs, or is admitted, as in the present case, that the identical bank notes and coins so obtained by fraud constitute a part of the common mass of bank notes and coins in the hands of the receiver, in my judgment the modern and better doctrine is that the depositor may take out of the common mass so much as he has put in. *Lewin, Trusts*, 1092, 1093." It is unnecessary here to consider whether such a doctrine is or is not consistent with the rule established in this state, as announced in many cases. Thus, it was laid down in *Trustees v. Kirwin*, 25 Ill. 73, that when money deposited was mixed up with the money in the bank its identity as a fund was thereby lost, and that the right to pursue it must also fail. *Bank v. Goetz*, 138 Ill. 127, 27 N. E. 907; *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904; *Association v. Jacobs*, 141 Ill. 261, 31 N. E. 414; *Bayer v. Bank*, 157 Ill. 62, 41 N. E. 622. It was said in the *Bayer Case*, 157 Ill. 68, 41 N. E. 624: "It has frequently been announced as the law of this state that even in a case where a definite and actual trust fund, which possesses all the attributes of a separate and distinct identity, has been so mixed and mingled with other funds as to render identification impossible, the cestui que trust, in the event of the insolvency of the trustee, is remitted to the position and the rights of a general creditor." It does not affect the question that an action may lie against the defaulting trustee for his wrongful act.

But if the rule contended for prevailed in this state it would not sustain appellant's position. Other checks besides her own went into the clearance settlement with the Bank

of Edwardsville, and it cannot be known what the proceeds of her check were. How can it be said that the balance of \$1,000 in money was received for her check rather than for the others? And, if it could be determined that Prickett & Son received in the settlement the \$1,600 check drawn on themselves as part of the proceeds of appellant's check, it would avail appellant nothing. Indeed, she does not seek to have that check delivered to her as a part of the proceeds of her own. It is clear that the proceeds of appellant's check cannot be traced. They have been mingled with the common mass, and their identity is lost. It cannot even be said with certainty that any such proceeds are in the hands of the assignee in the form of money. It is not so much a question between appellant and the insolvents as between her and other creditors, and no reason is perceived from this record why, as between them, the maxim that equality is equity should not prevail. The judgment of the appellate court will be affirmed. Judgment affirmed.

(174 Ill. 432)

WARD et al. v. WARD et al.

(Supreme Court of Illinois. Oct. 24, 1893.)

PARTITION—SALES—DISTRIBUTION OF PROCEEDS—LIENS—APPEAL—REVIEW.

1. Parties to proceedings for the partition of land consisting of several parcels, on which there are separate mortgage liens, cannot complain that the land was sold *en masse*, and that the lienholders' shares of the proceeds could not be properly determined, where they were not interested in the mortgage liens or the application of the proceeds thereto.

2. Nor could a party interested or affected by the distribution of such proceeds complain that the lienholders' shares could not be properly determined, where each tract was offered separately, and struck off subject to final offer, and the amount of the sale *en masse* was in excess of the aggregate of the separate bids, since the excess could be proportionately distributed.

3. A sale *en masse*, in partition, after offering each tract separately, for a larger amount than the aggregate of the separate bids, is not unlawful.

4. The sale of land *en masse* in partition proceedings will not be set aside in equity where there was no fraud or injury to the estate.

5. The objection to the report of commissioners in partition proceedings, that it did not show that the land could not be divided, cannot be raised for the first time on appeal.

Error to circuit court, St. Clair county; A. S. Wilderman, Judge.

Bill for partition by William E. Ward and another against Walter L. Ward, the Consolidated Coal Company of St. Louis, and others. From a decree confirming the commissioners' report, defendants Walter L. Ward and the Consolidated Coal Company of St. Louis bring error. Affirmed.

O. W. Thomas, for plaintiffs in error. James M. Dill, for defendants in error Brandenburg.

PHILLIPS, J. This is a partition proceeding. Both of the plaintiffs in error were defendants in the court below, one interested as an heir of an intestate, and the other as assignee of a lessee of certain coal lands. Both were defaulted, and neither objected to the report of the commissioners appointed by the court to divide the lands, or to set off dower, and value the lands, if the same could not be divided. They did except to the approval of the report of sale on the ground that the sale was en masse, and not in accordance with the notice; that a part of the property sold for less than two-thirds of its appraised value; that there were separate liens on separate parcels of the lands, which were to be severally satisfied out of the proceeds of such parcels; and therefore, as claimed, the proceeds could not be distributed as provided by the decree. It was also claimed the decree of sale clouds the leasehold interest of the coal company.

The leasehold interest was not affected by the decree, when all the parts of the decree relating thereto are considered. Neither of the objectors was interested in the mortgage liens or the application of the proceeds thereto, and therefore cannot be heard to complain that the lienholders' shares of proceeds could not be properly determined. Even if the heir, Walter L. Ward, can be said to be interested or affected by such distribution, yet, as each of such tracts was offered separately, and struck off subject to formal offer, and as the sale en masse was in excess of the aggregate of the separate bids, there would not seem to be any particular difficulty in properly distributing the proceeds according to the decree by proportionately distributing such excess, in which case he would be benefited, rather than injured, thereby. The statute (Starr & C. Ann. St. c. 106, § 27) expressly provides that, if all the tracts sell for enough to make the total amount of the sales equal to two-thirds the total amount of the valuation, then the sale is good, though some particular tract sells for less than two-thirds valuation. The aggregate amount was in excess of the two-thirds valuation. A sale en masse, after offering each tract separately, for a larger amount than the aggregate of the separate bids, thus resulting in a benefit, is not unlawful. *Van Valkenburg v. Trustees*, 66 Ill. 103. In this case the coal company has no right to object, and the other party was benefited.

The decree and notice of sale were of the entire property, and, although the notice stated the sale of the farm property would be on a certain day, and of the city property two days thereafter, each to be on the respective premises, yet the sale, in fact, was in pursuance of one decree, one notice, and of the entire property. It was, in short, one sale. The record shows that, not only was each tract offered separately, but, when the same was struck off, it was, as to each tract, made subject to "final offer" when the whole should

be offered together, which was done at the second date, with the result that a better sale was made. Certainly no one was misled by this usual and proper proceeding, and the estate was benefited. Unless there was fraud or injury, the sale of land en masse will not be set aside in equity. *Fairman v. Peck*, 87 Ill. 156.

It is urged that the commissioners did not report that the land could not be divided. The first report did show that fact, which is a part of this incomplete record. Besides, neither of these plaintiffs in error objected to the last report, which omitted that statement, nor do the exceptions to the report of sale include such point as an objection. It would seem to be too late, especially in view of the condition of this record, to raise that objection to the commissioners' report for the first time in this court. In the case of *McCracken v. Drott*, 108 Ill. 428, it was said (page 432): "By failing to except, he waived all objections to the report. He will not be permitted, when in court, to lie by, and permit errors in the commissioners' report to intervene, and then bring the record to this court, and reverse the decree confirming the report. He had his day in court when the decree fixing the rights of the parties and confirming the report was rendered." We find no error in the approval of the report, or in the proceedings, available to these plaintiffs in error. The decree is affirmed. Decree affirmed.

(175 Ill. 58)

BALTIMORE & O. S. W. RY. CO. v. FAITH.

(Supreme Court of Illinois. Oct. 24, 1898.)
ORDINARY CARE—HIGHWAYS—EXISTENCE—QUESTIONS OF FACT—EVIDENCE—INSTRUCTIONS.

1. The expressions "due care" and "ordinary care" are convertible terms.

2. On an issue of the existence of a legal highway, where the jury were instructed as to the different modes of establishing public roads, and the steps necessary to the legal laying out of a road in each of the different modes, a further instruction submitting the question whether a public highway had been legally laid out is not objectionable as submitting "as a question of fact" whether a public road legally existed at the point in controversy.

3. Evidence that a traveled public way crossed a railroad track at the point in question, that cattle guards had been constructed in the track on either side of the way, and that public funds and road labor had been expended on the road, is prima facie sufficient to establish the existence of a public highway at such point.

4. Where there is evidence which fairly tends to support a proposition of fact, the party in whose favor the fact would operate is entitled to an instruction as to the principle of law to which the fact relates.

Appeal from appellate court, Fourth district.
Action by Harrison Faith against the Baltimore & Ohio Southwestern Railway Company. From a judgment of the appellate court (71 Ill. App. 59) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Palmer, Shutt, Hamill & Lester and Gee & Barnes, for appellant. J. E. McGaughey, W. A. Cullop, and Wm. Robinson, for appellee.

PER CURIAM. This is an appeal from the judgment of the appellate court for the Fourth district affirming a judgment entered in the circuit court of Lawrence county in favor of the appellee, in the sum of \$1,000, in an action on the case, the declaration wherein charged that the appellant company negligently allowed one of its freight cars to stand partly upon a public highway at the crossing of the said highway and the track of the appellant's road; that the said car so partly standing upon the public road was an object calculated to frighten teams or horses attempting to be driven along said highway and over the said crossing; and that a horse of the appellee, attached to a buggy, driven by the appellee, while the appellee was endeavoring with due care and diligence to drive the said horse along said highway and across said crossing, became greatly frightened at said freight car, and became unmanageable, ran away, overturned the buggy, threw the appellee with great force and violence to the ground, and thereby inflicted serious personal injuries upon him. The plea was, "Not guilty," and the cause was submitted to a jury. A verdict of \$1,000 in favor of the appellee was returned. Judgment thereon followed, and the same was affirmed by the appellate court.

A number of witnesses testified in behalf of the respective parties. We have examined the testimony produced, and find it sufficiently excluded any imputation of contributory negligence on the part of the appellee, and in other respects so far tended to establish a right of recovery in the appellee as to warrant the submission of the case to the jury. The court therefore properly overruled the motion of the appellant company for an instruction peremptorily directing a verdict in its favor.

In the first, second, fifth, eighth, and twelfth instructions, the jury were instructed and advised it was essential it should appear the appellee had used "ordinary care" to secure his own safety on the occasion in question, and in the third, sixth, and ninth instructions the degree of care required by the law was denominated "due care." The expressions "due care," "ordinary care," and "reasonable care" are convertible terms, and no error occurred in the matter of the instructions in this respect. *Railroad Co. v. Yorty*, 158 Ill. 321, 42 N. E. 64.

The objection that the tenth instruction submitted to the jury, as a question of fact, whether a public road legally existed at the crossing in question, is not tenable. In *Harding v. Town of Hale*, 83 Ill. 501, the question whether or not a public highway had been legally laid out was declared to be a mixed question of law and fact, and that an instruction was erroneous which left it to a jury to

determine whether the public highway had been laid out, without advising them as to the steps necessary to the laying out of the same. In the case at bar the jury, in the other instructions, were fully advised as to the different modes of establishing public roads, and what steps were necessary to the legal laying out of a road, or the creation of a public highway, in each of the different modes by which the public may acquire such an easement. The instructions, considered as a series, properly directed the jury on this point. It appeared a traveled public way actually crossed the railroad track at the point in question, and that cattle guards had been constructed in the track of the railroad upon either side of the traveled way, though perhaps a few feet therefrom, and that the public funds and road labor had been expended upon the road. This was sufficient to establish *prima facie* the existence of a public highway.

While complaint is made that the seventh and ninth instructions are erroneous, no specific ground of objection is pointed out as to either in the brief, and we do not perceive, upon inspection of them, that they were erroneous, or in any respect operated to the prejudice of appellant.

The objection that there is no evidence to warrant it is urged against the twelfth instruction. In support of this objection it is urged the only evidence to base it upon is the testimony of the appellee. The testimony of the appellee in chief was such as to demand the submission to the jury, as a question of fact, whether he exercised ordinary care for his own safety, and whether the car, if standing, as he testifies it did, partly within the limits of the highway, was an object likely to frighten horses; and it was to these matters the instruction related. The contention that upon cross-examination the appellee made admissions to the effect that the horse became frightened from other causes, or that such admissions were proven by other witnesses, was proper for the consideration of the jury in connection with his testimony in chief, but had no effect to authorize the court to refuse the instruction on the ground that the preponderance of the evidence did not support it. If there is evidence which fairly tends to support a proposition of fact, the party in whose favor the fact would operate is entitled to an instruction as to the principle of law to which the fact relates. Whether the evidence preponderates in favor of the truth of the alleged fact is a matter for the jury, not the court.

The action of the court in modifying an instruction offered by the appellant company is criticised on the ground there is no evidence in the record to support the modification. The modification, in substance, was that the principle announced in the instruction was not applicable, if the jury believed, from the weight of the evidence, the car extended beyond the cattle guard, and into the public highway. We find it was testified to by more than one witness that the bumper of the car

stood even with, or very nearly extended to, the traveled portion of the road. The record is free from reversible error, and the judgment is affirmed. Judgment affirmed.

(175 Ill. 508)

LINNERTZ v. DORWAY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

EJECTMENT—POSSESSION—QUESTIONS FOR JURY
—ESTOPPEL.

1. In ejectment the defendant answered that the premises in his possession were not those described in the declaration. Plaintiff introduced evidence that the place in possession of defendant was within the limits of the survey described in his declaration. Defendant claimed that plaintiff was estopped to contend that the premises so possessed by him were embraced in the tract described by plaintiff. The court sustained a demurrer to the evidence, withdrawing the case from the jury. *Held* error, where plaintiff was not so estopped, since there was sufficient evidence to warrant the submission to the jury of the question whether the tract defendant was in possession of was the one described in the declaration.

2. In ejectment defendant claimed that plaintiff was estopped to contend that he was in possession of the premises described in the declaration, alleging that the evidence showed that he was in possession of the land described and another adjoining tract, both of which he conveyed to a grantee, through whom plaintiff claimed, but that such grantee went into possession of the latter tract and another tract, which also belonged to defendant; that such latter tracts were conveyed successively under deeds describing the land as in defendant's deed; that plaintiff and his grantors had acquiesced in such last tracts as being the land conveyed by defendant's deed. *Held* that, as plaintiff had the legal title, estoppel did not apply, since in ejectment estoppels in pais cannot be invoked to defeat a legal title.

Error to circuit court, Monroe county.

Action by John Linnertz against John Dorway and others. From a judgment for defendants, plaintiff brings error. Reversed.

Wm. Hartzell and J. B. Simpson, for plaintiff in error. H. Clay Horner, for defendants in error.

PER CURIAM. This was an action of ejectment brought by the plaintiff in error against F. W. Brickey and others, defendants in error. The defendants other than Brickey were tenants under Brickey. The declaration claimed title in the plaintiff in error to a tract of land described therein by metes and bounds, being 43.61 acres off the east part of survey 342, claim 2,058, township 5 S., ranges 9 and 10 W. The defendants in error filed but a single plea, averring they were not, at the time of the beginning of the suit or at the time of filing the plea, in possession of the premises in the declaration described. The issue raised by the declaration and the plea thereto was submitted to a jury for trial.

It was agreed that on the 10th day of January, 1855, the title to that part of survey 342 involved herein rested in the defendant F. W. Brickey. The plaintiff introduced testimony from which it appeared, without controversy,

this title had passed by mesne conveyances from him, the said Brickey, to the said plaintiff. The plaintiff produced a number of witnesses, among them one Gardner, who was a surveyor and deputy county surveyor of Monroe county, wherein the said land is situate. The testimony of these witnesses tended to establish that the premises described in the declaration were in the possession of the defendant Brickey. The said defendant Brickey did not deny but that he was in possession of the locus in quo referred to by these witnesses, but he insisted the tract so in his possession was not the tract described in the declaration, and introduced evidence tending to sustain his contention; and further insisted the plaintiff was estopped, for reasons hereinafter referred to, to contend that the tract so possessed by the defendant was embraced in the tract described in the declaration. Unless the plaintiff was so estopped to urge that the premises in the possession of the defendant Brickey were comprehended within the description contained in the declaration, whether the tract of which the defendant was in possession is the tract described in the declaration was a question of fact to be determined by the jury.

At the close of all the testimony the defendant interposed a demurrer to the evidence. The court sustained the demurrer, discharged the jury, and entered judgment finding the defendant was not guilty of unlawfully withholding the premises described in the declaration.

We find in the testimony of the surveyor, Gardner, and in the testimony of other witnesses produced in behalf of plaintiff in error, evidence tending to show that the locus in quo so confessedly in the possession of the defendant in error Brickey was within the limits of that part of survey 342 described in the declaration, and in the various deeds through and by which the plaintiff in error traced title thereto. Upon this branch of the case it cannot be said the evidence in support of the contention of the plaintiff in error, together with the intendments reasonably to be drawn therefrom, was so far insufficient to support his contention as to have justified the court in refusing to submit that question, as a question of fact, to the jury. Hence, unless the plaintiff in error was, as the defendant in error claimed, estopped to insist that the tract so in the possession of the defendant in error was within the limits of the tract described in the declaration, it is manifest the court erred in withdrawing the case from the jury and entering judgment against the plaintiff in error. *Railway Co. v. Lewis*, 109 Ill. 120; *Bartelott v. Bank*, 119 Ill. 259, 9 N. E. 898; *Wire Co. v. Mercier*, 163 Ill. 486, 45 N. E. 222.

Defendant in error insists the evidence disclosed facts from which it is to be conclusively presumed, as a matter of law, the plaintiff in error became estopped to claim that the description of the premises in his

declaration and in his deed referred to the premises in the possession of the defendant in error. The defendant in error alleged the facts so disclosed to be as follows: That he, the defendant in error, on the 10th day of January, 1855, was the owner of that part of the survey described in the declaration, and also of a tract lying immediately southeast thereof, to wit, the eastern part of the survey next adjoining on the southeast, and on that day sold and conveyed said portions of said surveys to one John Drury, and in the said deed to said Drury described the lands so sold and conveyed, as follows: "One hundred acres of the northeast end of survey 342, claim 2,058, and survey 341, claim 2,103." That, under and by virtue of said deed, said Drury entered into possession of certain tracts of land adjoining, upon the south, the tract of which the defendant was shown to be in possession. That said Drury afterwards sold, conveyed, and delivered the possession of the same tracts he purchased from, and received possession of from, the defendant in error, to one John J. Linnertz, father of the plaintiff in error. That said John J. Linnertz retained peaceable and undisturbed possession of the same locus in quo until the date of his death, in 1882, and that upon his death the title to the same premises and the possession thereof passed, under the laws of descent, to the plaintiff in error and his brother, Anton Linnertz. That Anton conveyed his undivided interest in and to said premises, and delivered possession thereof to the plaintiff in error, who now holds such possession.

The position of the defendant in error is that he sold to said Drury, and said Drury bought of defendant in error, other lands than the tract of which it was shown the defendant in error had the possession; and that the possession of such other land was, under the said conveyance, parted with by the defendant in error, and accepted by the said Drury, as being the lands comprehended within the descriptions employed in the deed; and that each successive grantor in the chain of title upon which the plaintiff in error relies sold and delivered to his grantee, including the plaintiff in error, said other tracts of land by the same description as that employed in the deed from Brickey to Drury; and that under said deeds each of the said grantees, including the plaintiff in error, entered into possession of the said other tracts; and that the plaintiff in error still has peaceable and undisturbed possession of said other tracts, holding the same under deeds of conveyance describing the said tracts he seeks as the same are described in the declaration in the cause.

The argument is that by the acts of the various grantors and grantees, through whom plaintiff in error obtained and claims title, and by his own acts, the descriptions of the land in the various deeds involved, including the land held by the plaintiff in error, have

been applied to certain tracts of land, and the boundaries of the tracts so described thereby fixed and established, and so long acquiesced in, that the parties to such deeds are to be deemed estopped from asserting that the descriptions in said deeds refer to other tracts of land now in the possession of the defendant in error. In support of this insistence we are cited to a number of cases decided by this court. We have examined all of such cases. The principle to be gathered from them is that the owners of adjoining tracts of land, by parol agreement, or recognition from which an agreement may be inferred, may settle and establish permanently the boundary line between their lands, which, if followed by possession according to such lines so agreed upon, is binding upon such owners and upon their grantees, and estops each of them to claim title beyond such line. But in the case at bar there is no evidence that the parties, by express agreement or acts of recognition or acquiescence, fixed upon, or attempted to fix upon, any line as being a true boundary line between the adjoining premises. The action here is ejectment. The plaintiff in error established that he was the holder of the legal title in the premises described in his declaration, and should have prevailed unless he failed to establish the defendant in error was in possession of the tract to which he held such title. The effect of the proposed estoppel was not to prohibit the plaintiff in error from avoiding any agreement, express or implied, fixing a boundary line between his lands and the land of any other person, but to prohibit him from asserting ownership of lands the title to which he had established by the production of evidence which the law provides shall evidence the investiture of title, on the ground the acts and conduct of the parties to such instrument established that it was the intention to transfer and convey another tract of land than such tracts as were described in such instrument.

It is not permissible in an action of ejectment to invoke estoppels in pais in order to defeat the legal title to permanent interests in land. *Winslow v. Cooper*, 104 Ill. 235; *Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co.*, 137 Ill. 9, 27 N. E. 38. Courts of chancery may afford relief of this character in a proper case, but in an action of ejectment the legal title must prevail. The principle upon which it is held boundary lines may be settled by agreements, and the parties to such agreements deemed estopped to disregard them, is not that title to land can pass by parol agreement, but that uncertainties as to the true location of a mutual boundary line may be adjusted and settled by the voluntary agreement of the respective owners of adjoining premises, and that, when such agreements are fairly and clearly made, the parties thereto shall not be allowed to reopen the controversy, but shall be required to abide their agreement. *Cutler v. Callison*, 72 Ill.

113; *Quick v. Nitschelm*, 139 Ill. 251, 23 N. E. 923. In the case last cited we said (page 262, 139 Ill., and page 929, 23 N. E.): "If the facts are not sufficient to show an actual agreement as to a boundary line, even though they amount to an estoppel in pais, it is to be observed that estoppels in pais affecting permanent interests in land can only be made available in a court of equity."

The action of the court in withdrawing the case from the jury cannot, therefore, be justified upon the ground the plaintiff in error had become estopped to contend that the defendant in error was in possession of the premises described in the declaration. We have seen the plaintiff in error produced testimony tending to show the defendant in error was so in possession of the premises. It was not necessary, in order to entitle the plaintiff in error to have that issue presented to, and decided by, the jury, that the court should have been of the opinion that the preponderance of the evidence supported his contention, for that would be to deprive him of his constitutional right to have his cause determined by a jury. Unless the court can say there is no evidence upon which the jury could, "in the eye of the law, reasonably find for the plaintiff," the issue must be determined by a jury. *Frazer v. Howe*, 106 Ill. 563; *Offutt v. Exposition Co.* (Ill. Sup.; Oct. 1898) 51 N. E. 651. The judgment must be reversed and the cause remanded. Reversed and remanded.

(174 Ill. 398)

CLEVELAND, C. C. & ST. L. RY. CO. v. JENKINS.

(Supreme Court of Illinois. Oct. 24, 1898.)

JUDICIAL NOTICE—OPERATIONS OF RAILROADS—MASTER AND SERVANT—LETTER OF RECOMMENDATION—BURDEN OF PROOF—EVIDENCE—CUSTOMS AND USAGES—DAMAGES—INSTRUCTION.

1. Judicial notice will be taken of the fact that a clearance card given to an employé of a railroad company at the end of his service is a letter showing the cause of discharge, length of service, capacity, etc.

2. At common law no duty is imposed on an employer to give his employé a letter of recommendation or clearance card on the severance of the relation, in the absence of any custom or usage on the part of said employer.

3. In an action by a discharged employé against his employer for refusal to give a letter of recommendation or clearance card, the burden is on plaintiff to show a custom or usage on the part of defendant to give each discharged employé such a letter or card.

4. The fact that an employer required a clearance card or letter of recommendation from each person seeking employment with it does not tend to establish a custom to give such letter or card to employés at their discharge.

5. In an action by a discharged employé against his employer for refusal to give him a clearance card, one of plaintiff's witnesses, who had been discharged by defendant, stated that he had received a personal letter of recommendation, and several others stated that it was defendant's custom to furnish such clearance cards, but they themselves had not received any when they were discharged by

defendant. Defendant's superintendent testified that it was not defendant's custom to give such cards. *Held*, that the evidence failed to establish such a custom.

6. An instruction that, if the jury find for plaintiff, they should assess damages "at such sum as you think right, not exceeding the amount claimed in the declaration," without any reference to the evidence, is erroneous.

7. In an action against a railroad company for refusal to give a discharged employé a clearance card, clearance cards of other roads, introduced for the purpose of showing a custom or usage to give such cards, are inadmissible, unless defendant is connected therewith by showing a common understanding between defendant and the other roads that such letters should be given and required of all employés.

8. A rule of a railroad company that, if any conductor should be suspended, he should be granted a full investigation within five days, with a right to appeal to the general officers of the road, and, if exonerated, he should receive pay for time lost, does not apply to a conductor who is discharged after being indicted for larceny.

9. A rule of a railroad company, adopted several years after the employment of a conductor, does not form part of the contract of employment.

Appeal from appellate court, Fourth district.

Action by Charles Jenkins against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. A judgment for plaintiff was affirmed by the appellate court (70 Ill. App. 415), and defendant appeals. Reversed.

This was an action on the case, brought by Charles Jenkins against appellant in the circuit court of Wabash county. The declaration charges that the plaintiff has been a faithful employé of the defendant for 10 years as a conductor on one of the freight trains on the line of its railroad running from Cairo to Danville, Ill.; that he was discharged about November, 1893, without cause, and although, by the regulations and customs of the defendant, a letter or clearance card is usually given to discharged employés, in order that they may secure employment on other roads, it being essential for that purpose, such letter or clearance card was refused to him, although he had often applied for it, whereby he had failed to secure employment; that defendant and other railroad companies had a rule or custom, which is charged to be a conspiracy, not to employ a discharged employé of another road without such a letter or clearance card; that after his discharge, and failure, on request, to receive such card, the plaintiff applied to various railroad companies for employment, but was uniformly refused on account of not having such card, to which he was entitled; that he had been receiving \$35 per month from the defendant for his services as conductor previous to his discharge, and that he was qualified and competent to earn the same wages on other roads, and would have done so had he received such card; that by reason of such failure and refusal on the part of defendant he was unable to secure employment, and compelled to quit such line of work, to his loss and damage. The declaration contains one count, and avers a cause

of action in case arising out of a contract. It avers the usage or custom existing upon the road of defendant and other roads, whereby a discharged employé is entitled to such letter, showing the time of service, reason for discharge, etc.; thus averring a contractual relation, out of which, as alleged, arose the duty, when such contractual relation was severed, to give a letter or clearance card for the purpose stated. The theory proceeded upon by plaintiff, as charged in the declaration, was that after his discharge he was entitled to such a clearance card, which was refused him, and without which he could not secure employment on other roads, whereby occurred the damage stated. To this declaration defendant pleaded the general issue. It appears from the record that shortly before the plaintiff's discharge he had been indicted by three separate indictments by the grand jury of Johnson county, Ill.,—two for larceny and one for embezzlement. Upon the confession or statement of one of the station agents of the appellant company, who had also been indicted by the grand jury for larceny in taking from cars certain goods, at various times, which were being transported, the plaintiff, Jenkins, was implicated. Upon being thus indicted, as before stated, he was suspended by the superintendent of the appellant road, and subsequently was discharged. Upon the trial of the criminal charges in the circuit court of Johnson county, on two of the indictments Jenkins was acquitted, and one indictment against him was nolle. On different occasions, before and after the disposition of the indictments against him, he made application for the clearance card, which was refused. A jury in the trial court found for the plaintiff, and assessed his damages at the sum of \$875. Motion for new trial was overruled, and judgment entered on the verdict. On appeal to the appellate court for the Fourth district this judgment was affirmed, and from that judgment of affirmance this appeal is brought to this court on a certificate of importance.

C. S. Conger (H. M. Steely, of counsel), for appellant. Mundy & Organ and Cullop & Kessinger, for appellee.

PHILLIPS, J. (after stating the facts). The gravamen of the declaration in this case is that the plaintiff was discharged, and refused a clearance card or letter, to which he was entitled, without which he could not obtain employment on any other road, and that he failed to obtain such employment, whereby he suffered damages. The declaration avers a cause of action on the case arising out of a contract. It avers a contractual relation, out of which, as alleged, arose the duty, when such contractual relation was severed, to give a letter or clearance card for the purpose stated. Unless the law imposes on appellant, in some form, the duty to give appellee, as one of its employes, a letter of recommendation

or clearance card, his action in this case cannot be sustained. If a legal duty is imposed upon the employer to give to a discharged employé, or one voluntarily leaving his service, a letter of recommendation, such duty must arise either by the common law, by statute, by contract of employment, or by such a generally established usage or custom as would demand it be done. Such usage, however, must be so well known and uniformly acted upon as to raise a fair presumption it was intended to be incorporated in the contract of employment. A distinction is to be made between what is known, in terms, as a clearance card, and a letter of recommendation. This distinction is apparent, not only from the evidence in this case, but also from the knowledge which courts have of the general conduct and management of railroad business and affairs. It is the duty of courts to take, and they will take, judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the every-day practical operation of them. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515; *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140.

From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad, or indifferent, given to an employé at the time of his discharge or end of service, showing the cause of such discharge or voluntary quitance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment.

As stated, an action for failure to give an employé either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. In the *American & English Encyclopedia of Law* (volume 14, p. 799) it is said: "It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much a servant is entitled to character in fairness, or how cruel the refusal might be." In *Townsh. Sland. & L.* (4th Ed.) p. 425, it is said: "On examination it will be perceived that this right of an ex-employer to give, as it is termed, a 'char-

acter' to his ex-employé, is nothing more than a consequence of the right to communicate one's belief. * * * No one is under any obligation to make such a communication. He does not owe it as a duty, either to the employer or the employé, to make any communication on the subject." In the case of *Railroad Co. v. Kasson*, 37 N. Y. 224, which involved a similar question, in the opinion it was said: "If I know that a villain intends to defraud or in any way injure my neighbor, it is doubtless my duty, as a good citizen and as a Christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of this duty. It is a moral duty, simply, not recognized by law." In *Smith on Master and Servant* (Text-Book Ed., pp. 380, 381) it is said: "It is clear, however, that, in the absence of any specific agreement to that effect, there is no legal obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so." In *Carrol v. Bird*, 3 Esp. 201, it is set forth in the declaration that the plaintiff's wife, having been retained by the defendant as a servant, was dismissed from the service; that, after she was so dismissed, she applied to a person of the name of Stewart for the purpose of being retained and hired as a servant; that Mrs. Stewart was ready and willing to have hired and taken her into her service if the defendant would have given her a character, and such character was satisfactory; that it was the duty of the defendant, by law, to have given her such character as she deserved; that the defendant, not regarding her duty, wholly refused to give her any character whatever, by reason of which the said Mrs. Stewart refused to hire her into service. In the opinion rendered in this cause Lord Kenyon said: "There was no case, nor could the action be supported by law. By some old statutes regulations were established respecting the characters of laborers, but in the case of domestic and menial servants there was no law to compel the master to give the servant a character. It might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it." A character is not given for the benefit of the ex-employé, although he may be either injured or benefited by reason of such a character being given; nor does the right to give such a character arise out of a duty to the employé, but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employé has a legal right to demand it. Such communications have been made, not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty to society, when

the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information. *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Mott v. Dawson*, 46 Iowa, 533; *Townsh. Sland. & L.* (4th Ed.) 395-397; 13 Am. & Eng. Enc. Law, pp. 415, 416; *Bacon v. Railroad Co.* (Mich.) 33 N. W. 181. In *Pars. Cont. p. 328*, the author says: "The master is under no legal obligation to give a testimonial of character to his servant." It is also a well-known rule of law that no man is compelled to enter into business relations with any other person unless he desires so to do, and it is also as well established that upon the dissolution of such business relations no man shall be compelled to divulge to the public his reasons, good or bad, for such dissolution. In *Cooley, Torts*, p. 328, it is said: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern." A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character to his servant. By statute no duty is imposed upon the employer to give to an employé a clearance card, nor does any right to demand such accrue to the employé. Therefore, if any cause of action exists to the appellee in this case, it must arise out of his contract of employment, or there must be shown and established such a custom or usage as would clearly entitle him to such. Under such views of the subject-matter involved in this case, where no action, either by law or by statute, accrued to the plaintiff, it was necessary for him to produce, in the first instance, evidence tending to show that a usage or custom existed on appellant's railroad, at the time of his contract of employment, to give to each discharged employé, or those voluntarily quitting its service, a clearance card or certificate of recommendation, and tending to show he was entitled to it under his contract of employment.

The fact that the master requires certificates of recommendation from persons seeking employment is certainly no reason why he should be legally compelled to give certificates to those leaving his employment. In this case the testimony produced, showing or tending to show that appellant required certificates of recommendation from persons seeking employment with it, does not, in any manner, tend to establish the fact that it gave to persons leaving its employment certificates of like character. For the purpose of establishing the existence of a usage or custom under which appellee was entitled to a clearance card, a number of witnesses were offered on the trial. The witness Baker had

worked for the predecessor of the appellant road, but had never worked for appellant. At the time he quit its employ he had not received a clearance card, nor had he ever seen but one such card issued by the appellant road, and that by a master mechanic. Another witness (Bedell) had worked for appellant, but on retiring from its service had received no card, and apparently, from his testimony, was refused one. Still another witness (Shearer), offered by appellee, had never worked for appellant, but had worked for other companies, and testified that he did not know positively what custom or usage existed. The witness Hunt worked for appellant, and on retiring from its service, in 1894, asked for a clearance card, but did not get one. Shields, another witness, worked for appellant in 1891, and on retiring from its service received a letter of recommendation, which was introduced in evidence. The letter is purely personal in its character, and shows on its face it was written and intended for the witness, and was not a general form which would be given to other employees. This witness had never seen any other card or letter issued by the appellant except his own. He produced a number of letters of recommendation, or, as they might be termed, clearance cards, from other roads, which were admitted over the objection of the appellant, with the understanding the appellant road should be connected with them in order to make them admissible, and that it should be shown they were issued by other roads in accordance with an understanding or agreement in which appellant took part. No such connection was made, however, and such letters issued by other roads were not admissible. For the purpose of proving the usage or custom on the part of the appellant road, therefore, the only evidence offered was one letter, purely personal in its character, and the statements of several witnesses that such a custom or usage existed, but without any apparent knowledge on which to make such statements. No other evidence was produced tending to show that appellant issued such cards or letters, or that it required them before employing its servants. A number of the witnesses above named, offered by the appellee, testified that on leaving the service of appellant they had received no such letters or cards. The positive and direct testimony of the superintendent of the appellant road—the person charged with the duty of issuing such clearance cards or letters of recommendation if any were to be issued—is that no custom or usage existed, and that it was of rare occurrence that an employé leaving its service received a letter of any character.

To establish a usage or custom, it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn, as a matter of inference, from transactions. 27 Am. & Eng. Enc. Law, p. 728. A usage

which is to govern a question of right should be so certain, uniform, and notorious as probably to be known to and understood by the parties as entering into their contract (U. S. v. Duval, Gilp. 356, Fed. Cas. No. 15,015), and cannot be proved by a single, isolated instance (Dean v. Swoop, 2 Bin. 72. See, also, Janney v. Boyd, 30 Minn. 319, 15 N. W. 308; Taylor v. Mueller, 30 Minn. 343, 15 N. W. 413). So, also, it is held that particular instances of a certain practice in a bank do not establish a usage (Allen v. Bank, 22 Wend. 215), nor instances in one or two banks other than the one concerned in the alleged usage (Bank v. Swain, 29 Md. 501). In Herring v. Skagg, 73 Ala. 446, it was held that a custom is a fact, and is as capable of proof as any other fact; that it may be proved by evidence of facts and instances in which it has been acted upon, but is not proved by evidence that it was acted upon in a few particular instances of dealing, nor is such evidence admissible to establish its existence. It is apparent, therefore, that a custom or usage, to be binding, must be so uniform, long established, and generally acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it, if nothing is stated to the contrary, and that the failure to conform to it would be an exception. Bissell v. Ryan, 28 Ill. 517; Wilson v. Bauman, 80 Ill. 493. A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known (Turner v. Dawson, 50 Ill. 85), and must not be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties or against the established principles of law. Besides this, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it. Turner v. Dawson, supra; Packard v. Van Schoick, 58 Ill. 79; Papin v. Goodrich, 103 Ill. 86. If it should appear, therefore, from the evidence, as it does in this case, that the foregoing elements are not established, and only a few isolated instances are shown to prove a usage or custom, the court, as a matter of law, should have held that a usage or custom was not thereby established. The evidence must clearly show the rule as above stated, and that a failure to conform with such custom would be unusual.

At the close of the plaintiff's evidence the defendant moved the court to instruct the jury to find for the defendant, which motion was accompanied by an instruction. This motion was renewed at the close of all the evidence in the case. The legal question is therefore presented to this court whether or not there was, at the close of plaintiff's testimony, evidence tending to establish the material averment in the declaration neces-

sary to be proven, and also whether or not, at the close of all the evidence, it was sufficient upon which to base a verdict if rendered. The rule in this regard is so well established that no citation of authorities is necessary. There was no evidence tending to show any general custom or usage existing on the appellant road and entered into between it and other roads, as alleged in the declaration. It is clear the evidence on that question was not sufficient to support a verdict, and the motion offered at the close of plaintiff's evidence, and renewed at the close of all the evidence, and accompanied by an instruction to find for the defendant, should have been allowed and the instruction given.

Complaint is also made of the first instruction given for appellee, which tells the jury that, under certain contingencies, "you should find for the plaintiff, and fix his damages at such sum as you think right, not exceeding the amount claimed in the declaration." No reference is made to the evidence in the case. This form of instruction is erroneous, and has been frequently condemned by this court. *City of Freeport v. Isbell*, 83 Ill. 440; *Railroad Co. v. Austin*, 69 Ill. 426. In the latter case, where an instruction concluded, "The jury should give the plaintiff such damages as they, under their oaths, can say will be a fair compensation for said injury, not exceeding, however, the sum of \$10,000, the amount claimed in the plaintiff's declaration," this court said: "The law required the jury to determine the liability of the defendant from the evidence, and from that alone; and an instruction which would permit them to enter into an open field of investigation cannot be sustained." The instruction was erroneous in not confining the jury to the evidence in considering their verdict.

The second instruction given for appellee is subject to the same criticism, and was also erroneous, and should not have been given without modification. Errors are also assigned as to the other of appellee's instructions, but it is not necessary in the condition of this record to discuss them.

It is also assigned as error by appellant that the letters of character or recommendation written by officials of other roads were improperly admitted in evidence against appellant. The specific objection made by appellant to this evidence was its incompetency unless appellant should be in some way connected with such letters; that it should be shown to have had knowledge and approval of their issuance, and be shown to have been a participant in a common plan or understanding that letters of such character should be given to discharged employes of such roads, and that such letters be required as a condition precedent to employment. For no other purpose could these letters issued by officials of other roads be admitted as evidence against this particular appellant. If such a common understanding or conspiracy as charged in the declaration existed, and was

unlawful, it was certainly necessary to in some manner connect appellant with it. This the appellee entirely failed to do, and the letters should not have been permitted to go to the jury.

In this case it is not shown, or even attempted to be shown, that appellee, at the time of his contract of employment with appellant, and as an incident of such employment, received any assurance that he would, at the time of his expiration of service, receive any clearance card or letter of recommendation from the appellant railroad. A rule in force on appellant's road, and known as "Rule 13," was offered in evidence, which reads as follows: "If a conductor is taken off his run for any cause, he shall be granted a full investigation, hearing, and decision within five days, at which time he shall have the right to have another conductor of his own selection to appear and speak for him, and shall have the right to appeal from the decision of a special to the general officers of the road. If exonerated, he shall receive pay for time lost." Appellant contends, and properly so, that this rule had no application to appellee's case. It was meant and intended to apply to cases in which a conductor, for some violation or infraction of appellant's rules or reported improper conduct, should be suspended. In this case appellee had been indicted by the grand jury of Johnson county for an alleged violation of the criminal law of the state. The only proper vindication was by a nolle of those indictments, or an acquittal by a trial jury. Such could not reasonably occur in five days, nor could appellant, by its rule, fix any time. Its own investigation would stand for naught. The other provisions of the rule show clearly it has no application to this kind of a case. This rule could in no sense be said to constitute any part of the contract of employment, as it only appears to have been adopted in 1890, and appellee had been in the service of the company some six years or more before that time. There being no other evidence tending to show appellee was entitled to a clearance card as part of his contract of employment, his action could not be maintained on that ground.

Another rule said to have been in existence on appellant's road is averred in the declaration. No such rule appears in the record, however. A rule numbered 11 (presumably this rule) was offered to be introduced by plaintiff below in rebuttal, not for the purpose of showing the effect of the rule, but to contradict the statements of two witnesses of defendant who had been asked whether or not such a rule was in existence. From the record it would appear that the rule, if in force, applied to engineers and brakemen, but not to conductors; and the court on this ground, or for the reason that the contradiction would be as to immaterial matter, refused to admit it. No cross errors are assigned by appellee upon the action of the

court in so doing, but an examination of the record indicates the trial court committed no error in that respect. Had such a rule applicable to conductors, providing for the issuing of clearance cards, as alleged in the declaration, been offered and established as a part of plaintiff's case, a different question might have been presented for the consideration of this court. In the condition of this record, however, where no usage or custom was shown to exist under which appellee could recover, and no provision incident to his contract of employment imposing upon appellant the duty to issue a clearance card or certificate, his action must fail. For the errors herein indicated, the judgment of the appellate court for the Fourth district and the judgment of the circuit court of Wabash county are reversed, and the cause remanded. Reversed and remanded.

(174 Ill. 627)

CROFT et al. v. PERKINS et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

VENDOR AND PURCHASER—LAND CONTRACT—SUBSEQUENT VERBAL CONTRACT—PREPONDERANCE OF EVIDENCE—VENDOR'S LIEN.

1. In a suit upon a written contract for the sale of land, wherein defendant relied on a subsequent verbal agreement modifying the written contract, it appeared that defendant's testimony as to such agreement was not corroborated by testimony of any weight, that complainant and his wife positively denied the making of any subsequent verbal contract, that other witnesses testified to complainant's refusal to accept defendant's offer in accordance with the terms of the alleged verbal agreement, and that the written contract remained in complainant's hands uncanceled. *Held*, that defendant failed to establish the verbal contract by a preponderance of evidence.

2. Where the owner of land conveys it by deed divesting himself of the legal title, and a part of the purchase price remains unpaid, he retains, in equity, a vendor's lien for the unpaid purchase money.

Error to circuit court, Effingham county; S. L. Dwight, Judge.

Bill by Fred Croft and another against William J. Perkins and another. From a decree dismissing the bill, complainants bring error. Reversed.

The bill in this case was filed by Fred Croft and Margaret Croft, plaintiffs in error, to set aside a deed made by them to William J. Perkins for 220 acres of land in Effingham county, Ill., or, in case the deed should not be set aside, the bill asks for a strict foreclosure of a vendor's lien upon the land so deeded, for the amount of the unpaid purchase money. The bill alleges that on the 7th day of December, 1895, a contract was entered into in writing between Fred Croft and William J. Perkins, by which Croft agreed to convey to Perkins 220 acres of land, for which Perkins agreed to pay \$15 per acre, making \$3,300. Said contract is as follows: "Contract between Fred Croft, of Watson township, and W. J. Perkins, of

Union township, both of Effingham county and state of Illinois: Now know ye all men," etc., "that I, Fred Croft, have bargained and sold to the said W. J. Perkins the following lands, to wit, southwest quarter section 1, town 6 north, range 6, and the north half of the southwest quarter of section 36, and the northeast quarter of section 36, and 20 acres off of the south side of the southeast quarter of the northwest quarter of section 36, all in town 7, range 6, except the first 80 acres, for the sum of \$15 per acre, to which the said Fred Croft agrees to give the said W. J. Perkins an abstract title; and the said Fred Croft agrees to take of the said W. J. Perkins the east half of the southeast quarter of section 3, town 6, range 6, as part payment, for the sum of \$1,000, and the said Perkins agrees to give the said Fred Croft an abstract title to the same. Now, it is further agreed that the said Perkins is to pay the said Croft all the money, less \$1,000 to be paid in land, if he can possibly get it, on or before the 1st day of March, 1896; but it is also agreed that, if the said Perkins can't raise the said amount to pay it all, then the said Croft is to accept of \$2,500, including \$500 paid by said Perkins in land, and then take a second mortgage for the remaining \$800, due in one year, with seven per cent. interest. Dated this 7th day of December, 1895. Fred Croft, W. J. Perkins." The bill charges that the land sold to Perkins, and the 80 acres he was to let Croft have, should be conveyed by perfect titles and free from incumbrance, the words in the contract, "an abstract title," being understood by the parties to mean a perfect title, free from incumbrance; that Perkins had the deed prepared for Croft and wife for the 220 acres, and also the deed from himself and wife to Croft for the 80 acres, which were to be taken towards the payment of the 220 acres; that Perkins represented that the money was ready to pay for the land, and thereupon Croft and wife executed the deed for the 220 acres; that after the deed was executed Perkins stated the money was not there, but at Effingham, and that in order to obtain the money it was necessary for Perkins to have the deed and take it to Effingham and have it recorded, when he would get the money and return immediately and pay Croft, and thereby complainants were induced to let Perkins take the deed; that Perkins was a near neighbor to the Crofts, and had often in the past few years advised them in regard to their business matters, and had their confidence; that Perkins did not have the money ready at Effingham, or elsewhere, to pay for the land according to the contract, and had not then even applied for a loan of money; that afterwards, on the 16th of January, 1896, Perkins applied for a loan on the 220 acres of land, and on the 14th of February, 1896, he obtained a loan of \$1,500 on the said 220 acres so conveyed to him, out of which he paid a \$600 mortgage and \$42.

interest thereon, and \$50 interest on a mortgage due from Croft to one Gilmore on another tract of land, and certain expenses, making in all about \$696.75, and retained out of the \$1,500 the sum of \$500, which he converted to his own use instead of paying it to Croft; that he only paid Croft \$300, making, with the mortgage he paid off for Croft, and the interest, about \$996.75; that said sum was all that Perkins had ever paid to Croft in money, directly or indirectly, on the purchase of the land, all of which money was a part of the proceeds of the \$1,500 mortgage which Perkins put upon the land; that at the time of the payment of the \$300 he asked complainants to take a mortgage for the balance of the cash payment, which they refused to do; but were willing to take a mortgage for \$800, as provided in the written contract; that Perkins having obtained the deed for the 220 acres of land, and having mortgaged the same for \$1,500, and retained \$500 himself, demanded of the Crofts that they should take a second mortgage on the 220 acres for \$1,800, due in four years, for the residue of the purchase money, and informed them he could get no more money and could pay no more on the land; that Perkins sets up as an excuse that there had been a change made in the terms of payment, by which Croft agreed to take a second mortgage on the land for \$1,800; that Perkins was insolvent and unable to pay anything on the purchase of the 220 acres except what he realized by mortgaging or selling the land; that the Crofts, when Perkins refused to make the payment for the land according to the terms of the contract, retained possession of the 220 acres, and did not take possession of the 80 acres Perkins had conveyed to them in part payment for the 220 acres of land. The bill prays for an injunction, and asks that the deed from Croft and wife to Perkins be set aside, and said contract canceled, or, in case said deed is not set aside, that complainants be decreed to have a vendor's lien upon the lands in the deed so executed by them, for the unpaid purchase money, etc.

The answer of defendants denies that defendant William J. Perkins stated to complainants on the 7th of January, or at any other time, that he was ready to pay for said premises according to said agreement, but avers the agreement was abandoned by complainants and defendants, and a new verbal contract made, on or about the 20th day of December, 1895, by which complainants agreed to sell said 220 acres of land to defendant Perkins for the sum of \$3,300, the land to be paid for, in part, by conveying the title to the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 8, township 6 N., range 6 E., of the third principal meridian, in Effingham county, Ill., for \$1,000, and Perkins to negotiate a loan for as large an amount as could be borrowed upon the said land, and after deducting \$500 from said amount of said loan said defendants to

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pay the complainants the remainder; that for the residue of said \$3,300 defendants would execute a note, secured by a second mortgage upon the said 220 acres of land, payable in five years, with 7 per cent. interest, and that complainants should convey the title to said 220 acres to William J. Perkins, and enable him to negotiate a loan and comply with that agreement; admits the conveyance was made January 7, 1896, by complainants to him, but denies it was in fraud of complainants' rights or for the purpose of injuring them; that after obtaining the title to said 220 acres, and with knowledge on the part of complainants, he obtained from Kagay & Kelly a loan thereon for the sum of \$1,500; that it was agreed complainants should pay to Perkins out of the proceeds of the loan the sum of \$500; that he retained said sum, and then paid \$600 to Kagay & Kelly on a prior mortgage, with \$42 interest, and to S. F. Gilmore \$50 interest on a mortgage, and \$10 for abstracts, and paid complainants \$300 in cash; that defendants, on the 7th of January, conveyed to complainants the 80 acres in section 3; that afterwards defendants executed a note for \$1,800, payable to complainants four years from January 1, 1896, with 7 per cent. interest, and prepared a mortgage on said 220 acres, to be second to the mortgage for \$1,500, but that complainants refused to accept the same, and refused to deliver possession of the land. The answer denies all fraud and intention of dispossessing complainants or incumbering the land, except as before stated. A replication was filed, and at the October term, 1897, a hearing was had and a decree rendered by the circuit court of Effingham county dismissing the bill, and rendering a decree against the plaintiffs in error for costs. A writ of error was applied for, and the case brought to this court.

Henry B. Kepley and R. C. Harrah, for plaintiffs in error. Gilmore & Gilmore and W. S. Holmes, for defendants in error.

CRAIG, J. (after stating the facts). 1. Was there a subsequent verbal contract changing or modifying the written contract? The defendant Perkins claims that the written agreement was abandoned by both parties. The complainant Croft denies this, and avers that the sale was made under the written contract, and that he made no verbal agreement with the defendant Perkins for the sale of the land in controversy. The burden of proof is upon the defendants to prove, by a preponderance of the evidence, the making of the alleged subsequent verbal contract. The only direct evidence on this point is the testimony of defendant W. J. Perkins, who admits the making of the written contract, but claims he took the land under a verbal contract subsequently made, for the same consideration of \$3,300, and claims Croft was to take a mortgage for \$1,800, due in four years, with 7 per cent. interest.

The only testimony introduced to corroborate the theory of a subsequent verbal contract is that of the witnesses Henry Pille, John R. Davis, and Henry Imming. An examination of the testimony of Pille and Imming convinces us that it is entitled to little weight. Pille was almost a stranger to Croft, having never seen him but once before, in 1895, when he went to get some tobacco plants. He says that in the spring of 1896—in the latter part of February—he was down at Charlie Crosier's on a horse trade; that he was on horseback, and met Croft in the road, and went with him about the distance of 10 rods; that he asked Croft to lend him \$2 to pay his taxes, but Croft said he could not,—that he was to get \$2,500 from Perkins, but Perkins failed to get the money, and he had to make an agreement with him to take \$500. Charles Crosier testified that Henry Pille was never at his house for the purpose of trading horses, and that he did not have any conversation at his house or any other place in February, 1896, about trading horses, and did not have any horses. Croft denies meeting Pille in the road, or that Pille asked him, there or at any other place, to lend him some money, and denies that he told him that he had made another contract with Perkins, or a new one, about selling the land to him; that he never said a word to Pille about the trade or contract, and that the only time he ever saw Pille was two years before the coming summer, which was the time when he came for tobacco plants. George H. Smith testified Pille worked for him; that Pille had a conversation with him the 1st, 2d, or 3d of February, 1896; that Pille said he did not know much of benefit to either of the parties to this suit; that Pille fixed the time of the conversation with Croft at the time he went for the tobacco plants, the year before, instead of in the road. Celia Gules, a witness for complainants, who lived a little over a quarter of a mile from Pille, testified to a conversation with Pille at Pille's own house; that she heard Pille say that he did not care which one beat in this case, that he had got his pay out of it; that he expected there would be lots of lies sworn to on both sides, and that he would swear to a lie for a dollar. Henry Imming, in his testimony, swears he went to lease a house of Croft, and that Croft said they did not get as much money as they expected, so they had to make a new contract; that Mrs. Croft heard the conversation. This conversation was after the bill was filed in this case, and both Fred Croft and Margaret Croft, his wife, deny telling him about the trade with Perkins. John R. Davis testified he met Croft in the road near Croft's house, about the middle of February, 1896, and had a conversation with him in regard to the land deal with Perkins; that he asked him whether he ever got the \$2,500 he was to receive from Perkins; that he replied he had not, but had agreed that if Perkins would raise \$1,500 the

trade would go on; that Perkins had raised the latter sum; that Croft also said something about having received 80 acres of land from Perkins.

A careful perusal of the testimony of Pille and Imming convinces us that it is entitled to little weight in the present inquiry as to whether there was a subsequent verbal contract. Neither does the testimony of John R. Davis add anything in corroboration of the testimony of Perkins on the question of this verbal contract. Croft denies that he saw Davis at the time or place that Davis swears the conversation took place, and denies he made the statements that Davis testifies to. Opposed to the above testimony is the positive testimony of Fred Croft and Margaret Croft, his wife, that no change was made in the written contract and that no verbal contract was afterwards made. When Perkins wished the Crofts to take a mortgage for \$1,800 they refused, and they swear they told him they wanted their money according to the contract, and Perkins promised to get the money as soon as he could. Clemmie Gouchenour corroborates the Crofts. She was at their house when Perkins paid the \$300, about the 18th of February, and says he told them that the money was ready; that they said they did not want a mortgage for \$1,800,—the money that was back,—but wanted the money. Sallie Croft, the wife of George Croft, testified that she heard Fred Croft tell Perkins that he would not take any second mortgage for \$1,800 on the land, and George Croft testifies to the same effect. Another fact proper to be considered is that the written contract was in the hands of complainant Croft, not taken up or canceled. The defendants failed to establish, by a preponderance of the testimony, that there was a subsequent verbal contract changing the written contract, but the testimony satisfies us that the written contract is in force, and that the defendants have failed to comply with its terms.

2. Is the grantor Fred Croft entitled to a vendor's lien for the unpaid purchase money, under the facts as shown by the record in the case? The written contract provided that 80 acres of land, valued at \$1,000, should be taken as part payment for the 220 acres sold by Croft. An abstract of title was to be given by Perkins to the same. Perkins was to pay all the unpaid purchase money, less the \$1,000 to be paid in land, if he could possibly get it, on or before the 1st day of March, 1896; but it was also agreed in the written contract that, if Perkins could not raise the full amount, then Croft was to accept \$2,500, including \$500 paid by Perkins in land, and take a second mortgage for \$800, due in one year. Perkins represented that he had the money to pay for the land, and Croft and wife, when they executed the deed, undoubtedly expected to receive the money in accordance with the terms of the contract. Croft swears the deed was delivered to Perkins because he said he had the money ready for

them any time they would go to Birmingham. It appears from the testimony that he did not have the money ready, and did not make an application for a loan until January 16, 1896, nine days after the deed was given to him by Croft and wife. We are impressed with the fact, from reading the testimony, that Perkins procured the deed by fraudulent representations about having the money, and imposed upon his neighbor, Croft, and after he procured the loan he attempted to avoid his contract by paying only \$300 to Croft, and paying off an incumbrance of \$600 on the 220 acres, with \$42 interest, and \$50 interest due to Gilmore, and retained \$500 of the money borrowed. This appears to have been all the money paid by Perkins to Croft on the purchase of the land out of the \$1,500 borrowed by Perkins on the land through Kagay & Kelly. When Perkins paid the \$300, Croft and his wife say he wanted them to take a mortgage for the balance of the cash payment on the land, but they refused, and wanted the balance of the money according to the contract, and were willing to take a mortgage for \$900, as provided therein. Perkins, after he had mortgaged the land for \$1,500, insisted they should take a mortgage for \$1,800, due in four years, which they refused to accept. When Perkins refused to make the payment due under the written contract, the Crofts refused to surrender up possession, and still retain possession of the land.

The principle recognized in equity as to liens whose existence is not known or obligation enforced at law, and in respect to which liens courts of equity exercise a very salutary jurisdiction, is stated in 2 Story, Eq. Jur. (Redfield's Ed.) § 1217, as follows: "In regard to these liens, it may generally be stated that they arise from constructive trusts. They are therefore wholly independent of the possession of the thing to which they are attached as a charge or incumbrance, and they can be enforced only in courts of equity. The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached. Of this we have a strong illustration in the well-known doctrine of courts of equity that the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid. To the extent of the lien the vendee becomes a trustee for the vendor, and his heirs and all other persons claiming under them with such notice are treated in the same predicament." In section 1219 the same author also says: "The principle upon which courts of equity have proceeded in establishing this lien in the nature of a trust is that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not pay the full consideration money." This doctrine has been recognized by this court in

Dyer v. Martin, 4 Scam. 146, in the following language (page 151): "In fact, it is a general rule in equity—and it requires a very strong case to make an exception—that no man shall be compelled to part with his title till he receives the consideration; and so vigilant are the courts of equity to protect the seller that although an absolute conveyance be made, and no mortgage or other security taken, still, in the hands of the vendee or a subsequent purchaser with notice, the vendor has a lien on the land for his money." A vendor's lien proper arises in cases where the owner of land conveys the same by deed, thus divesting himself of the legal title, and where some part or all of the purchase price remains unpaid. In such case the grantor retains, in equity, a lien for the unpaid purchase money. Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761. The case at bar comes clearly within this principle of equity. Fred Croft, the vendor, conveyed the 220 acres of land to W. J. Perkins, the vendee. The legal title is still in the vendee, and a part of the purchase money remains unpaid.

Under the written contract between Croft and Perkins the 220 acres of land were sold at \$15 per acre, making the total consideration \$3,300. Croft was to take 80 acres of land as part payment for \$1,000, free of incumbrance. The balance of the purchase money was to be paid by Perkins on or before March 1, 1896, but, if Perkins could not raise all the money, then Croft was to accept \$2,500, including \$500 paid by Perkins in land, and take a second mortgage for the remaining \$800, due in one year, with 7 per cent. interest. It is admitted that the deed was made by Perkins for the 80 acres which were to be taken by Croft for \$1,000 (the incumbrance of \$500 to be satisfied) towards the purchase price of the 220 acres, but it is contended that it was not worth that amount. The land, by the proof, was within a few miles of Croft's home, and could have been easily seen by him, and he could have satisfied himself of its value. If he was cheated as to its value, it was through his own negligence.

The testimony shows that only \$300 in money was paid Croft; that Perkins paid off an incumbrance of \$600, and \$42 interest, which was a lien upon the 220 acres, and paid to S. F. Gilmore \$50 interest due from Croft on a mortgage on another tract of land, and some expenses for abstracts, making the total amount paid by Perkins to Croft \$996.75, which, with the \$500 in land, makes a total of \$1,496.75 paid by Perkins on the purchase price of the 220 acres. Perkins testifies he told the Crofts that if they would take the 80 acres of land he had in Union township at \$1,000, or at \$500 subject to a mortgage of \$500, he could get his equity out of his 80, if nothing else. This shows that it was understood by Perkins that he was only to receive \$500 for his 80 over and above the mortgage, which would leave a balance of \$1,803.25 due

Croft on the purchase price, for which, as vendor, he should have a lien upon the 220 acres, subject to the mortgage of \$1,500; the mortgagee having loaned the money without notice, so far as the record shows, of the rights of Croft. The decree of the circuit court is reversed, and the cause remanded, with directions to the court to enter a decree requiring Perkins to pay the amount found due, with interest thereon, within a short day, to be fixed by the court, and, in default of payment, that the premises be sold in satisfaction of the amount. Reversed and remanded.

(174 Ill. 503)

HANCOCK v. SINGER MFG. CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL AND ERROR—MALICIOUS PROSECUTION—REVIEW.

1. Under the practice act, as amended by Act June 2, 1877 (Laws 1877, p. 152), making the decision of the appellate court conclusive on questions of fact, the supreme court cannot review them on appeal.

2. In an action for malicious prosecution, it appeared that plaintiff was arrested on complaint of an agent of defendant, that such agent had no authority to act for defendant for such purpose, and that defendant never adopted or ratified the act, but, as soon as advised of it, disaffirmed it. *Held*, that plaintiff was not entitled to recover.

Appeal from appellate court, Fourth district.

Action by John H. Hancock against the Singer Manufacturing Company. From a judgment for plaintiff, defendant appealed to the appellate court, and from a judgment of reversal (74 Ill. App. 556) plaintiff appeals. Affirmed.

John J. Brenholt, for appellant. Wise & McNulty, for appellee.

CRAIG, J. This was an action brought by John H. Hancock against the Singer Manufacturing Company for malicious prosecution. It appears that Hancock was arrested upon a warrant sworn to by one Preston, claiming to be an agent of the Singer Manufacturing Company, and in the complaint it was charged that Hancock was guilty of malicious mischief, in taking apart and injuring a sewing machine, the property of the Singer Manufacturing Company. The warrant was issued by the justice on May 22, 1896, and delivered to a constable. On the same day the constable served the warrant, and Hancock gave bail for his appearance before the justice upon a future day. Three days thereafter the prosecution was abandoned and dismissed, and this action was brought to recover damages for the arrest. On a trial before a jury a verdict was returned in favor of Hancock for \$1,500, upon which the court en-

tered judgment. The Singer Manufacturing Company appealed to the appellate court, where the judgment was reversed, and a remanding order refused. Upon reversing the judgment the appellate court made a finding of facts, which was incorporated in its judgment, as follows: "Daniel Preston, pretending to act as agent of appellant for the purpose, complained, under oath, to a justice of the peace of Madison county, in this state, that appellee, at and in the county, had committed the crime of malicious mischief, done to a Singer sewing machine, the property of appellant, and appellee was arrested on a warrant issued on the complaint. That said Preston was not the agent of, and had no authority to act for, appellant, for such purpose. That appellant never in any way adopted or ratified his act, but, as soon as advised of it, promptly disaffirmed it, and no trial was had, but the complaint was dismissed at Preston's cost. Preston was the agent of appellant, but his authority was expressly confined to the selling and leasing of sewing machines, and the collection of money therefor." The appellate court did not reverse the judgment of the trial court on account of any erroneous rulings on questions of law, but found the facts different from the finding in the trial court, and incorporated that finding in its judgment, and reversed on the ground that the evidence did not authorize a recovery. Under section 87 of the practice act, as amended by the act of June 2, 1877 (Laws 1877, p. 152), the judgment of the appellate court is final and conclusive as to all matters of fact in controversy. The decision of the appellate court being conclusive on the questions of fact, we cannot review them on appeal. *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463. Whether the finding is right or wrong is a question that does not arise here. There is therefore but one question properly before us on this record, and that is whether, on the facts as found by the appellate court, the law authorizes or precludes a recovery. If the Singer Manufacturing Company did not cause the arrest of appellant, no argument is needed to establish the proposition that it could not be held liable to respond in damages for the arrest. The only way in which it was sought to hold the company liable was that Preston, who was an agent of the Singer Manufacturing Company, caused the arrest. But the appellate court found Preston was not the agent of the company, and had no authority to act as such in causing the arrest. As he was not, therefore, the agent, his acts could not be binding on the company, unless ratified, which was not the case. Under the facts as they appear in the record, the judgment of the appellate court, holding that no recovery could be had, was right, and it will be affirmed. Judgment affirmed.

(174 Ill. 638)

BURR v. BLOEMER.

(Supreme Court of Illinois. Oct. 24, 1898.)

SALE OF DECEDENT'S LAND—NOTICE TO HEIRS.

1. An administratrix petitioned for and obtained leave to sell real estate of her intestate to pay his debts. One of the heirs was not made a party to the proceeding, nor served with process, nor did he enter an appearance. *Held*, that the sale, as to him, being void, his title was unaffected thereby.

2. A decree for the sale of real estate of an intestate was obtained without notice to one of the heirs, and without making him a party. The land was sold, and the purchaser mortgaged it to obtain the purchase money, which was paid to the administratrix, and applied by her to the payment of intestate's debts. *Held*, that the payment of such debts did not validate the proceedings or transfer the title of such heir either to the mortgagee or to the purchaser.

Appeal from circuit court, Effingham county; W. M. Farmer, Judge.

Bill by Henry Bloemer against Amos S. Burr for partition. From a decree in favor of complainant, defendant appeals. Affirmed.

W. G. Cloyd and B. F. Kagay, Sr., for appellant. Chas. H. Kelly and R. C. Harrah, for appellee.

CARTWRIGHT, J. Frederick Thoele died January 1, 1881, seised in fee simple of certain real estate in Effingham county, occupied as his homestead. Mary Thoele, his widow, survived him; and he left eight children, and appellee, his grandchild, only child of his deceased daughter, Elizabeth, his only heirs at law. The widow continued to occupy the premises as a homestead, and was appointed administratrix of the estate. On February 6, 1888, she filed in the county court a petition for leave to sell the real estate to pay the debts of the deceased; and at the March term, 1888, a decree was entered ordering the sale of the real estate for that purpose. To this proceeding appellee was not made a party, or served with process, and did not enter his appearance. He lived in the neighborhood of the premises, and the parties knew of his relationship, but supposed or were advised that he was not an heir, and had no interest in the property. On April 7, 1888, the real estate was sold, under the decree, for \$1,800, to Joseph Thoele, uncle of appellee, and a deed was afterwards executed and delivered to him. On October 1, 1888, Joseph Thoele, the purchaser, together with his wife and Mary Thoele, the widow, who was in possession and held homestead and dower rights in the premises, executed a mortgage to appellant of the property for \$1,400 loaned by appellant. This money was used by Joseph Thoele to complete the purchase, and when received by the administratrix was applied to the payment of debts according to the decree. Default was made in payment of this mortgage, and it was foreclosed. The widow continued to occupy the premises as a homestead, but, the parties failing to redeem, she was divested of her homestead

and dower rights, and in February, 1898, left the premises. Thereupon appellee filed his bill in this case in the circuit court against appellant for partition. These facts were shown upon the hearing, and it was decreed that appellee owned in fee an undivided one-ninth of the premises, and partition was ordered accordingly.

The real estate in question, upon the death of Frederick Thoele, descended to and vested in his heirs at law; and complainant, as one of them, was vested with an undivided one-ninth interest. The administratrix took no title to the real estate, and as such had no control or concern with it, except a naked power to subject it to sale for the payment of debts. *Ryan v. Duncan*, 88 Ill. 144. The administratrix had a right to apply to the county court for an order to sell the real estate, if necessary; but in that proceeding complainant had a right to be heard, before the court could deprive him of his property. His title as an heir could not be divested by the proceeding, unless he was made a party. If notice of such a proceeding is not given, or an appearance entered, so that the court acquires jurisdiction of the person of the heir, the decree will be void, and binding upon no one, and may be disputed in any proceeding, whether direct or collateral. *Morris v. Hogle*, 37 Ill. 150; *Clark v. Thompson*, 47 Ill. 25; *Botsford v. O'Conner*, 57 Ill. 72; *Fell v. Young*, 63 Ill. 106. Complainant was not made a party, and did not enter his appearance, and consequently his title was unaffected by the proceeding. As to him, it was void. The premises were in possession of his grandmother until shortly before he commenced his suit, and there is nothing in the case which could estop him, or affect his rights in any manner. The mortgagors owned only eight-ninths of the title, and their mortgage conveyed no more. The fact that the money loaned was used in the payment of debts did not validate the proceedings, or transfer complainant's title either to defendant, or to the purchaser at the sale under the decree of the court. The parties knew of his relationship, and were simply mistaken as to the law. The decree is affirmed. Decree affirmed.

(175 Ill. 94)

RYDER'S ESTATE et al. v. CITY OF ALTON.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—RECORDS—AMENDMENT—STREET IMPROVEMENT—ASSESSMENT—DESCRIPTION OF SEWER—OUTLET—EVIDENCE—WITNESSES.

1. Where an officer of a municipal corporation, having charge of its records, produces them in court as the record, they can be attacked only for fraud.

2. Though the record of the proceedings of a city council was not written up when it was examined by witnesses, the clerk, having the custody thereof, may amend it according to his knowledge of the truth, or the city council may order it to be corrected according to the

facts, even after it has been approved, where no private rights have attached.

3. Where an ordinance directs the levy of the total cost of a street improvement (with the exception of a definite portion), and provides for its assessment on abutting property in proportion to frontage, it need not fix the amount to be assessed by the commissioners. Such amount, under the statute, may be subsequently ascertained.

4. An ordinance providing for an assessment for the construction of a sewer is sufficiently certain in specifying the character and location of the improvement, where it places the point of beginning at the intersection of the center lines of two streets, provides that it shall extend therefrom along the center lines of specified streets to a point of connection with another sewer, and states its depth at the point of beginning and at its intersections with cross streets.

5. An ordinance providing for an assessment for the construction of a sewer is not invalid because the outlet provided thereby (a sewer to be constructed) was not in fact constructed at the time the assessment was made.

6. Under City and Village Act, art. 9, conferring on cities and villages authority to make local improvements by special assessment, it is competent for them to declare what shall be a local improvement, provided it be reasonable and proper; and it is not an unreasonable exercise of such power for a city council to provide that the outlet of a proposed sewer shall be another sewer, to be thereafter constructed.

7. Commissioners appointed to make the assessment for a local improvement are not competent witnesses to impeach their own report by showing that the oath which was signed by them, and which the notary certified they had taken, was not in fact taken.

Appeal from Madison county court.

Proceedings to levy a special assessment by the city of Alton. The assessment roll was confirmed, over the objections of the Simon Ryder estate and others, and they appeal. Affirmed.

Travous & Warnock, for appellants. Henry S. Baker, Jr., for appellee.

PHILLIPS, J. In 1895 the city council of the city of Alton passed an ordinance providing for the building of a sewer in Langdon street, commencing at Eighth street, and extending to its intersection with an underground sewer to be built and constructed in Front street, which last-named sewer was to be built by the St. Clair, Madison & Belt Railroad Company under an ordinance granting said railroad company certain privileges and franchise, and by virtue of a resolution of the city council authorizing and approving the Front street sewer, to be known as the "Burlington Intercepting Sewer." The ordinance provided that at Eighth and Langdon streets the sewer should be placed at a depth of 12 feet below the surface of the street, at Seventh and Langdon streets 14 feet below, at Sixth and Langdon streets 15 feet below, and at its intersection with the intercepting sewer 10 feet below. After the adoption by the city of the ordinance providing for the building of the sewer, and paying for a certain part thereof by general taxation,—the residue being apportioned as a special tax on the con-

tiguous property in proportion to frontage,—a committee was appointed to make an assessment of the cost of the sewer, who reported the same to the city council. A petition was filed, and certain lot owners appeared and filed objections to confirming the assessment roll. The objections embodied in the abstract are: First, that the assessment was unauthorized, and the proceeding thereunder was null and void; third, that the ordinance is void as requiring another cost to be assessed against the abutting property in proportion to frontage, without reference to benefits to accrue; sixth, that the property of objectors had not been, and will not be, benefited by the construction of said sewer; seventh, that there was no outlet for said sewer; tenth, that the commissioners appointed to make the assessment did not take the oath required by law; fourteenth, that the sewer is improperly constructed, and is a menace to public health; fifteenth, that the ordinance is void because the city council did not in the ordinance, or in any way, determine or fix the sum to be assessed as a special tax, or give any data by which such sum could be easily determined; nineteenth, because the ordinance does not specify the nature, character, and description of the improvement, as required by statute. In argument, appellants referred to a part of the above objections. Certain legal objections were overruled, and evidence offered on certain objections triable before a jury was excluded, which action presents the questions for determination on this record.

The first objection is that the report of the committee making an assessment of the cost of the improvement was never approved by the city council. It was attempted to be shown by certain witnesses who examined the records of the city clerk of the city of Alton that the same, when examined by them, did not show that the committee appointed under the ordinance made a report which was approved. The record produced recites that the special committee appointed under the ordinance made a report, which was approved, all the members voting aye, and then sets out the report as made to the city council. Whether the record was written up at the time the examination was made by the witnesses called is not shown, for no attempt was made to show that the record of the council as produced by the city clerk was wrong. Where an officer of a municipal corporation, having charge of the records, produces the same as the record, the same can be attacked only for fraud; and, if the record was not written up at the time it was examined by the witnesses, the clerk may amend the same according to his knowledge of the truth, so long as he has the custody thereof as clerk. *Mott v. Reynolds*, 27 Vt. 206. Nor will the writing up of the record according to the actual facts vitiate the acts of the council because it

may not have been written up at a time when a certain witness sought to examine the same. *Town of St. Charles v. O'Malley*, 18 Ill. 407. A city council may, unless private rights have attached, order the record of its own proceedings to be corrected according to the facts, even after it has once been approved. It was shown that the council did approve the report of the committee. The objection made, that the filing of the petition for assessment was unauthorized, and the proceedings had thereunder were null and void, was properly overruled.

It is next objected that the ordinance does not fix the amount of money to be assessed by the commissioners as a special tax. Section 8 of the ordinance provides that the entire cost of this improvement shall be paid for by special taxation, except a portion of the sewer mentioned, which is to be paid for by the city. Where an ordinance directs the levy of the total cost of the improvement,—excluding street intersections and the right of way of railroad companies,—and provides for its assessment on abutting property in proportion to frontage, by fixing the total tax to be levied, the cost may be ascertained, under the statute, by the committee. *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602. The record in this case shows the commissioners appointed by the county court under the petition filed therein did not assess the total amount of the cost against the property owners, but excluded therefrom the cost of the construction of the said sewer through a certain square. From the report of the committee to the council the commissioners were able to determine the exact cost of the sewer through the public square, which was to be paid for by the city, and, the total cost having been determined, sufficient data were given to determine the amount to be apportioned according to frontage, as it was a simple question of subtraction to determine the total amount charged to property owners, being the total cost less the amount to be paid for by the city.

It is next objected that the ordinance fails to specify the nature, character, and description of the improvement as required by the statute. The first section of the ordinance declares that the sewer shall commence at a point where the center line of Eighth street intersects the center line of Langdon street, at which point said sewer shall be placed 12 feet below the surface of Eighth street; thence the sewer is to be laid along the center line of Langdon street until it intersects the center line of Seventh street, at which point the sewer is to be placed at a depth of 14 feet. The description continues along Langdon street in the same manner, giving its depth in Sixth street, in Seminary square, in Fourth street, in Third street, in Second street, and in Front street, and the point where the connection with the Front street sewer is made. This is sufficiently certain

as to the character and location of the improvement, and the nature and description of the same are not objected to.

Objection is made that there is no outlet to the sewer, inasmuch as the proposed outlet is at a point where a sewer is to be constructed. That cannot affect the validity of the ordinance, or the right to levy the special tax and spread the assessment. In *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704, an objection was urged that the outlet for the sewer was on private property; and it was held that whether the right had been exercised to demand an outlet, or whether the right of way was otherwise acquired at the time such assessment was made, could make no difference as to the validity of the assessment. In *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1068, it was held that the fact that the proposed system of sewerage in the village had no outlet except over private ground would be no reason for declaring the ordinance void before the ground had been obtained, by condemnation or otherwise. To the same effect is *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105. The ordinance upon its face provides for an outlet, and that is all that is required. The ordinance cannot be declared void because the outlet was not in fact constructed at the time the assessment was sought to be made.

Objection is made that the improvement is unreasonable, and would be a menace to the public health. This evidence was excluded by the court on appellee's objection. Under article 9 of the city and village act, conferring upon cities and villages authority to make local improvements by special assessment or by special taxation, it is competent for them to declare what shall be a local improvement, provided the said improvement is reasonable and proper. A sewer is clearly a local improvement, and conserves the public health. There was here an attempt to show that the sewer would be a menace to public health, by reason of the fact that an outlet had not been opened; the ordinance providing for its emptying into a sewer to be thereafter constructed. It was within the power of the city council to so provide, and there was not an unreasonable exercise of that power. The offer of proof of the construction of the sewer without having an outlet opened was not relevant evidence, and it was not error to refuse to permit the same to be introduced.

It is finally objected that the commissioners appointed by the county court to make the assessment did not take the oath required by law. The objectors called as a witness Z. B. Job, one of the commissioners, and offered to prove that the paper which purported to be the oath taken by the commissioners was not in fact sworn to by them. It appeared that the oath required of the commissioners had been signed by them, and the notary public had certified, under his hand

and seal, that they had taken the oath. One of the commissioners cannot be heard to impeach his own report, nor can he impeach the foundation upon which the report rests. It was not error in the court to refuse to hear evidence from one of the commissioners that the oath had not in fact been administered to him. *Wright v. City of Chicago*, 48 Ill. 285; *Quick v. Village of River Forest*, 130 Ill. 323, 22 N. E. 816.

The above are the only objections urged, and it is unnecessary for us to consider others, as the objections thereto may be considered waived. The judgment of the county court of Madison county is affirmed. Judgment affirmed.

(174 Ill. 448)

LOUISVILLE & N. R. CO. v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Oct. 24, 1898.)

RAILROADS—RIGHT OF WAY—LEASES—COVENANTS RUNNING WITH THE LAND—SPECIFIC PERFORMANCE—LEASES—PARTIES—MORTGAGES—FORECLOSURE—STATUTE OF FRAUDS—JUDGMENTS—EVIDENCE.

1. An agreement whereby a railroad company which had constructed its road across the right of way of another was permitted to maintain its tracks there for 10 years, in consideration of the payment of one dollar a year and all taxes assessed against the tracks, and the maintenance of crossing frogs, and the furnishing of signals and switchmen, and saving the other harmless from damages arising from collision, is a lease.

2. The covenants in such lease run with the land.

3. Covenants that run with the land are applicable to incorporeal hereditaments as well as to corporeal.

4. The rule of caveat emptor applies to sales in foreclosure of mortgages.

5. In a suit by a lessor for specific performance of a lease, it appeared that the lessee had conveyed all his interest in the property for a period of years to defendant, who had entire control and possession thereof. *Held*, that such lessee was not a necessary party.

6. Where a railroad company, by permission, constructed its tracks across the right of way of another, and afterwards a written contract was entered into, whereby the former was permitted to maintain its tracks there on payment of a consideration, the statute of frauds did not apply.

7. A railroad company mortgaged its property, and subsequently, by lease, was permitted to maintain its tracks across those of another in consideration of certain rent and the performance of certain conditions pertaining to the operation of trains at the crossing. The former road was sold under foreclosure, and the purchaser conveyed the property to one who leased it to another company. *Held*, that the terms of the lease were binding on the last lessee, even after the original term had expired without a renewal being made, where such lessee remained in possession.

8. A contract whereby one railroad was permitted to cross another provided that the former would furnish all "necessary switchmen and signals." *Held*, that it was not error for an expert to testify as to what was meant by "necessary switchmen and signals."

9. Mere lapse of time will not necessarily bar a decree for specific performance, when it has not been made material by the agreement.

10. A decree for specific performance of a

contract, whereby one railroad was permitted to cross another, required the former to keep signals at the crossing, to consist of "a gate with proper lamps, and to be operated by switchmen, according to the manner customary at railroad crossings." The contract provided for the maintenance of "switchmen and signals" at the crossing. *Held*, that the decree was not broader than the contract.

Appeal from circuit court, St. Clair county; A. S. Wilderman, Judge.

Bill by the Illinois Central Railroad Company against the Louisville & Nashville Railroad Company for the specific performance of a contract. From a decree in favor of plaintiff, defendant appeals. Affirmed.

J. M. Hamill, for appellant. William H. Green (James Fentress, of counsel), for appellee.

PHILLIPS, J. The appellee corporation, organized in 1851 under a charter which was made a public law, procured its right of way, including that at the Ashley crossing, hereinafter referred to, in 1852, and has been in its possession since that date, its road being completed to Ashley, in Washington county, in 1854. In 1869 the St. Louis & Southeastern Railway Company was incorporated, and built a railroad from a point in Illinois opposite the city of St. Louis, to Shawneetown, Ill., via McLeansboro, which crossed the railroad and right of way of appellee at Ashley, where appellee's right of way is 200 feet wide. In October, 1869, the St. Louis & Southeastern Railway Company mortgaged its railroad to two trustees. By that mortgage it appears no part of the road had been built at that date, and when it was executed there was only a proposition to build 16 miles of railway east of Ashley; but between the making of the mortgage and the 16th of February, 1874, its railroad was built across appellee's right of way and railroad at Ashley, by permission of appellee. On the date last named an agreement was entered into between the appellee and the St. Louis & Southeastern Railway Company, as follows:

"Memorandum of agreement, made this 16th day of February, 1874, by and between the Illinois Central Railroad Company of the first part, and the St. Louis and Southeastern Railway Company (consolidated) of the second part, witnesseth: First. The party of the first part, in consideration of the agreements and payments hereinafter specified to be kept and made by the party of the second part, hereby authorizes the party of the second part to maintain and use its one track as now located at Ashley, Washington county, Illinois, and also hereby authorizes the party of the second part to lay down, maintain, and use a second track parallel with its present track (with the inside rails of the two tracks not more than nine [9] feet apart) over and across the right of way of the party of the first part, for the period of ten (10) years from the first of January, 1874, with the privilege of renewal. Second. And in consid-

eration of this license the said St. Louis and Southeastern Railway Company (consolidated) hereby agrees to pay to said party of the first part, in advance, for each year, the sum of one dollar per annum, and also to pay all taxes that may be assessed upon the said tracks across the right of way of the party of the first part. Third. The party of the second part hereby also agrees to maintain the crossing frogs at the intersection of the two railroads in good condition, so that they shall be at all times perfectly safe, and in condition satisfactory to the general superintendent of the Illinois Central Railroad; also to provide, at its own expense, the necessary signals and watchmen which may be necessary and required at the crossing for the safety of trains, and to save and keep harmless the party of the first part from the payment of all damages which may occur to the party of the second part, its trainmen, passengers, and freight, by reason of any collision at said crossing not arising from the gross negligence of the party of the first part. In witness whereof, the parties hereto have set their hands, and have caused their respective corporate seals to be affixed, the day and year first above written. Signed in duplicate. Illinois Central Railroad Co., by John Newell, President. St. Louis and Southeastern Ry. Co., by E. F. Winslow, President. [Seal.]"

The mortgage made in 1869 was foreclosed in 1880 in the United States circuit court for the Southern district of Illinois. On the 27th day of January, 1881, the property was sold by the master in chancery of said court to a purchasing committee, by whom it was conveyed to a new corporation called the Southeastern & St. Louis Railway Company, organized on the 4th of November, 1880, to purchase, maintain, and operate said railroad, and the last-mentioned company leased said railroad on the 27th of January, 1881, to the appellant, for a term of 49 years, with right of perpetual renewal. The appellant refused to comply with the covenants in the contract of February 16, 1874, and appellee filed its bill to enforce specific performance of that contract. Appellant answered, denying the execution of the contract, and setting up that compliance with its covenants is unnecessary for the safety of trains; and relied on an issue of law, which is that the covenants in the contract do not bind appellant, as it is claimed they are not covenants which run with the land. The evidence shows that the agreement which was offered in evidence, and which purported to be executed by the St. Louis & Southeastern Railway Company, by its president, E. F. Winslow, was signed in the handwriting of E. F. Winslow at the time he was president of the latter-named company, and that it was his genuine signature. The weight of the testimony also shows the safety of trains demanded the use of switchmen and signals, as provided in the contract. By the agreement an estate for years was carved out of appellee's fee-simple title in the

right of way at the Ashley crossing, and vested in the St. Louis & Southeastern Railway Company, and that corporation agreed to render rent by paying the nominal sum of one dollar per year, and maintaining the crossing frogs, and furnishing switchmen and signals. Appellant contends that this agreement is a mere license, and does not constitute a lease. The right to build a railroad and operate it upon the land of another is an interest in land which can only pass by grant, and an agreement to convey such a right, if not in writing, is clearly within the statute of frauds. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384. Prior to 1869 no part of the St. Louis & Southeastern Railroad had been built. After that time, and prior to 1874, its road was built across the right of way and track of appellee by its mere permission. That permission did not amount to a grant, and no title could have been acquired by occupancy prior to 1874, when the agreement above recited was entered into. By the express terms of this contract the relation of landlord and tenant was created, because it recognized the ownership of the land on the one hand and the occupation and right of possession on the other, and provided for compensation for the use of the premises. *Tayl. Landl. & Ten.* § 19. We hold this agreement constituted a lease, with the Illinois Central Railroad Company as lessor and the St. Louis & Southeastern Railway Company as lessee.

It is insisted, however, that long before the filing of this bill for specific performance the lease had expired by its terms, and had not been renewed. The question arises whether the covenant in this case is one running with the land. It was said in *Spencer's Case*, 5 Coke, 16: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant, is quoad modo, annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words. * * * If the lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant and goeth with the land in whose hands soever the term shall come, as well as those who come to it by act of law as by the act of the party, for all is one having regard with the lessor." This case is found in 1 Smith, Lead. Cas. 187. The editor's notes to *Spencer's Case* in the last-named citation, on page 219, say: "Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself as on whether it tends directly or necessarily to enhance its value, or render it more beneficial and convenient to those by whom it is owned or occupied; for, if this be the case, every successive assignee of the land will be entitled to enforce the covenant." This language is used by this court in *Gibson v. Holden*, 115

Ill. 199, 3 N. E. 282. The covenants of this agreement, which invested the St. Louis & Southeastern Railway Company with an estate for years across the right of way of the appellee railroad company, and under which that railroad company was entitled to hold possession, and covenanted to pay rent in consideration of such fact, are covenants that run with the land. *Webster v. Nichols*, 104 Ill. 160; *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83.

The question is then presented whether such covenants running with the land are applicable to incorporeal hereditaments as well as to corporeal. That is not an open question in this state. In *Hydraulic Co. v. Williams*, 66 Ill. 393, it was said (page 397): "The portion of water power acquired by the deed was an easement. 'If a miller should purchase a water privilege or portion of water power without any portion of the bed of the river, he, in that case, would gain an incorporeal hereditament or easement.' Ang. *Water Courses*, § 144. The capacity of covenants to run with incorporeal hereditaments is the same as it is with those which are corporeal. 1 *Smith, Lead. Cas. (Hare & W. Notes)* pt. 1, p. 173. All covenants which relate to land and are for its benefit run with it, and may be enforced by each successive assignee into whose hands it may run by conveyance or assignment." In *Fitch v. Johnson*, 104 Ill. 111, it was said (page 121): "While it is true the cases are not all in harmony on this subject, yet we are of opinion that by the decided weight of authority the doctrine that covenants run with incorporeal as well as corporeal hereditaments is fully established, and, where the owner of certain premises conveys a part of them, covenanting that the purchaser, his heirs and assigns, shall enjoy certain permanent rights in and with respect to the premises retained by the grantor, and also covenants in the conveyance to do and perform, from time to time, certain acts which are essential to the use and enjoyment of the purchased premises, * * * such covenant, although regarded as a burden, will be deemed to run with the servient estate, and to subject the assignee thereof to its performance." The mortgage made by the St. Louis & Southeastern Railway Company could not convey to the mortgagee an interest greater than that possessed by the mortgagor, and a foreclosure under that mortgage did not include a greater interest than that held by the mortgagor. It is presumed that in a judicial sale the purchaser will examine the title with the same care that a person does who receives a conveyance of land, as the rule of caveat emptor applies to sales of this character as well as to all other judicial sales. *Wing v. Dodge*, 80 Ill. 564; *Bishop v. O'Conner*, 69 Ill. 431. The mortgagor having leased the land across the right of way, and constructed its railroad thereon, the purchaser under the foreclosure of the mortgage, and

its grantee, the appellant here, must take notice of the rights of appellee under the above rule, as the rights of the appellee were clearly paramount to the deed of trust or mortgage.

It is objected that the Southeastern & St. Louis Railway Company is a necessary party to the suit, as both the bill and the answer state it was the owner of the railway operated by appellant, and the answer set up that no decree could be rendered in the cause without making it a party defendant to the suit. That corporation had conveyed all interest in its road to appellant for a period of 49 years from the time it acquired the same, and at the time of filing the bill the lessee corporation, the appellant here, had still more than 30 years of absolute control of the easements held by the Southeastern & St. Louis Railway Company as a corporation. The lessor corporation, not being in possession or control of the line of its right of way and track, is not a necessary party to this bill, for no decree against it could be made compelling it to comply with the terms of this contract; and its rights could not be materially affected by the decree under the prayer of this bill. In order to render one a necessary party to a chancery proceeding, it must appear such person may be compelled to respond to the prayer of complainant's bill, and where there is nothing he is called upon to do, or can be compelled to do as a duty, he is not a necessary party. *Story, Eq. Pl. § 76*, et seq.; *Mitt. Eq. Pl. 162, 163*. No question can arise under the statute of frauds, as the contract in this case is in writing, and confers upon the lessee the right to occupy, use, and hold the estate leased. There is an entire absence of testimony showing a right in the lessee to hold and occupy the premises leased to it, as against the lessor, by reason of any action of the lessor prior to the lessee entering into possession. When the lessee entered into possession, whether before the execution of the lease or after, by executing the lease and promising to pay rent the ownership of the lessor of the premises was recognized, and the lessee will be estopped to deny the lessor's title. The right to occupy and hold the premises during the term for which the lease was executed included the right to build and operate a railroad track thereon, and the right to build and operate a railroad track and operate it upon the land of another is an interest in land which can only pass by grant. By the terms of the agreement a right to maintain and use the track as located at Ashley over a crossing and right of way of the party of the first part for a period of 10 years from the 1st day of January, 1874, with the privilege of renewal, was created. The payment of a nominal consideration, the agreement to maintain the crossing frogs at the intersection of the two railroads in good condition, to provide the signals and switchmen necessary and required at the crossing for

the safety of trains, and to save and keep harmless the appellee from the payment of all damages which might occur to the party of the second part, its trainmen, passengers, and freight, by reason of any collision not arising from gross negligence of the appellee, were covenants by which a duty was to be done and performed by the lessee as a further consideration for the right to occupy and use the premises. If no right existed in the lessee to retain possession of the premises, although in possession thereof, by this agreement the lessor was recognized as owner of the land, and a covenant was made between the lessee and the lessor, the appellee, to pay rent. The lessor was thus in possession at the time the mortgage was foreclosed, and the sale made to the landlord of the appellant company; and for almost three years after it commenced to operate its trains on the track and right of way of its leased road the lessee's right to possession was under and by virtue of this lease. The right to cross appellee's right of way and track existed in it in no other manner. Appellee was incorporated for the purpose of building its road, and in contemplation of law it or its successors would forever maintain and operate a railroad track on the right of way it was authorized to acquire through the length of the state of Illinois, and under the law creating it it had acquired a right of way 200 feet wide, on which its existing track was constructed and being operated. A railroad across the state in another direction could, in pursuance of the provisions of the statute, cross this right of way and track of the appellee company. The right to cross the right of way and track of appellee company could also be acquired by another road by contract. Only in the manner provided by law or by contract could this right be acquired. The purposes for which the land was used and owned by the appellee company, and the surrounding circumstances, are all to be taken into consideration in determining the material inquiry whether a covenant runs with the land, consistent with policy and principle, for the benefit of the land. It does not depend so much on whether it is to be performed on the land itself, or whether it tends to directly or necessarily enhance its value, or render it more beneficial and convenient to those by whom it is owned and occupied, for where such is the case every successive assignee of the land will be entitled to enforce the covenant. The evidence shows that the business of the appellee company has vastly increased, and that it has become material to its interest to have signals and switchmen at this crossing; and, the possession of the appellant company being that of a tenant in possession under and by virtue of a lease, the terms of the contract are applicable to it, and it is bound by the covenant.

The agreement provides that the lessee should provide, at its own expense, necessary

switchmen and signals. On the hearing the court permitted a witness to be called, who testified with reference to what was meant by "necessary signals and switchmen," and stated that what the contract "contemplates is the old gate arrangement which crossed the track, with a lamp on each at night, and a switchman there to operate these gates against the train on either road when they come to the gate, it being thrown against the railroad that has not the right to cross,—that is what the contract intended to cover when it was made." Thereupon the court asked, "Well, is that, in a general way, the character of the signals that, in your opinion, would be necessary at that point?" to which witness responded, "Well, I would say this: That would protect the crossing very much more than it is now. I think that if we were to put in an interlocking, of course that would make it absolutely safe." It is urged that this evidence was error. The agreement providing for necessary signals and switchmen to a certain degree rendered the contract ambiguous, unless the court should take cognizance of what is meant by the terms "signals" and "switchmen." Such terms may be explained by expert evidence. We are not disposed to hold that in answering these questions there was error.

Appellant contends that in not filing its bill for specific performance until the change in the parties and in the circumstances of the ownership of the railway, which have taken place since the date of the agreement, the appellee has been guilty of laches. The enforcement of the covenant with reference to maintaining such switchmen and signals as "may be necessary and required at the crossing for the safety of trains," may not have been necessary immediately after the execution of the agreement, but with the increased number of trains which the evidence shows the appellee has been running for several years before the bill was filed, and which are continuously increasing in number, in consequence of which the danger of collision has become greater, the direct performance of that covenant has become necessary for the safety of trains. This is one of those cases where mere lapse of time, when it is not expressly made material by the agreement of the parties, is not such laches as will necessarily bar a decree for specific performance, and preclude the granting of relief. *Hough v. Coughlan*, 41 Ill. 130; *D'Wolf v. Pratt*, 42 Ill. 198; *Thompson v. Bruen*, 46 Ill. 125.

It is insisted the decree is broader than the agreement in requiring gates to be maintained at the crossing. The language of the decree requiring switchmen and signals to be kept at the expense of appellant at such crossing is: "And said signals shall consist of a gate, with proper lamps, and to be operated by switchmen according to the manner customary at railroad crossings, for the purpose of preventing collision, and otherwise enhancing safety in the joint usage of such

crossing by said railroad companies; and that the defendant shall continue to provide the aforesaid signals and switchmen so long as it shall maintain and operate its track over the right of way of the complainant under and by virtue of the contract, and shall also continue to maintain the crossing frogs at said crossing during said time." Since we have held it was not error on the part of the court to have explained the meaning of the terms "signals" and "switchmen," as used in the contract, we hold the decree is not broader than the contract itself, and only includes what was meant thereby.

We are of the opinion that it was not error to decree a specific performance of the contract so long as the appellant company continued to use and operate its track across the right of way of the appellee company, it having shown no right to do so save under and by virtue of this contract. The judgment of the circuit court of St. Clair county is affirmed. Judgment affirmed.

(174 Ill. 500)

SHUP v. CALVERT et ux.

(Supreme Court of Illinois. Oct. 24, 1898.)

ADMINISTRATOR'S SALE—DEFECTIVE TITLE—RELIEF.

A purchaser of land from an administrator, under a sale to pay intestate's debts, executing a mortgage for the price, with knowledge that the intestate was residing on the land when he died, leaving minor heirs, cannot defeat a foreclosure of the mortgage, after taking possession of the land, on the ground that he acquired a defective title, the minors having a homestead interest in the land.

Appeal from circuit court, Jasper county; Truman E. Ames, Judge.

Bill by Frank L. Shup, administrator de bonis non of the estate of John R. Byrne, deceased, against F. W. Calvert and wife. From a decree for defendants, complainant appeals. Reversed.

Fithian, Davidson & Kasserman, for appellant.

CARTWRIGHT, J. Frank L. Shup, administrator de bonis non of the estate of John R. Byrne, deceased, filed his bill of complaint in this case in the circuit court of Jasper county against F. W. Calvert and Annie E. Calvert, his wife, to foreclose a mortgage executed by them to the former administrator of said estate on the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, township 5 N., range 10 E., in said county. The bill was answered, and the defense set up was that the mortgage was given to secure the balance of purchase money for the mortgaged premises sold and conveyed to F. W. Calvert by said former administrator, under a decree of the county court of said county, for the payment of debts of the deceased; that said John R. Byrne left minor children at his death, having a homestead estate in the land sold;

that said land was worth less than \$1,000; and that it was therefore not liable to sale for debts of the estate, and F. W. Calvert acquired no title by the administrator's deed. F. W. Calvert also filed a cross bill, alleging the same matter set up in the answer, and asking that the deed from the administrator to him, and the notes secured by the mortgage, should be canceled. A demurrer to the cross bill was overruled, and the administrator answered. The cause was then referred to the master, who took and reported the evidence to the court. The following facts were established: John R. Byrne owned the land in fee simple, and lived upon it as a homestead at the time of his death. He left no widow, but left five children, two of whom are still minors. Since the death of their father these minors have lived in Indiana, with their uncle, who is their legal guardian, and who took them from the land at the death of their father. Charles King was appointed administrator, and petitioned the county court for leave to sell the real estate to pay debts. A decree was entered, and the premises were sold January 26, 1895, to F. W. Calvert, for \$610, one-third of which was paid in cash, and for the balance he gave two notes in equal amounts, due in 9 and 15 months, respectively, secured by the mortgage. Nothing was paid on either of the notes. Calvert went into possession at the time of the sale, and has remained in possession, cultivated the land, and received the rents and profits. He resided in the vicinity of the land at the time of the death of John R. Byrne, and knew that he left minor children, and was acquainted with the facts. No fraud whatever was practiced or attempted by the administrator or any one representing the estate. Upon this showing the court dismissed the original bill, and granted the prayer of the cross bill, canceled the administrator's deed and the notes secured by the mortgage, and decreed payment of the costs of suit against the administrator, to be paid in due course of administration.

It has long been settled by a uniform course of decisions that the rule of caveat emptor applies with all its force to sales by administrators under decrees of the county court. The administrator is vested only with a naked power to make sale under the order of the county court, without warranty, or any terms except those fixed by the law and the decree. He cannot warrant title, either for himself or for the estate; and the purchaser takes the risk of the title, the jurisdiction of the court over the persons of the heirs, and of the validity of the proceedings generally. He acts at his peril, and must inquire into the title before he buys; and, if he fails to acquire a good title, he cannot be relieved, in the absence of fraud or mistake entering into the transaction, of such a character as to vitiate it. This is the rule in equity as well as at law. *Bingham v. Maxcy*, 15 Ill. 295; *McManus v. Keith*, 49 Ill. 388; *Bishop v.*

O'Conner, 69 Ill. 431; Vanscoyoc v. Kimler, 77 Ill. 151; Holmes v. Shaver, 78 Ill. 578; Bond v. Ramsey, 89 Ill. 29; Tilley v. Bridges, 105 Ill. 336; Meyer v. Mintonye, 106 Ill. 414. In this case there was no fraud or deception of any kind, and there is no rule of law or equity under which the facts set up in defense of the original bill and alleged in the cross bill would constitute a ground of defense or of relief. The complainant in the cross bill has not been disturbed in his possession, and has received and is receiving the profits of the land, but in any event he cannot be relieved from the consequences of his neglect to inquire into the title or the right of the administrator to sell. The decree of the circuit court is reversed and the cause remanded, with directions to dismiss the cross bill and to enter a decree of foreclosure on the original bill. Reversed and remanded.

(174 Ill. 384)

MCCAULEY et al. v. MAHON.

(Supreme Court of Illinois. Oct. 24, 1898.)

**ADVERSE POSSESSION—PAYMENT OF TAXES—
EVIDENCE—EJECTMENT.**

1. The holder under claim and color of title, based on payment of taxes for seven successive years on unoccupied property, sent money to his agent to pay taxes for certain years. The agent's testimony was indefinite and uncertain as to the payments, and as to the person he made them for. Tax receipts were not produced for all the years, and the tax collector's and township books for some of the years were missing. *Held*, that the evidence was insufficient to defeat the paramount title, since, to do so, the evidence must be clear and convincing.

2. One claiming under Limitation Act, § 7 (2 Starr & C. Ann. St. p. 1547, par. 7), providing that payment of taxes on unoccupied land, in good faith, under color of title, gives the legal title, must prove that after the lapse of seven years he took possession.

3. In ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of that of defendant.

Appeal from circuit court, Richland county; E. D. Youngblood, Judge.

Ejectment by James Mahon against R. N. McCauley and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

R. N. McCauley and H. G. Morris, pro sese. Leeds & Ramsey, for appellee.

MAGRUDER, J. This is an action of ejectment brought by the appellee, James Mahon, against the appellants, R. N. McCauley and H. G. Morris, to recover the possession of 40 acres of land in Richland county. After the first trial, which resulted in judgment for the plaintiff below, a new trial was prayed for, and granted under the statute, upon the payment of costs in the mode and within the time provided by the statute. The case then came on for trial a second time, and was tried before the court, by agreement, without a jury. Upon the trial the defendants sub-

mitted to the court, to be held as law in the decision of the case, 11 propositions, of which the first five were marked "Refused," and the others were marked "Held." The judgment of the court was in favor of the plaintiff, finding that he was the owner in fee simple of the premises described in the declaration, and ordering that he should recover the possession of the same and the costs, and that plaintiff have his writ of possession. The present appeal is prosecuted from such judgment. The plaintiff below (appellee here) sought to establish title by introducing a tax deed dated February 1, 1883, executed by the county clerk of Richland county, conveying the 40 acres in question to one B. W. Mahon. The appellee also introduced in evidence a guardian's deed from Ella L. Mahon, guardian of the minor heirs of B. W. Mahon, deceased, to the appellee, James Mahon, conveying the said 40 acres, which said last-named deed was dated October 17, 1885, and recites the appointment of Ella L. Mahon as guardian, her petition for the sale of the real estate, and the sale of the same to James Mahon for \$—; no consideration being expressed in said deed. The plaintiff, under one or the other of said deeds as color of title, sought to prove the payment of taxes upon the 40 acres during a period of seven years, while the same was vacant and unoccupied. The evidence did not show that the plaintiff was ever in possession of the 40 acres, either after the expiration of the seven years during which the taxes are claimed to have been paid, or at any other time. The defendants sought to establish title in themselves by a regular chain of conveyances from the government. We do not deem it necessary to pass any opinion upon the character of the title sought to be established by the appellants (the defendants below). The declaration in this case was filed on October 30, 1896. In May, 1895, the appellants had the 40 acres, which was then wild land, surveyed, and fenced it in, and cleared about 6 acres of it, and put some cattle in the inclosure. The fence was a wire fence, and inclosed the entire tract. It thus appears that appellants at the time this action was brought were in possession of the property.

In the first place, the proof in regard to the payment of taxes for a period of seven years under color of title is not clear or convincing. It is well settled by the decisions of this court that, as the payment of taxes under color of title operates to defeat the paramount and all other titles, when relied on, the proof must be clear and convincing. Burns v. Edwards, 163 Ill. 494, 45 N. E. 113; Bell v. Neiderer, 169 Ill. 54, 48 N. E. 194. The appellee testifies that he sent the money to his agent to pay the taxes for certain years, but cannot say positively whether the agent did so pay them or not. The agent, in his testimony, mentions certain years (less than seven) during which he thinks he paid taxes, but his testimony upon the subject is

indefinite and uncertain. Tax receipts were not produced for all of the years constituting the period of seven years. The collector's books and the township books for some of the years were missing from the treasurer's office where they were kept. Paramount titles or other titles claimed to be set aside by rights acquired under the statute of limitations cannot be overcome by loose and uncertain testimony, or upon mere conjecture or violent presumptions. *Hurlbut v. Bradford*, 109 Ill. 397.

In addition to this, the agent, who is claimed to have paid the taxes, is uncertain for what person he paid such taxes during certain years named by him, and embraced within said period of seven years. The rule is that the claim and color of title must coincide with the payment of taxes, and that the person paying the taxes must in some way be interested in or connected with the claim and color of title. *Hurlbut v. Bradford*, supra. In view of this uncertainty of the testimony of the agent above referred to, it does not appear clearly that the taxes for the whole period of seven years were paid for the person holding or interested in the color of title.

But, besides the want of clearness in the proof as to the payment of taxes, the appellee, who was the plaintiff below, did not establish his right to a recovery in this action. If it be admitted that the appellee introduced a deed which was good color of title, and proved that he paid all the taxes thereon for a period of seven years, while the premises were vacant and unoccupied, yet he did not prove that after the bar had become complete thereby he took possession of the premises. Where a plaintiff in an action of ejectment relies for his right to recover upon section 2 of the act of 1839, which is section 7 of our present limitation act (2 Starr & C. Ann. St. p. 1547, par. 7), he must not only prove that he had color of title, and that he paid taxes for seven successive years upon the premises while they were vacant and unoccupied, but he must also prove that after the lapse of the seven years he took possession of the premises. In *Paullin v. Hale*, 40 Ill. 274, we held that while section 2 of the limitation act of 1839 cannot be used as a sword to attack with, unaccompanied by possession, yet that, when the benefit of the bar under the statute had been once acquired, the right of possession thereby attaches to the occupant, and remains with him, even if he should temporarily leave the possession, and enables him to recover the possession as against all persons as to whom his bar, if set up in defense, would have been available. Again, in *McCagg v. Heacock*, 42 Ill. 153, we said (page 155) "that when one had acquired color of title in good faith to vacant and unoccupied lands, and had paid the taxes thereon for seven successive years from the time his color of title was acquired, and had afterwards got into possession of the land under such title, no title whatever could prevail against

him; and this is the widespread understanding of the community. Should the holder of the paramount title get into possession before the party who has color, and who has paid the taxes for seven successive years, such possession is protected." See, also, *Hale v. Gladfelder*, 52 Ill. 91; *McDuffee v. Sinnott*, 119 Ill. 449, 10 N. E. 385; *Whitford v. Drexel*, 118 Ill. 600, 9 N. E. 263; *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12; *Sullivan v. Eddy*, 164 Ill. 391, 45 N. E. 837. In *Gage v. Hampton*, supra, it was held that when the holder of color of title acquired in good faith pays all the taxes legally assessed on the land to which the color of title relates, for seven successive years while it remains vacant and unoccupied, and then takes actual possession by inclosing the same with a fence, the bar of the statute will be complete, and the holder of such title may assert the same, either as a defense, or to regain possession if invaded. It necessarily follows from these decisions that, if possession does not concur with the bar previously obtained by the payment of taxes for seven successive years on vacant and unoccupied land under color of title, the holder of such title cannot recover in an action of ejectment. The case of *Whitford v. Drexel*, supra, is a case very much like the case at bar. In the *Whitford Case*, which was an action of ejectment to recover a strip off a lot, the plaintiff showed color of title for the whole lot, and also proved the payment of taxes thereon for seven successive years under such color of title, but failed to show any possession of such strip at any time; and it was there held that the evidence did not authorize a recovery, and that the court properly instructed the jury to find for the defendant. So in the case at bar the appellee, in whose favor the judgment was rendered below, failed to show that he took possession of the property at any time. On the contrary, the proof does show that the appellants took possession of the property before the commencement of the present action. Inasmuch as the appellee showed no right to recover, it is a matter of no consequence whether the appellants had any title or not. The plaintiff is bound to recover upon the strength of his own title, and not on the weakness of that of his adversary. *Whitford v. Drexel*, supra.

The propositions of law submitted by the appellants upon the trial below, which were refused, announced the doctrine here stated as to the necessity of showing possession after the completion of the bar under section 7 of the limitation act in order to establish a right of recovery. We are therefore of the opinion that the court below erred in refusing the propositions so submitted. For the error thus indicated the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(174 Ill. 485)

DUCK ISLAND CLUB v. BEXSTEAD et al.
(Supreme Court of Illinois. Oct. 24, 1898.)**SALE FOR TAXES—FRAUD—PAYMENT UNDER COLOR OF TITLE—LIMITATIONS—APPEAL—EJECTMENT—GUARDIAN AND WARD—PARTIES.**

1. The mere fact that a purchaser at tax sale failed to comply with the statutory requirements as to notice governing the execution of tax deeds does not establish bad faith or fraud, so as to render the deed unavailing as color of title.

2. Where there is a conflict of testimony as to questions of fact, they will not be reviewed in the absence of a brief for defendant in error.

3. Part performance under Rev. St. c. 83, § 7, providing that payment of taxes for seven years on vacant land gives a legal title, followed by part performance under section 6, which provides for legal title upon payment for seven years on land in possession, will not give title, as performance under the two statutes cannot be tacked.

4. Taxes paid upon land prior to the issuance of a tax deed, not being made under color of title, are not availing, under Rev. St. c. 83, §§ 6, 7, which provide that payment of taxes under color of title, for seven years, on unoccupied land or on land in possession of the one paying taxes, will entitle him to legal title.

5. An action for ejectment is properly brought by a guardian in the name of the wards.

Error to circuit court, Fulton county; Jefferson Orr, Judge.

Ejectment by Susan Bexstead and others against the Duck Island Club. Judgment for plaintiffs, and defendant brings error. Reversed.

Chipperfield, Grant & Chipperfield, for plaintiff in error.

BOGGS, J. This was ejectment by the defendants in error against the plaintiff in error. The defendants in error prevailed upon the theory that said Susan was the widow, and the others children and only heirs, of Roland Bexstead, deceased; that said deceased, during his lifetime, had and held color of title made in good faith to the premises in controversy; that, under such color of title, all taxes legally assessed against said premises were paid for and during seven successive years by the owners and holders of such color of title; that the said premises were vacant and unoccupied during the said period, and at the expiration thereof were reduced to possession by the owners and holders of said color of title; and that they were dispossessed by the plaintiff in error by force, etc. This is a writ of error to reverse the judgment. Briefs have not been filed on behalf of the defendants in error.

It appeared Roland Bexstead, on the 30th day of June, 1876, obtained a tax deed purporting to convey him the premises in controversy. Plaintiff in error contends this deed did not constitute color of title; that it was not made in good faith; and that it was not proven the premises were vacant and unoccupied, or that the taxes were paid by or for the holders under said tax deed for a

period of seven successive years. Plaintiff in error insists the affidavit made by the said Bexstead as authority for the execution of the tax deed to him did not set forth a proper description of the tract, and that the notice of the purchase of the land by him at the tax sale, and of the time of the expiration of the period for redemption, which the said Bexstead caused to be published in the Canton Register, a newspaper published in Fulton county, was not published within the time provided by statute for the publication of such notices, and did not contain all the statute required should appear in such notices, and that the imperfections of the affidavit and the notice establish that the said tax deed was not made in good faith. The rule is that good faith is presumed in the absence of proof of actual bad faith. The mere fact that Bexstead may have failed to comply with and fulfill the requirements of the law governing the execution of deeds for lands sold for taxes does not establish that he was guilty of bad faith. His acts of omission may have resulted from inadvertence, misapprehension of the law, or ignorance thereof. The presumption of good faith will prevail until it is overcome by evidence of fraud or actual bad faith. *Lewis v. Pleasants*, 143 Ill. 271, 30 N. E. 323, and 32 N. E. 384; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833, and cases there cited.

Whether the premises were vacant and unoccupied prior to the year 1886 was the subject of conflicting testimony, which, in the absence of briefs for defendants in error, we will not further advert to.

The plaintiff in error took possession of the premises, caused a fence to be erected thereon in the year 1886, and has since held possession; hence payment of taxes by the defendants in error since that date would avail nothing in favor of the title they seek to uphold, for the reason that color of title and payment of taxes must be coupled with possession to complete the bar, under section 6 of the limitation act, or the premises must be unoccupied in order to ripen a title, under section 7. Part performance of the requirements of one section cannot be tacked to part performance of the provisions of the other section, but, to constitute the bar, the provisions of one or the other of the sections must be complied with. *Ross v. Coat*, 58 Ill. 53; *Whitney v. Stevens*, 80 Ill. 53. The deed to Bexstead, relied upon as color of title, bears date June 30, 1876. Taxes paid upon the land by Bexstead prior to the issuance of the tax deed to him availed nothing, because such payments were not coupled with color of title.

It is insisted it was not proved the taxes were paid under the deed for the years 1879, 1881, and 1882. There was a conflict in the testimony as to the payment of the taxes for the years 1879 and 1881, but we find no evidence whatever tending to show that the taxes for 1882 were paid by or for any one

interested in this title. It will be observed that payment of the taxes assessed for the year 1882 was indispensable to complete the payment for the term of seven years first ensuing under the said claim and color of title. The second period of seven years would therefore have been entered upon beginning with the year 1883. But before that period elapsed, to wit, in 1886, the plaintiff in error entered into actual possession of the premises, and it ceased to be vacant and unoccupied land; hence it was not established by the proof that the defendants in error had become vested with title under the operation of either of the sections of the statute of limitations.

The case of *Muller v. Benner*, 69 Ill. 108, cited by plaintiff in error, is authority for the position that our statute does not invest a guardian of a minor ward with power to institute an action of ejectment in his own name, as guardian. In the case at bar the action was brought in the name of the wards by the guardian, and such is the proper course to be pursued. In *Muller v. Benner*, supra, it was said (page 111): "It [the action] should have been brought in the names of the wards, who are alleged to be the owners in fee of the lands, by their guardian." The evidence does not support the verdict, and the cause should be again tried. The judgment is reversed, and the cause remanded. Reversed and remanded.

(174 Ill. 579)

TOWNSHIP OF WHITLEY v. LINVILLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

HIGHWAYS—PROSECUTION FOR OBSTRUCTION—EVIDENCE—USE BY PUBLIC—INSTRUCTION—DEDICATION.

1. On a prosecution for encroachment on a highway by setting out a fence, evidence that, after such encroachment, the highway was still as wide as it was at other places, is inadmissible, in defendant's favor, where the public had been in the uninterrupted use of the highway, as it had existed, for more than 15 years; it being immaterial what width the public had acquired at other places.

2. On a prosecution for encroaching on a highway, it was error to charge that if defendant and other landowners established the road by dedication, and gave to the public 40 feet for a road, the public would have no right by the dedication to more than 40 feet, where the highway was 64 feet as originally fenced by defendant, and the only proof of a dedication of 40 feet was defendant's testimony that he aimed to make the road 40 feet wide when he opened it.

Error to circuit court, Moultrie county; Edward P. Vail, Judge.

Action by the township of Whitley against Jerry Linnville to recover a penalty for obstruction of a highway. There was a judgment for defendant, and the township brings error. Reversed.

R. M. Peadro, for plaintiff in error. John R. & Walter Eden, for defendant in error.

CARTWRIGHT, J. Defendant in error was prosecuted before a justice of the peace for obstructing a public highway, and was convicted. On appeal to the circuit court there was a trial, and he was found not guilty. Plaintiff in error then sued out a writ of error from this court to review the proceedings in the circuit court.

The public highway in question runs north and south, between the land of defendant in error on the east and that of Lot Luttrell on the west. It has been in existence as a highway for more than 20 years, and for at least that length of time has been fenced on each side by the adjoining owners, and has been used as a public highway. About 20 years ago, an open ditch was dug in the highway as it was fenced out. It was dug by the defendant and one Moberly, who then owned the adjoining land on the west. This ditch ran along the east side, and near the fence of the defendant. It started at the south end with a tile drain with which it connected, and ran north, varying in depth from 1½ to 8 feet, and in width up to 15 feet in the widest part, for a distance of 70 or 75 rods, and then turned west across the traveled road. The land in the highway is low and flat, and the ditch has served the purpose of drainage. It has been used as an outlet by adjoining owners, who tilled into it with the consent of the commissioners, for draining their lands; and they assisted in cleaning it out and keeping it open, part of the expense being paid by them, and part by the commissioners. In the spring of 1896 defendant put a barbed-wire fence of two strands along the west side of the ditch, so as to inclose it with his land. The fence follows the crooks in the ditch, and stands about 15 feet in the widest place from the old fence which inclosed the highway.

Defendant was permitted, against objection, to prove that this highway, after he set his fence out and made the obstruction complained of, was still as wide as the same highway north and south of his lands. This was wrong. The public has been in the uninterrupted use of the highway as it had existed for more than 15 years, and it was wholly immaterial what kind of highway, or of what width, the public had acquired at other places.

The fourth instruction given at the request of defendant told the jury that if he and other landholders established the road by dedication, and gave to the public 40 feet for a road, then and in that state of the proof the public would have no right, by the dedication, to more than 40 feet. There was no evidence on which to base this instruction. The road, since the encroachment upon it, is 42 feet wide; and the opinions of a couple of defendant's witnesses that there was still plenty of room to travel, and a good road, were before the jury. The wire fence, as it now exists, is about 22 feet from the west line of defendant's land. According to de-

fendant's own testimony, he fenced the road out with the original fence; and the only thing looking in any way to a dedication of 40 feet was his testimony that he aimed to make the road 40 feet wide when he opened it. This aim, if it existed, was a secret, unexpressed intent, not consistent with his act. The highway was not only accepted as fenced, but was used for much more than 15 years as a public highway. The ditch, which served the purpose of drainage, was as much a part of it as the part which was traveled. It was error to give the instruction. The judgment is reversed, and the cause remanded. Reversed and remanded.

(175 Ill. 251)

BALTIMORE & O. S. W. RY. CO. v. TRIPP.

(Supreme Court of Illinois. Oct. 24, 1898.)

RAILROAD COMPANIES—SETTING FIRES—PLEADING
—EVIDENCE—CONSTITUTIONAL LAW.

1. The equal protection of the laws is not denied by Act March 29, 1869, making the fact of the setting of a fire by a locomotive passing along a railroad prima facie evidence of the company's negligence; the difference in the rule between that and other cases being reasonable and natural, and not arbitrary.

2. A declaration in an action for fire set by a locomotive sufficiently states the company's duty to be "to so operate its road and its engines running thereon that fire shall not escape and be communicated therefrom."

3. A railroad company's record of the inspection of its engines, not being a book of account, is not admissible in an action for fire set by a locomotive.

4. Testimony that a locomotive claimed to have set a fire emitted cinders 10 days thereafter is admissible on the question of its condition at the time of the fire.

5. It cannot be said, as matter of law, that the emission of sparks from a locomotive is not evidence of negligence.

Appeal from circuit court, Sangamon county; O. P. Thompson, Judge.

Action by David Tripp against the Baltimore & Ohio Southwestern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Palmer, Shutt, Hamill & Lester, for appellant. Patton, Hamilton & Patton, for appellee.

CARTER, C. J. This is an appeal from a judgment of the circuit court awarding appellee damages for the destruction by fire of lumber and an office building. The declaration alleged that the loss was caused by appellant in so negligently operating a locomotive on its road that fire was emitted and communicated to a corncrib situated on its right of way, from whence it spread to and destroyed said property of the plaintiff. The appeal is taken directly to this court, because it is alleged that the validity of the act of March 29, 1869, "relating to fires caused by locomotives," is involved; it being assigned for error that the statute "is unconstitutional and void, in that it discriminates against railroads and deprives them of the equal protection of the law."

The statute in question provides that in actions like this, to recover damages for injury to property caused by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge the corporation or persons who shall at the time be in the occupation and use of the railroad, etc. This statute has been in force for nearly 30 years, and has been considered and applied in many cases (Railroad Co. v. Quaintance, 58 Ill. 389; Railroad Co. v. Rogers, 62 Ill. 346; Railroad Co. v. Clamplitt, 63 Ill. 95; Railway Co. v. Larmon, 67 Ill. 68; Railroad Co. v. Funk, 85 Ill. 460; Railway Co. v. Campbell, 86 Ill. 443; Railroad Co. v. Pennell, 110 Ill. 435); but, as said in Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, its validity has not heretofore been questioned.

It is not contended in the argument that the legislature may not establish rules of evidence, but it is insisted that by this statute companies or persons operating railroads are singled out, and a different and harsher rule is applied to them than is applied by the law to others, and that they are denied the equal protection of the laws. The argument is that to make one rule of evidence applicable to actions for losses caused by fire communicated by locomotive engines while upon or passing along any railroad, and another rule applicable where the fire is caused by other agencies,—such, for example, as a traction engine running upon a public highway,—is to discriminate arbitrarily and unjustly against companies or persons operating railroads; that the law imposes a heavy burden upon the latter, leaving all others free from it. It is also said that the statute in question does not create any right of action against, or impose any duty on, railroad companies, and that the burden is not imposed as a penalty, in the nature of a police regulation, for a violation of duty imposed by the statute itself; and counsel cite and rely with confidence upon Railroad Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, as sustaining their contention that the statute is void. Many authorities are reviewed in that case, including some from this state, but we perceive a radical distinction between that case and this. In that case it was held that the Texas statute, making railroad companies liable to the opposite party for his attorney's fees in certain cases, violated the equality clause in the fourteenth amendment to the federal constitution, because the classification was not based upon any reasonable ground, but was purely arbitrary in selecting railroad companies alone and fixing upon them a liability not imposed upon others, and which was not imposed as a penalty for the violation of a police regulation. But we are unable to see

how the principle there applied is applicable to the case at bar. To our minds, the classification made by our statute is a reasonable and natural one. There are such obvious differences between the dangers to be apprehended from fires emanating from locomotives running at great speed upon railroads built upon rights of way, and the dangers from fires emanating from traction engines or other vehicles passing, necessarily at much slower speed, along public roads, that it would seem unnecessary to point them out. The statutes relating to the use of the two kinds of engines recognize the differences in the dangers to which they give rise. Steam engines upon public highways must be stopped by persons in control of them, when meeting persons with horses, until the latter shall have passed by, and a trusty man must be kept at not less than 50 nor more than 200 yards in advance of such engines to assist in controlling any horse being driven on such highway, and it is made unlawful to blow any whistle on such engines while they are on the public highway. Such regulations, if applied to engines running upon railroads, would be absurd. It is true, these are police regulations, and have no reference to destruction of property by fire emanating from such engines, but they indicate the dangers sought to be guarded against by the temporary use of the public highways by traction engines, and the statutes applicable, respectively, to the two classes of engines recognize the differences in the kind and character of the dangers to property by the use of each.

It is apparent that, as a rule, it would be much less difficult for the property owner to prove negligence where it existed and had caused the destruction of the property by fire emanating from a steam engine proceeding slowly along a public road in the neighborhood than it would in a similar case of loss by fire emitted from a locomotive engine running upon a railroad. Locomotive engines run upon the railroads at all times, day and night, in such numbers, and with such frequency and speed, that the liability to set fire to adjacent property is very great; and besides, from the very nature of the case, it is often difficult to prove that fire which may have destroyed property emanated from them, and often impossible to prove that such emanation of fire was caused by the negligence of the railroad company or its servants. It is no hardship on companies or persons operating such engines, after proof that they have set fire to the property of others, to be required, in order to relieve themselves from liability, to prove that they were not guilty of negligence. Whether they exercised due care or not in the operation of the engine with reference to the danger of emitting fire therefrom, and in its equipment with the most approved appliances to prevent the escape of fire, are matters more peculiarly within their knowledge, and they can sup-

ply such proof more readily than the property owner, who, as a general thing, has had no connection with the cause which operated to destroy his property, and rarely adequate proof of negligence of the company or its servants at his command. *Woodson v. Railroad Co.*, 21 Minn. 61. Besides, the law of this state prior to the enactment of the statute, so far as applicable to the facts of this case, was the same as it has been since. *Bass v. Railroad Co.*, 28 Ill. 9; *Railroad Co. v. Montgomery*, 39 Ill. 335; *Railroad Co. v. Mills*, 42 Ill. 407. In the *Mills Case* (decided in 1868) an instruction was assailed which asserted "that the escape of fire from a railroad engine raises a presumption of negligence on the part of the road, and, that fire having been shown to have thus escaped, the onus then devolved upon defendants to rebut the presumption of negligence," and this court said (page 410): "Experience proves that by the use of modern inventions for the purpose the escape of fire may ordinarily be prevented, and when it does escape we may safely infer that such machinery has been omitted, and require the company to show that it was employed and in proper condition." The same rule has been announced in *England. Piggot v. Railway Co.*, 3 C. B. 229.

We hold the act to be constitutional. The cases cited by counsel for appellant are not analogous, and do not contravene the view we have taken.

It is contended by appellant that the court erred in overruling its motion in arrest of judgment because the declaration was defective. The only defect complained of is that the declaration did not state the duty of appellant correctly. It charged that it was its duty "to so operate its road and its locomotive engines running thereon that fire should not escape and be communicated therefrom" to the property of the plaintiff. This is substantially the form held sufficient in *Railway Co. v. Corn*, 71 Ill. 493. At the close of the plaintiff's evidence the defendant company (the appellant here) asked that the case be taken from the jury, and they be instructed to find for defendant, which motion was overruled. At the close of all the evidence the motion and instruction were renewed, and were again overruled. These rulings of the court are assigned as error. There was evidence sustaining the charge in the declaration, and, as it is the province of the jury to pass on the question whether the company has exonerated itself from the presumption of negligence, the motions were properly overruled, and the instructions to find for defendant properly refused.

Complaint is made of the refusal of three instructions offered by the defendant. The first one was in regard to a cause of action not stated in the declaration nor in any way referred to in the testimony, and was therefore entirely immaterial and improper. The other two were fully covered in instructions

given for appellant, which are certainly as favorable to it as the law will warrant.

Some errors are alleged in the exclusion of evidence offered by appellant, but we find no error in that regard. The testimony designed to be secured by some of the questions of the defendant which were not permitted to be answered was given in answer to other questions, and the other rulings of the court complained of did not prejudice appellant. The exclusion of the so-called inspection record was proper. It was not a book of account. Besides, witness was allowed to refresh his memory from the same, and thus its contents came before the jury.

It is also insisted that the court erred in permitting plaintiff below to prove by the witness Hopper that shortly (within 10 days) after the fire he saw the same engine passing through Farmingdale, going in the same direction as when the fire was alleged to have been set out, and saw it "throwing cinders from its smokestack." This, it is claimed, was error, in the absence of proof that the engine was in the same condition it was at the time of the fire. We are of the opinion that the evidence was admissible. The plaintiff was endeavoring to prove by circumstantial evidence that the crib was set on fire by the defendant's engine. It was a question whether the engine emitted sparks of fire or not, and, if it was seen emitting fire when going up the same grade shortly after the fire, that fact would tend to show that the engine was of such a character as to its construction and equipment as to emit fire, and it would, when the substantial and permanent character of such an engine is considered, have some relation to its condition in the respect mentioned at the time, then so recently past, when the property in question was destroyed. Testimony that the engine had emitted sparks or set out other fires near to the time of the fire complained of has been held admissible in many cases. *Railroad Co. v. Noel*, 77 Ind. 121; *Railroad Co. v. Richardson*, 91 U. S. 470; 8 Am. & Eng. Enc. Law, 9, and notes. Whether or not such testimony would come more properly in rebuttal after testimony for the defendant relative to the construction, equipment, and condition of the engine in respect to its liability to emit fire it is not necessary to decide, as that question would rest in the sound discretion of the trial court, and no point has been made upon it in this case. But if, as might have been the case, the plaintiff had been unable to prove that the engine in question emitted sparks of fire when it passed the corner crib a few minutes before the fire was discovered, the way would have been still open to him to prove by more remote circumstances that the defendant's engine did emit sparks and did in fact set out the fire that destroyed his property, and the fact in question was one of such more remote circumstances, and was not rendered irrelevant by proof of others having a more direct bearing on the issue. It was the privilege of the defendant to disprove the fact, or

prove that the engine had gotten out of repair after the fire.

It is said, however, that it was not disputed that the engine did at times emit sparks, and it is further said that the proof was that all, even the best-equipped, engines, when laboring hard, will emit fire, and that the defendant is not liable, even if the property of the plaintiff was set on fire by defendant's engine, unless there was negligence. The defendant did not admit, but controverted, the fact that the fire was caused by its agency, as alleged, and it devolved upon the plaintiff to make the necessary proof. Besides, it cannot be said, as a matter of law, that the emission of sparks from an engine is no evidence of negligence.

It is also contended that the verdict is contrary to the weight of the evidence. It was for the jury to say whether the fire was communicated from the engine, and, if so, whether the company had observed the proper precautions for its prevention, or was guilty of negligence. *Railway Co. v. Pindar*, 53 Ill. 447. We cannot, from an inspection of the record, say that the verdict is not sustained by the evidence.

Finding no prejudicial error, the judgment is affirmed. Judgment affirmed.

(174 Ill. 538)

SMITH v. WILLARD.

(Supreme Court of Illinois. Oct. 24, 1898.)

HUSBAND AND WIFE—RESULTING TRUST—ESTOPPEL
—DEEDS—RECORDATION—PURCHASERS—CREDITORS.

1. Although the wife did not know that title to land bought with her money was taken in her husband's name for seven years thereafter, and until after one had sold goods to him on his representations, and on the credit of his ownership, yet the deed was kept in a bureau in their two-room house, to which she had free access, and she was a shrewd, educated business woman, and might have learned the facts for herself. The husband rented the land and collected the rents, but it was generally understood in the neighborhood that the land belonged to her. She did not notify the creditor of her ownership, and he did not know of it until the day of the sale of the land under his execution against the husband. *Held*, that the creditor's claim was superior to her resulting trust.

2. Under Rev. St. c. 30, § 30, providing that deeds are effective as to creditors without notice only from their recordation, a wife withholding from record a deed from her husband to her for nearly a year, and until the rights of her husband's creditors have matured, and judgment rendered against him and the land levied on, cannot assert a claim superior to the creditors', where the latter had no knowledge of her claim, and sold goods to the husband relying on his representation of ownership of the land.

3. Under Rev. St. c. 30, § 30, providing that deeds are effective as to a subsequent purchaser without notice only from their recordation, a judgment creditor issuing execution against the land before the filing of a deed is a purchaser, and hence notice to him of the grantee's claim on the day of the sale under his execution is too late.

Appeal from circuit court, Pike county; Thomas N. Mehan, Judge.

Bill by Eliza B. Smith against John Willard. There was a decree for defendant, and complainant appeals. Affirmed.

This was a bill in chancery filed by Eliza B. Smith against John Willard to set aside a sheriff's deed upon the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 32, township 7 S., range 2 W., in Pike county, Ill., bearing date July 19, 1897.

The facts as alleged in the bill, and substantially shown in the testimony upon hearing of the cause, were that about the year 1888 the complainant inherited some land in Calhoun county from her mother, which land she sold, receiving \$2,600 in cash. A few months afterwards, in September, 1888, having in mind the purchase of a farm, she and her husband looked at the place of one George Williams, containing 120 acres, including the land in controversy. They concluded to buy it, and the complainant paid to the wife of Williams \$25 earnest money, taking a receipt therefor in her own name. A short time afterwards she drew \$1,500 of the money she had received from the sale of her mother's estate, and paid it to Williams, that being the consideration for his land. There is some conflict in the evidence as to the circumstances regarding the execution of the deed. Complainant says it was executed a number of days after the money was paid to Williams, and that her husband, on account of her illness, looked after the transaction; that she told him she wanted the deed made to her; that he brought home the deed, and placed it in the bureau drawer in the house, telling her it was all right, although no particular conversation seems to have occurred between them at that time as to whether or not he had complied with her instructions in taking the deed to her. The vendor of the land, Williams, testifies he made the trade with the husband, and was told by him the deed should be made to him, the husband of the complainant; that complainant and her husband wanted the deed made to the husband, and after so executing it he went to their house and received payment in checks for the land, and delivered the deed to one of them in the presence of both. His recollection, as stated, is that the deed was handed to the wife, the complainant. The husband was dissipated, and in after years became somewhat involved in debt, among other indebtedness owing about \$300 to the defendant, John Willard, for a threshing outfit. George Williams, who had sold the land above mentioned, was a surety on the note signed by Smith. He testifies he signed the note believing Smith, the husband of complainant, to be the owner of this 120 acres of land, and Willard also believed the same to be true. A number of witnesses, however, old residents and neighbors of the complainant, testified that the land was generally known in the neighborhood as her land, and it is shown that Willard lived only a few miles away, but was apparently not well ac-

quainted in her neighborhood. Complainant states that she did not discover the deed which had been executed by Williams and his wife for the land was made to her husband until the month of May, 1895,—nearly seven years after its execution. During this time it was deposited in the bureau drawer in their house, with other papers. The house contained only two rooms, and complainant had at all times access to the place where the deed and other papers were kept. Her attention was called about this time, by her brother-in-law, to the fact that her husband was involved in debt, and she was asked about the deed to the land, and says she found for the first time, upon examination, that the deed executed seven years before had been made to her husband instead of to her. She requested her husband to execute to her a deed to the land, which he did, bearing date June 6, 1895, which was not recorded, however, until March 30, 1896.

At the November term, 1895, of the circuit court of Pike county, John Willard, the defendant, obtained a judgment against John Smith and George Williams for \$341.75. Execution was issued March 5, 1896, and the 40 acres of land in controversy were sold April 18, 1896. At the time and place of sale appellant, through her attorney, gave oral notice to the defendant and others that appellant claimed to own the land in controversy, and that the same was purchased with her money. The land was bid in by the defendant, Willard, and his certificate of purchase afterwards ripened into a deed. In August, 1897, this bill was filed by complainant to set aside the sheriff's deed as a cloud upon her title. Upon a hearing upon the bill, answer of the defendant denying the material allegations to the bill, and replications thereto, the chancellor found that the allegations in the bill were not sustained by the proof, and that she was not entitled to the relief asked for, and ordered her bill to be dismissed for want of equity. A decree to this effect was so entered, and for the purpose of reversing that decree this appeal is prosecuted to this court.

A. G. Crawford, for appellant. W. E. Williams and W. L. Coley, for appellee.

PHILLIPS, J. (after stating the facts). Under the assignment of error in this case it is urged and argued by appellant that the circuit court erred in dismissing her bill, for the reason the evidence offered was sufficient to entitle her to a decree setting aside the deed of the defendant as a cloud upon her title. It is also urged the land in question having been purchased by the husband with money belonging to his wife, a resulting trust was established in her favor.

From the record in this case there can be no question but the money of appellant was used in the purchase of these lands. The rule is well established, if the husband pur-

chase lands with the separate estate of his wife, or with proceeds or accumulations from it, and takes the title in his own name, a trust results to the wife. 1 Perry, Trusts (3d Ed.) § 127; Lathrop v. Gilbert, 10 N. J. Eq. 344; Cass v. Demarest, 37 N. J. Eq. 393; Millman v. Divers, 31 Pa. St. 429; Hay v. Martin (Pa. Sup.) 14 Atl. 333; Radcliff v. Radford, 96 Ind. 482. The whole foundation of a resulting trust is the ownership and payment of purchase money by one and the taking of title in the name of another, and the presumption, founded on such transaction, of the intention of the parties that such trust should result. In this case, where the purchase money was that of the wife and the title taken in the name of the husband, there is a disputed question of fact as to whether or not she consented or agreed that the title should be so taken. She says she had no knowledge of such fact until seven years after the execution of the deed. Whether or not appellant directed her husband to have the deed executed to her, it is apparent after that time she had ample opportunity to know, and in justice to third interested persons she should have known, that her directions were complied with. She was a woman possessing the advantages of a common and boarding school education, and said to be shrewd in business matters. The deed in question was for seven years in a bureau drawer in her house, consisting of two rooms. To the place where it was deposited she had free access, and it would appear a woman of her abilities, having furnished the money for the purchase of the land, and having been so explicit, as she has stated, in directing that the deed should be taken in her name, would at least have manifested enough further interest in the transaction to have ascertained the fact.

Where a married woman holds out to the world that her husband is the owner of property in which she has a resulting trust, or permits him to so act as to induce others to believe he is the owner of such property or has power to bind her, third persons acting reasonably on the strength of such belief, and giving credit to him thereupon, will be protected. *Anderson v. Armstead*, 69 Ill. 452; 14 Am. & Eng. Enc. Law, 646. The party who sold the land to appellant, however, testifies the deed which was executed to the husband was so ordered to be made, and was delivered in the presence of both the husband and the wife at the time the purchase money was paid. The husband afterwards rented the land and collected such rents. Evidence is offered tending to show that the land was considered by people in the neighborhood as belonging to the appellant. Such evidence, however, is of no great value, unless it had the effect of bringing notice to appellee, at the time he extended credit to the husband of appellant, that the husband was not the actual owner of the land.

We do not deem it necessary to discuss the authorities cited by appellant tending to show that she held a resulting trust in this land by reason of having furnished the purchase money, and that her husband simply held the land as trustee for her. Had this been a bill filed by her to establish such resulting trust, and where the rights of third parties had not intervened or attached by reason of any omission or laches on her part, the evidence would clearly entitle her to a decree vesting in her the title to this land. The question is now presented, however, whether, after the title to this land has remained in the husband for a period of seven years or more, and by proper diligence appellant might have ascertained that fact, there was a duty imposed upon her to know that her directions as to the execution of the deed were carried out, before she will be permitted to maintain title as against one who has extended credit to the husband on the faith of his apparent title, and secured the lien. The further question is also presented as to whether, after ascertaining the existence of title in her husband and securing from him a deed which would fulfill any trust vested in him, she has, by withholding such deed from record for nearly a year, during which time the rights of her husband's creditors have matured, lost by such act her right to assert title.

At the time of the conveyance by the husband to the wife in fulfillment of this resulting trust it became and was her duty to give such notice as the law requires to all persons that he no longer held any title or interest in these lands. Section 30 of chapter 30 of the Revised Statutes provides as follows: "All deeds, mortgages and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record." While appellant's deed was executed in June, 1895, it was not recorded until March, 1896. Meanwhile the judgment of appellee had been rendered and the lands in question levied upon. The undisputed evidence of appellee in this case shows that he gave credit to the husband of appellant upon the strength of the fact that he was the owner of the land in question. The husband, at the time of the execution of the note on which judgment of appellee was based, stated that he was the owner of this land. There is no attempt on the part of appellant to bring notice to appellee that she held any resulting or other interest in this land, nor is there any evidence which indicates that he had any such knowledge until the day of the sale. He had a right to rely upon the condition of the title of these lands as shown by the record, and

upon the representations of the husband that he was the owner, and, in the absence of evidence indicating any knowledge of appellant's interest, appellee had the legal right to give credit to the husband under the belief that he was the actual owner. "The law is well settled that a bona fide purchaser of the legal estate will be protected against the prior equitable title of another of which he had no notice." *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934. So, also, in the same case, it was said that, "although the grantee in a deed may hold the legal title in trust for another, a third person may acquire the title from the trustee if he has no notice of the trust and acts in good faith." *Peck v. Arehart*, 95 Ill. 113; *Emmons v. Moore*, 85 Ill. 304; *McDaid v. Call*, 111 Ill. 298; 2 Pom. Eq. Jur. § 770; *Bradley v. Luce*, 99 Ill. 234.

It is insisted by appellant that because she, through her attorney, gave notice on the day of the sale of this land by the sheriff that she was the owner of it and that it had been purchased with her money, that was sufficient to charge appellee with notice of such fact, and defeat his lien if her claim was well founded. Section 30, above quoted, provides that "all deeds * * * shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice." The deed of appellant in this case was not filed until March 30, 1896. The judgment of appellee had been rendered and execution issued before that time. Appellee, being a judgment creditor before the filing of this deed for record, occupied the same position as purchaser, within the meaning of this statute. *Massey v. Westcott*, 40 Ill. 160; *Martin v. Dryden*, 1 Gilman, 187; *McFadden v. Worthington*, 45 Ill. 362; *Milmine v. Burnham*, 76 Ill. 362; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Munford v. McIntyre*, 16 Ill. App. 316; *Bergman v. Bogda*, 46 Ill. App. 351. The notice, therefore, given, or attempted to be given, by appellant of her claim or interest in this land after the appellee, by virtue of his judgment and the levy of the execution, occupied the position of purchaser, could in no wise affect or diminish his interest. A careful consideration of this record, and of the reasons presented by counsel for the reversal of this decree, furnishes us no ground for disturbing the decree of the circuit court dismissing appellant's bill. The decree of the circuit court of Pike county is therefore affirmed. Decree affirmed.

(174 Ill. 344)

LADD et al. v. JUDSON et al.

(Supreme Court of Illinois. Oct. 24, 1898.)
CREDITORS' SUITE—JUDGMENT AT LAW—NONRESIDENCE OF DEBTOR—ATTACHMENT—EQUITABLE INTEREST—GARNISHMENT OF TRUSTEE.

1. A bill in the nature of a creditors' bill to reach equitable assets of a debtor cannot be maintained by a creditor whose demand is

purely legal, where a judgment at law has not been obtained in the jurisdiction where the bill is filed.

2. The fact that, because of the nonresidence of such debtor, an action at law cannot be maintained against him in such jurisdiction, affords no reason for dispensing with the judgment at law.

3. The rights of a nonresident beneficiary under a will devising property to an executor or trustee within the state, and directing him to sell it, and pay the proceeds to her, constitute an equitable interest in the property in the hands of the executor, within Rev. St. p. 154, c. 11, § 8, authorizing the levy of a writ of attachment on any land or tenements in and to which a nonresident debtor "has or may claim any equitable interest or title."

4. Where a nonresident debtor is a beneficiary under a will devising property to an executor or trustee within the state, and directing him to sell it, and pay the proceeds to her, the executor may be summoned as garnishee, under Rev. St. c. 11, § 21, authorizing the sheriff to summon as garnishee persons in his county, whom the creditor shall designate as having any property, effects, choses in action, or credits in his possession or power belonging to defendant.

Phillips, J., dissenting.

Appeal from appellate court, Third district.

Bill by William Ladd and another against Thomas P. Judson and others. The decree of the circuit court sustaining a demurrer to, and dismissing, the bill was affirmed by the appellate court (71 Ill. App. 283); and plaintiffs appeal. Affirmed.

This is a bill in equity in the nature of a creditors' bill, by appellants, against appellees, filed in the Montgomery circuit court. It alleges that complainants obtained a decree of foreclosure in the circuit court of Josephine county, Or., against defendants Thomas P. and Jennie H. Judson, on a note and mortgage executed by them for \$1,121.45; that certain mortgaged property was sold under that decree, and the proceeds applied thereon, but was insufficient to fully pay the same, leaving a balance of \$981.11; that Solomon Harkey, the father of defendant Jennie H. Judson, died testate, leaving a large amount of real and personal property in Montgomery county, Ill., which he willed to the defendant Alexander A. Cress, as executor, in trust, to sell and convert into money, and then divide the proceeds equally among his several children, including the said Jennie H. Judson; that there is now remaining in the hands of said trustee under said will, and undisposed of, certain real estate described, containing about 320 acres, in Montgomery county, Ill.; that the judgment referred to in this bill was regularly obtained against the defendants in the circuit court of Josephine county, Or., personal service having been had upon them, and that the Judsons are insolvent and nonresidents of the state of Illinois; that the funds sought to be reached to satisfy this debt are within the jurisdiction of this court; and that there is no way in law by which the said property rights and interests held in trust by the said Alexander A. Cress for the defendant Jennie

El. Judson can be reached; and that there is no other property of any kind or character in the state of Illinois, owned by the defendants, which can be reached by attachment or otherwise; and that complainants have no remedy at law. The bill alleges, generally, upon information, that the trustee has control of notes, accounts, choses in action, etc., which he holds in trust for the defendants under the terms and conditions of the will aforesaid, and prays discovery; that said T. P. Judson and Jennie H. Judson have refused to pay the amount due the complainants, or to apply thereon the equitable interest which is held in trust for them by the said trustee, all of which is contrary to equity and good conscience; that by reason of said defendants being nonresidents of the state of Illinois, and keeping themselves out of the jurisdiction of the courts, complainants have been unable to obtain judgment in Illinois against the Judsons. The bill prays answer not under oath, and especially that the said Alexander A. Cress may be required to inform the court as to the amounts and value of all property, interests, and effects held by him in trust for the use of T. P. Judson and Jennie H. Judson, whereby complainants' debt could be satisfied, and that the Judsons may be decreed to pay to complainants the amount heretofore named, with interest; that the executor or trustee may be required, if on hearing he is found to hold real estate for the use of the Judsons, to sell or dispose of it, or so much of it as may be found necessary to satisfy complainants' debt; and that he may turn out other property and property rights towards the payment of the said indebtedness; and that complainants may be declared to have a lien upon all property owned or held by the said Cress in which the Judsons are interested.

A copy of the will making such devise was attached to and made a part of the bill. Item 4 is as follows: "I will and devise to my executor or executors hereinafter named or described all my real estate, including all that devised to my wif for life, but, subject to that devise for life to her, in trust for the following purposes or objects: First, that he may sell said real estate, and convert the same into money; and, as I don't wish my said real estate sacrificed, I hereby authorize and empower my executor or executors to sell the whole or any part or any parcel thereof, and convey the same, when sold, on such terms and at such times as he may deem for the best interest of my estate. He is expressly authorized to use his discretion in selling any and all real estate, and make the sales thereof privately or publicly, as shall seem to him best for my estate. Secondly, the rents and profits of said estate, except so much thereof as shall be necessary to make such repairs as are needful to keep the improved parts of said real estate from deteriorating in value and pay the taxes on my entire real estate, including that in which my wife has

a life estate, together with the proceeds of said real estate, shall be divided into seven equal parts,—that is, after the costs and expenses of my said real estate have been paid,—and one-seventh part thereof shall be paid as follows: To my sons William P. Harkey, Jacob M. Harkey, and Solomon S. Harkey; and one-seventh part each to my daughters Sarah C. Wilton and Jennie H. Judson; one-seventh part to my granddaughter Martha J. Blackburn; one-seventh part thereof to the children of my deceased son or the survivor of them, viz. Ida Harkey and Ella Lee Harkey, one-seventh part thereof." Publication was made as to the defendants Judson, and personal service had on Alexander A. Cress. He appeared, and filed a general and special demurrer to the bill, alleging for special cause that it did not show that the complainants had recovered a judgment at law on their claim. This demurrer was sustained, and, complainants declining to amend, the bill was dismissed at their cost. To reverse that order, they appealed to the appellate court for the Third district; but the decree of the circuit court was affirmed, and they now prosecute this further appeal.

Howett & Jett, for appellants. J. M. Truitt, for appellees.

WILKIN, J. (after stating the facts). The principal question raised and discussed on this record is whether the failure of complainants below to obtain a judgment at law against the defendants Judson in this state is, on the facts alleged, fatal to their bill. That a judgment at law and execution thereon, with a return of nulla bona, are prerequisites to the maintenance of a creditors' bill proper, has never been questioned. Our statute expressly so provides. A bill in the nature of a creditors' bill, the object of which is to remove a fraudulent incumbrance or other obstruction out of the way of a levy and sale under an execution, may be filed immediately upon obtaining judgment. The judgment is, however, no less essential in such a case than that of a simple creditors' bill. The reason frequently given for requiring such judgment at law in both classes of cases is that to allow a complainant to establish his claim in the first instance in a court of chancery would be to deprive the defendant of the right of trial by jury. It is also well settled that the judgment at law necessary to give the court jurisdiction in such cases must be a judgment in the jurisdiction where the bill is filed. *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588, citing *Steere v. Hoagland*, 39 Ill. 264.

But counsel for appellants insist that there is a third class of cases in which a creditor may maintain a bill in equity for the satisfaction of his debt,—that is, where he seeks to reach property or funds accessible only by the aid of a court of chancery,—and that in such cases no judgment at law is neces-

sary. Expressions are referred to in some early decisions of this court which give support to this contention. *Greenway v. Thomas*, 14 Ill. 271; *Miller v. Davidson*, 3 Gilman, 518; *Getzler v. Saroni*, 18 Ill. 511. But it has never been decided in this state that the mere fact that assets of a debtor out of which satisfaction is sought can only be reached through a court of equity will give that court jurisdiction, in the absence of a judgment at law; and the uniform holding that, in bills of the second class above mentioned, such a judgment must be averred and proved, is irreconcilable with any such decision. If a case can arise in which relief may be sought in equity in the first instance, it must appear that the complainant's demand is of such an equitable character that it can only be established in a court of chancery; otherwise, the right of the defendant to a trial by jury upon a legal claim would be taken away, and the reason for the rule, as above stated, destroyed. And so we said in *Dormuell v. Ward*, 108 Ill. 216, where it was insisted that the case came within an exception to the general rule requiring a judgment (page 219): "These so-called exceptions, when properly understood, are rather nominal than real, for a bill of this character will not lie in any case where the claim, as it is here, is a purely legal demand. In all cases where such a bill has been maintained, the claim of the complainant has had some equitable element in it,—such as a trust, or the like. But, in the absence of some element of this character, there is a want of jurisdiction to adjudicate upon the claim at all; and it is upon this fundamental doctrine the rule controlling this class of cases rests. When, however, a judgment has been obtained, and an execution has been returned nulla bona, and it can be shown the defendant has equitable assets which cannot be reached by execution, or that he, or others acting in concert with him, have fraudulently placed obstructions in the way of collecting the claim by execution, a case will then be made out for the interposition of a court of equity. The jurisdiction of the court thus invoked is known as a part of the auxiliary jurisdiction of a court of equity; but, as a condition precedent to its exercise, where the demand is purely legal, as it is here, the claim must be reduced to a judgment and an execution thereon returned nulla bona. Such is the settled law of this state, and it is supported by the general current of authority." See, also, *Shufeldt v. Boehm*, 96 Ill. 560.

If it were true, as alleged in the bill and urged in the argument, that, by reason of the nonresidence of the defendants Thomas P. and Jennie H. Judson, an action at law cannot be maintained against them in this state, that fact would furnish no sufficient reason for changing the well-settled rule, uniformly adopted, making a judgment at law necessary. *Shufeldt v. Boehm*, supra.

We are not, however, prepared to hold that this bill shows that such a judgment cannot be obtained. If Mrs. Judson's ownership in the property in question, or the proceeds thereof when sold, is such an interest as can be seized by a decree in chancery, and applied in satisfaction of her indebtedness, it is difficult to see why, under our attachment and garnishment laws, an action at law cannot be maintained against her. Cases like *Baker v. Copenbarger*, 15 Ill. 103; *West v. Schnebly*, 54 Ill. 523, and *Farrar v. Payne*, 73 Ill. 82, decided under the law as it existed prior to the passage of the act of March 31, 1869, re-enacted December 23, 1871, and still in force, are not authorities on this question. The present statute authorizes the levy of a writ of attachment upon any lands or tenements in and to which a debtor "has or may claim any equitable interest or title." Rev. St. p. 154, c. 11, § 8. It would seem clear that Mrs. Judson, on the facts here alleged, "has or may claim" some equitable interest in the property in the hands of the executor of her father's will. But, if she cannot, upon what principle can her creditors attack it? If it be conceded that the property could not be levied upon, still the executor, if he has in his "possession or power" any property, effects, choses in action, or credits belonging to Mrs. Judson, may be summoned as garnishee in an action by attachment. Id. § 21. In *Stelb v. Whitehead*, 111 Ill. 247, certain real estate was devised to trustees to keep rented, make repairs, etc., and "pay over all remaining rents and income in cash into the hands of my said daughter Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet," and it was held that the net income was not liable to garnishment in the hands of the trustee for debts of the beneficiary, Juliet. The decision was placed upon the sole ground that, by the terms of the devise, it appeared the testator intended to place it beyond the control of his daughter or her creditors while in the hands of the trustees. It is fairly inferable from what is there said that, but for such manifest intention on the part of the testator, the fund would have been the subject of garnishment.

But it will not be necessary to pursue this inquiry further. It may be that upon a full answer in garnishment, involving all the facts and a construction of the will of Solomon Harkey, such an action cannot be maintained; but on the facts here alleged, which are admitted by the demurrer, we see no reason for so holding. Aside from that question, appellants' claim being purely a legal one, they cannot reach Mrs. Judson's property through a court of equity without first obtaining a judgment against her in a court where she may avail herself of a jury trial and all legal defenses which she may have to such claim; and, if it be true that no such judgment can be obtained, then, how-

ever great the hardship, they must forego the satisfaction of their debt out of the property sought to be reached by this bill. The judgment of the appellate court will be affirmed. Judgment affirmed.

PHILLIPS, J. (dissenting). Where, under a will, lands are devised to an executor to sell, and convert the same into money, and divide the same so received therefrom between certain devisees, this is a devise of money, and not of land. Land so devised to the testator, with power of sale, cannot be sold on execution issued on a judgment against one of the devisees, who is to receive a portion of the proceeds thereof. *Baker v. Copenbarger*, 15 Ill. 103. The devisee has no interest in the land which can be sold under execution, nor can he sell and convey the same so as to effect an absolute conveyance thereof. While all the devisees may elect to take land instead of money, that election can only be made by all the devisees acting in concert, and cannot be made by one or more less than all. Lands in such case devised to an executor, not being liable to sale on execution, is for the same reason not liable to be sold on attachment. The legal title to the land is held in trust by the executor, for the purpose specified in the will to be sold, and the proceeds distributed according to the directions of the will; and the title held by the executor, being strictly in trust with power of sale, is as free from any right or claim of the devisee as if he was to have no interest in the proceeds. The devise in such case is a devise of money, and not of land, and the devise to the devisee was not land, but money; and her only claim of interest was in that money, and in that she has no interest until the land is sold by the executor. *Baker v. Copenbarger*, *supra*. The principles announced in this case have been frequently recognized and followed by this court. *Jennings v. Smith*, 29 Ill. 116; *Rankin v. Rankin*, 36 Ill. 293; *Ridgeway v. Underwood*, 67 Ill. 419; *Germain v. Baltes*, 113 Ill. 29; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503; *In re Corrington's Estate*, 124 Ill. 363, 16 N. E. 252; *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013; *Strode v. McCormick*, 158 Ill. 142, 41 N. E. 1091.

In the absence of special statutes, it is a well-recognized rule of law that an executor or administrator cannot, in his official capacity, be held liable as garnishee at suit of a creditor of a decedent, or of one who is a legatee or distributee, or creditor of an estate. The executor derives his authority under the will from the law, and must execute it according to the directions of the will, and in pursuance of rules of law. If executors and administrators were liable to a process of garnishment, the operation and effect of the law with reference to the administration of estates would be substantially destroyed, and the settlement of estates be delayed, disarranged, and rendered complex and involved.

No garnishment can be had against an executor or administrator of a distributive share of a devisee to an estate until the court has decreed a distribution of the proceeds in the hands of the administrator. *Barnes v. Treat*, 7 Mass. 271; *Brooks v. Cook*, 8 Mass. 247; *Thorn v. Woodruff*, 5 Ark. 55; *Stout v. La Follette*, 64 Ind. 365; *Colby v. Coates*, 6 Cush. 558; *Threshing-Machine Co. v. Miracle*, 54 Wis. 295, 11 N. W. 580; *Thayer v. Tyler*, 5 Allen, 94; *Welch v. Gurley*, 3 N. C. 510; *Young v. Young*, 2 Hill (S. C.) 425; *Curling v. Hyde*, 10 Mo. 374; *Winchell v. Allen*, 1 Conn. 383; *Lyons' Adm'r v. Houston*, 2 Har. (Del.) 349; *Waite v. Osborne*, 11 Me. 185; *Wilder v. Bailey*, 3 Mass. 289; *Marvin v. Hawley*, 9 Mo. 382; *Hill v. Railway Co.*, 14 Wis. 291; *Dawson v. Holcomb*, 1 Ohio, 275; *Norton v. Clark*, 18 Nev. 247, 2 Pac. 529; *Milison v. Fisk*, 43 Ill. 112. Whenever the devisees may maintain an action at law against the executor or administrator to recover the legacy or distributive share of the estate, then, and not till then, can such executor or administrator be garnished by any creditor. *Cutter v. Perkins*, 47 Me. 557; *Post v. Love*, 19 Fla. 634; *Piper v. Piper*, 2 N. H. 439. To allow a distributive share in the estate to be secured by garnishment before that share is ascertained and determined would, in cases where debts have not been paid, lead to absolute uncertainty, and injustice, as it cannot be determined whether there will be a surplus in the hands of the executor or administrator on final settlement; and hence the rule of law is that, until the distributive shares are ascertained, they cannot be secured by garnishment. *Richardson v. Lester*, 83 Ill. 55; *Richards v. Griggs*, 16 Mo. 416; *Norton v. Clark*, *supra*; *Hoyt v. Christie*, 51 Vt. 48; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *In re Nerac's estate*, 35 Cal. 392.

In a case where the testator dies, and by his will devises land to an executor in this state with power of sale, and that executor is directed to sell and dispose of the lands, and convert the same into money, and distribute the same among certain devisees, and some of those devisees are nonresidents of the state of Illinois, or have absconded from the state, and have no property in this state, except the equitable interests under the will of the testator, there is no method known to the law by which a judgment at law could be recovered. There could be neither attachment, nor garnishment of the interest of a devisee. The statute has provided no means by which the interest could be reached by proceedings in rem only, by garnishment. No service could be had on the devisee in such case, so that a judgment at law could be recovered. An absconded or nonresident debtor having such equitable interests in property in this state cannot escape a liability for a bona fide debt, because the law has provided no means by which a judgment at law may be recovered. The creditor may resort to a court of equity, establish his debt, and have satisfac-

tion out of the equitable interest of such absconded or nonresident debtor. It was held in *Getzler v. Saroni*, 18 Ill. 518: "And if the property be not subject to attachment at law, being an equitable interest only, and personal service cannot be obtained on his debtor, so that he is without remedy at law for the establishment of his debt, he may, in the first instance, go into equity, establish his debt, and have satisfaction out of the equitable interest." To the same effect is *Russell v. Clark*, 7 Cranch, 87. In *Steere v. Hoagland*, 39 Ill. 264, it was held: "Where a fund cannot be reached at law, and is only accessible in a court of chancery, then creditors may resort to equity in the first instance. * * * If the claim is to be satisfied out of the fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

To the general rule that there must be judgment and return of execution unsatisfied before resort can be had to a court of equity, there are, and have always been, exceptions in special cases, such as this, where a judgment cannot be obtained because the debtor has absconded or removed from the state, or is a nonresident. As fully sustaining this doctrine, we cite *Scott v. McMillen*, 1 Litt. 302; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Kipper v. Glancey*, 2 Blackf. 356; *Pendleton v. Perkins*, 49 Mo. 565; *Peay v. Morrison's Ex'rs*, 10 Grat. 149; *Earle v. Grove*, 92 Mich. 285, 52 N. W. 615. In the latter case it was held: "The complainants claim that while the general rule in all the states, statute or no statute, is that there must be judgment and a return of execution unsatisfied before a resort can be had to equity, still, that there are and always have been exceptions to this general rule, in special cases; as where a judgment cannot be obtained because the debtor is dead, or has absconded or removed from the state, or is a nonresident. * * * Here the amended bill avers a judgment regularly obtained upon personal service in New York, and the exhaustion of legal remedies in that state; that Kendall is insolvent and a nonresident of this state; that the fund sought to be reached to satisfy the debt is here within the jurisdiction of the court, where the bill has been filed; and that there is no way in law in which to reach such fund. This would be sufficient to maintain the suit if we had no statute, and the statute does not forbid it." The right to relief by a bill in equity without judgment at law, when the debtor has absconded, and there is no remedy except in equity, is recognized in *Greenway v. Thomas*, 14 Ill. 272. To the same effect is *Pope v. Solomons*, 36 Ga. 541. In *McCartney v. Bostwick*, 32 N. Y. 62, it was held with reference to resort to a court of equity without judgment at law: "The rule, of course, presupposes that they have a legal remedy; but,

so far as the courts of this state are concerned, they have none. The facts stated by the complainants show that no remedy whatever at law exists in their favor in this state; that no court of law of this state has jurisdiction to entertain a suit to be brought by them against the debtor, either upon a judgment or the original indebtedness, and that it is therefore impossible for them to recover judgment in this state, and have their execution returned. Does equity demand that the legal remedy shall be exhausted where none exists, before it will enforce a trust created by statute, of which it alone has jurisdiction?"

In this case there is no possible manner in which a judgment may be recovered at law, and no satisfaction can be had by garnishment. A nonresident debtor having large equitable interests as a devisee of an estate cannot be reached in the proceedings at law, and recourse may be had to equity as the only jurisdiction that can protect the interests of the court, and make the property liable for the debts of this devisee. The remedy in equity is full and complete, and it was error to sustain the demurrer to the bill, as it was also error in the appellate court to affirm the same. Because the right of garnishment did not exist as against administrators and executors, the legislature, by an act entitled "An act in relation to the garnishment of administrators," approved June 11, 1897, in force July 1, 1897 (*Laws Ill. 1897*, p. 231), endeavored to remedy the difficulties arising from the want of power of a creditor to garnish such administrators and executors with respect to land, money, goods, etc., belonging to any heir or distributee of an estate, but providing no final judgment should be rendered against such administrator or executor until after an order of distribution had been made. This statute, however, was enacted long after the commencement of this suit, and can have no effect on the questions presented on this record; hence I cannot concur in this opinion.

(176 Ill. 359)

CLEVELAND, C. C. & ST. L. RY. CO. v. PEOPLE ex rel. JETT.

(Supreme Court of Illinois. Oct. 24, 1898.)

MANDAMUS—RAILROADS—LEGISLATIVE POWERS—STOPPAGE OF TRAINS.

1. The enactment of the railroad act, as amended July 1, 1879, § 25 (*Hurd's Rev. St. 1889*, p. 1060), providing that every railroad corporation shall cause its regular passenger trains to stop a sufficient length of time at its stations at county seats to accommodate passengers, was within the legislative power to regulate corporations, so as to provide for the public welfare.

2. A corporation operating a railroad across Illinois is, for all purposes of local government, a domestic corporation, and subject to the police control of the legislature of the state.

3. The railroad act, as amended July 1, 1879, § 25 (*Hurd's Rev. St. 1889*, p. 1060), providing that every railroad corporation shall cause its

regular passenger trains to stop a sufficient length of time at its stations at county seats to accommodate passengers, is applicable to a railway corporation running a passenger train through the state, and does not interfere with interstate commerce, since it is a mere police regulation.

Appeal from circuit court, Montgomery county; Robert B. Shirley, Judge.

Petition by the people, on the relation of Thomas M. Jett, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for mandamus to compel defendant to stop a passenger train at a county seat. From a judgment awarding the writ, defendant appeals. Affirmed.

John T. Dye and Geo. F. McNulty, for appellant. M. T. Moloney, Atty. Gen., and Thos. M. Jett, State's Atty. (T. J. Scofield, Jas. M. Truett, and M. L. Newell, of counsel), for appellee.

PHILLIPS, J. The relator filed a petition alleging the appellant was an incorporated railway company operating a certain railroad from the city of St. Louis, Mo., across the county of Montgomery, and through the corporate limits of the city of Hillsboro, in said county, to the city of Indianapolis, in the state of Indiana. It was further alleged the city of Hillsboro was, and for many years had been, the county seat of said county of Montgomery, and that the appellant kept and maintained a railroad station and depot within the corporate limits of said city, where its passenger trains were accustomed to stop and take on and discharge passengers from its trains; that by the statutes of the state of Illinois it was the duty of the appellant to stop all regular passenger trains by it run over and upon said railroad within the corporate limits of said city at said railroad station a sufficient length of time to receive and discharge passengers, but, disregarding its duty, appellant unlawfully and knowingly runs a regular passenger train, designated as the "Knickerbocker Special," twice each day, through the corporate limits of said city, without stopping at the station to receive and discharge passengers, contrary to the provisions of the statute. The petition prayed for a writ of mandamus to compel the appellant to stop said train at the railroad station at the said county seat a sufficient length of time to receive and discharge passengers, as by the statute provided.

The answer averred that before and at the time of filing the petition appellant furnished ample and sufficient accommodation for all local and through business, and ready and convenient transportation to and from Hillsboro to all points and connections without delay; that the same number of trains ran and stopped as before the "Knickerbocker Special" was put on; that the latter was and is a train in urgent demand, specially devoted to interstate transportation between St. Louis and New York, because other trains, which stop at Hillsboro and other county seats, can-

not make the time required by the demands of passengers and interstate commerce; that said train is not a regular passenger train, carrying passengers from one point to another in Illinois, but is a special train, engaged exclusively in interstate travel, from points wholly without to points wholly without the state of Illinois; that no tickets are sold or passengers received on this train from points in Illinois to points in Illinois, and that it makes no stops except such as are necessary for fuel, water, and at railway crossings; that to stop at county seats would destroy the usefulness of the train, and interfere with and obstruct interstate commerce; that sufficient trains, convenient and suitable to the travelling public, pass through and stop at Hillsboro to fully supply the demand; that the state of Illinois had no power to pass any act that would require such a train, devoted solely to interstate commerce, to stop at county seats in Illinois, and that such an act is in violation of the constitution of the United States.

To this answer a demurrer was interposed and sustained. The defendant stood by its answer, whereupon the court entered judgment, and awarded the peremptory writ of mandamus, and this appeal is prosecuted.

Section 25 of the railroad act, as amended July 1, 1879, is as follows: "Every railroad corporation shall cause its passenger trains to stop, upon its arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety." Hurd's Rev. St. 1889, p. 1060. It is important first to determine the question as to the power of the legislature to pass this act, and whether applicable to trains running through the state of Illinois and carrying passengers.

In *Chicago & A. R. Co. v. People*, 105 Ill. 657, we said (page 661): "In the enactment of the law requiring all regular passenger trains to stop at county seats, the legislature, no doubt, had in view the great benefit the public would derive in the increased facilities for reaching the county seat, to aid in the dispatch of business in courts, in the prompt arrest and prosecution of criminals who might be indicted in the courts, in the attendance of witnesses, grand and petit jurors,—indeed, the prompt and efficient transaction of all business in the courts held at the county seat,—and the facility for the examination of the records on the sale and conveyance of property. These and various other matters pertaining to the welfare of the public doubtless led to the enactment of the law, and in its enactment we are fully satisfied that the legislature transcended none of its powers, nor did it violate any chartered right of the railroad company."

In granting a charter to a private corporation, the state does not part with its power to enact proper police regulations. Corporations accept their charters upon the implied condition that they are to exercise their rights subject to this power of the state. The legislature has the power, by the enactment of general laws from time to time, as the public exigencies may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety, health, and welfare. *Railroad Co. v. Loomis*, 13 Ill. 548; *Railroad Co. v. McClelland*, 25 Ill. 123; *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173. This corporation, operating a railroad across the state of Illinois, is, for all purposes of local government, a domestic corporation, subject to the police control of the legislature of this state.

In *Chicago & A. R. Co. v. People*, supra, it was said (page 659): "The train in question was equipped and operated in the same manner as any other passenger train on the road. It carried passengers and baggage, as did other trains. It ran upon the official time-table of the company, as other trains did. Indeed, the only difference between this and the other passenger trains on the road was that the other two stopped at all the stations, while this did not. On account of this difference, can the train, within the meaning of the statute, be regarded other than a regular passenger train? We think not. The language of the act would not, perhaps, include a wild train, a freight train, an excursion train, or a special train; but where a train was engaged in carrying passengers, running regularly every day upon an advertised time-card of the company, equipped as all other passenger trains are, we are satisfied such a train was designed by the legislature to fall within the terms of the act, 'all regular passenger trains.' Had the legislature intended to except a fast train or a through train from the operation of the law, it would have been an easy matter to have framed the law in such a way that no doubt could have existed in regard to the intention, and, if such had been intended, language of a different character would no doubt have been used." To the same effect is *People v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. 657.

In the case of *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, it was said: "There can be no doubt that each of the states through which the Mobile & Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee, and Kentucky, to some point near the mouth of the Ohio river, where it would connect with another railroad to the Lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico in the South and the Great Lakes in the North. It is equally certain that congress aided in the construction of parts of this line of road so as to establish such a route of

travel and transportation; but it is none the less true that the corporation created by each state is, for all the purposes of local government, a domestic corporation, and that its railroad within the state is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a state, is, while there, subject to the constitutional authority of the state government. Clearly, under this rule, Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of the road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character, affecting the comfort, convenience, or safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from state regulation or state control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other states through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the constitution of the United States within the exclusive jurisdiction of congress; that is to say, using the language of this court in *Cardwell v. Bridge Co.*, 113 U. S. 210, 5 Sup. Ct. 425, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting all states alike.' Under this rule, nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company, or impair the usefulness of its facilities for interstate traffic. It is not enough to prevent the state from acting that the road in Mississippi is used in the aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the state as well as within."

While the regulation and control of interstate commerce has been confided exclusively to congress, and a state can interfere with transportation into or through its borders only to the extent absolutely necessary for its own protection, still, whatever tends to promote the health, safety, or welfare of society would be a proper exercise of the police power.

er. Toledo, W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37. Whatever is necessary to provide for the public welfare and the general security is within the police power of the government. Whether a particular regulation is a reasonable exercise of the police power is strictly a judicial question, but the lawmaking power is the sole judge of when the necessity exists, and when, if at all, it will exercise the right to enact such laws. As held in *Chicago & A. R. Co. v. People*, supra: "The prompt and efficient transaction of all business in the courts held at the county seat. * * * and various other matters pertaining to the welfare of the public, doubtless led to the enactment of the law." Such a statute for such a purpose would be a proper exercise of the police power of the state.

It is insisted that while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons, and for the protection of property there situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action. While admitting this proposition to be true so far as it goes, yet we find no warrant for holding that the state is excluded from an exercise of a police power looking to the general welfare of the public, or that that subject-matter has been by the constitution confided exclusively to the congress of the United States. Although the regulation of interstate commerce is confided to congress, the railroads within this state are domestic concerns, subject to the constitutional authority of the state government, which may regulate freights and fares for business done exclusively within the state, and make needful police regulations. As held in *Stone v. Trust Co.*, supra: "This company is not relieved entirely from state regulation or state control * * * because it has been incorporated by, and is carrying on business in, the other states through which its road runs." If this latter fact deprived the state of the exercise of the police power, the lives and property of its citizens might be sacrificed in crowded thoroughfares, and the state be powerless to protect them.

It is finally urged that as this train was demanded by and put on solely to meet the requirements of interstate travel, and was intended for no local business, to compel it to stop at county seats, and do a local business, would be a violation of the federal constitution, inasmuch as such action would interfere with and regulate interstate commerce. This railroad company, at the time of the filing of this petition, was running its trains over the tracks of what is known as the "Terre Haute & Alton Railroad Company," which was incorporated under an act of the legislature of the state of Illinois in force January 28, 1851. At the same session of the legislature a supplemental act was also enacted in relation to

the incorporation of the Terre Haute & Alton Railroad Company, which supplemental act went into effect February 13, 1851. An act was also passed by the legislature of the state of Illinois amending the act in relation to the incorporation of the Terre Haute & Alton Railroad Company, which last act went into force February 28, 1854. These acts were declared to be public acts. The authority for constructing, operating, and maintaining the track over which trains of the appellant pass was all derived through and from the state of Illinois. At the time of the construction of the railroad over which the trains of the appellant company pass, the city of Hillsboro was one of the objective points through which it was to run, as designated in and by the authority granted to the company by the legislature of the state of Illinois. This company cannot, by its manner of doing business, escape state control, and disregard a statute of the state which seeks to regulate and control domestic concerns within the limits of the state for the public welfare and general good. Appellant's "Knickerbocker Special" is not national in its character, requiring uniformity of regulations affecting all states alike.

The Illinois act operates as a regulation of business within the state only. We hold this act is not an interference with interstate commerce, but a mere police regulation, applicable solely to the limits of the state of Illinois. It no more interferes with the expedition with which trains passing through the state carrying passengers from one state to another exclusively may reach their destination than does a regulation limiting the speed of trains running through a crowded thoroughfare, and, like the latter regulation, is for the public welfare. It was not error to sustain the demurrer to the answer, and the judgment of the circuit court of Montgomery county is affirmed. Judgment affirmed.

(175 Ill. 28)

COCHRAN v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

ABORTIONS—INDICTMENTS—DESCRIBING THE COMMISSION OF THE OFFENSE.

1. Cr. Code, div. 1, § 3, provides that "whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry," shall be imprisoned. *Held*, that an indictment charging that defendant did "administer and use on one S. * * * a certain instrument" is insufficient for failure to state in what manner the instrument was used or administered, since, where the language of the statute does not describe the acts constituting the offense, the indictment must put them forth specifically, notwithstanding *Id.* div. 11, § 6, provides that an indictment stating the offense in the language of the statute creating it is sufficient.

2. The indictment does not charge the offense in the language of the statute, within Cr. Code, div. 11, § 6, providing that stating the offense in the language of the statute creating it is sufficient.

Magruder, J., dissenting.

Error to circuit court, Cumberland county; Frank K. Dunn, Judge.

Charles G. Cochran was convicted of an attempt to procure an abortion, and he brings error. Reversed.

At the August term, 1897, of the circuit court of Cumberland county, the grand jury returned an indictment of two counts against the plaintiff in error, charging him with the crime of producing an abortion. At the following February term, 1898, he appeared before the court, and entered a motion to quash the indictment, and each count thereof, which was overruled. He then entered his plea of not guilty, and a trial was had resulting in a verdict of guilty "of an attempt to procure an abortion," and upon this verdict the court, after overruling a motion for a new trial, sentenced him to the penitentiary.

The first count of the indictment charges "that Dr. Charles G. Cochran, late of the county of Cumberland and state of Illinois, on the 18th day of November, 1896, at and in the county aforesaid, did unlawfully and feloniously administer and use on one Stella Roberts, then and there being a woman pregnant with child, a certain instrument, the name of which is to the grand jurors unknown, with the intent then and there to produce an abortion and miscarriage of the said Stella Roberts, and then and there did thereby unlawfully and feloniously cause the miscarriage of the said Stella Roberts, it not being then and there necessary to cause such miscarriage for the preservation of the life of the said Stella Roberts, the said Charles G. Cochran then and there well knowing that the said instrument would produce such miscarriage, and by reason of such miscarriage she, the said Stella Roberts, then and there died," etc. The second count is substantially the same.

The only evidence of the defendant's guilt was the testimony of David Wickham, a confessed accomplice and guilty of the girl's pregnancy, who admitted on the witness stand that he had been promised immunity from punishment if he would testify in the case, and who was wholly uncorroborated. He testified, in substance, that he took Stella Roberts from her home, in Hutton township, Coles county, to the defendant's house, in Hazel Dell, a village in the southeast corner of Cumberland county, on the 18th day of November, 1896; that he had never been there before, and did not know the doctor, but that the girl told him where to go; that he there "had a slight talk with him," the result of which was that he drove with the girl to a certain place designated by the doctor, some three miles northwest of the village, where the defendant met them, and took the girl from the buggy to a fallen tree top, a short distance from where the witness remained with the buggy; that he saw the girl lying on her back, the doctor being down at her feet, and that he saw him take out of

his valise some bright instrument; that shortly afterwards they came back to the buggy, where he paid the doctor \$20, and then took the girl back to Casey, in Clark county, and from there to her home. He does not state the distance between Hazel Dell and Hutton township, Coles county, where Stella Roberts lived, but it must be from 15 to 20 miles. He does not say that he saw any use whatever made of the instrument, or that the girl manifested any indication of pain or other symptom of having been operated upon, but, on the contrary, says she never complained to him, and when he reached her grandparents' house, about 9 o'clock that night, she made no complaint, or words to that effect.

The defendant testified, in his own behalf, that he resided in Hazel Dell, where he had lived 25 years, and was a practicing physician at that place. He denied in the most emphatic terms that he knew or had ever seen Stella Roberts, or produced, in any way or manner, an abortion upon her, or attempted to do so, or that he had ever seen the prosecuting witness, Wickham, prior to his indictment. The evidence of Wickham is contradicted as to the time he and Stella Roberts were at the defendant's house on the 18th of November, several witnesses testifying to facts tending to show that at that hour the doctor was not at his house, but some distance in the country, visiting patients. There was some evidence that defendant had theretofore sustained a good reputation in the neighborhood and vicinity in which he lived, but that subject was not gone into very fully.

Stella Roberts, died at her grandparents' house, in Coles county, about November 23d, from the effects of an abortion. Her attending physician, Dr. Franklin, testified that the abortion was produced by taking medicine, though this statement was based simply upon what the patient told him, and his smelling upon her breath the odor of turpentine, camphor, and oil of tansy, all of which, he testified, are abortives. There was other testimony offered upon the trial which tended to corroborate the defendant and contradict the prosecuting witness.

Among the grounds urged for a new trial was that of newly-discovered evidence, supported by affidavits stating facts strongly tending to prove the defendant's innocence, and contradict the prosecuting witness, Wickham. This writ of error has been made a supersedeas, and a reversal of the judgment of sentence entered by the court below is insisted upon on several grounds.

L. N. Brewer and Everhart & Declus, for plaintiff in error. Smith Misner, State's Atty., and E. N. Rinehart, for the People.

WILKIN, J. (after stating the facts). We are unable to see how the jury, upon the evidence as it is presented to us, could reach the conclusion that there was no reasonable

doubt of the guilt of the plaintiff in error. In *Hoyt v. People*, 140 Ill. 588, 30 N. E. 315, and *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, the defendants were each found guilty on the uncorroborated testimony of accomplices, and the judgments of conviction were reversed on the ground that the evidence was insufficient to sustain the verdicts. What was said in those cases as to the credibility of such testimony applies with at least equal force to the evidence of David Wickham in this record.

The newly-discovered evidence, as shown by the affidavits filed, was very important to the defendant, but it was cumulative in its nature, and perhaps not of that conclusive character which would demand the granting of a new trial.

The statute under which the prosecution was had is section 3 of division 1 of the Criminal Code, as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder." In our opinion, the indictment is wholly insufficient, under the foregoing statute, to sustain the conviction, and the court erred in refusing to quash it, and also in refusing to sustain the defendant's motion in arrest of judgment. Both counts attempt to charge that the offense was committed with an instrument. The first count says, "did * * * administer and use on one Stella Roberts * * * a certain instrument." The second count avers, "did * * * use on and administer to one Stella Roberts," etc. No attempt whatever is made, in either count, to state how or in what manner the instrument was used "or administered." Whether it was done "by forcing, thrusting, and inserting said instrument into the private parts," as was alleged in the indictments in *Baker v. People*, 105 Ill. 452, and *Scott v. People*, 141 Ill. 195, 30 N. E. 329, or in some other manner, is wholly left to inference. If the evidence produced on the trial on this subject proves anything, it tends to show that some instrument was used by thrusting, etc., in the private parts of Stella Roberts; but no one will seriously contend that, under the allegations of the indictment, the use of an instrument with the intention of producing an abortion, in any other manner, would not have been equally admissible.

The only attempt to justify this departure from well-understood rules of criminal pleading is the contention that, being a statutory offense, the indictment is sufficient as charging it in the terms and language of the statute, or so plainly that the nature of the of-

fense might be easily understood by the jury; relying upon section 6 of division 11 of the Criminal Code. It is true that under this section of the statute it is generally sufficient to state a statutory offense in the terms and language of the statute; but there are well-understood exceptions to the rule. Where the language of the statute describes the act or acts constituting the offense, no more is necessary than to state the offense in that language, as where the offense is having in possession instruments used in counterfeiting coin. In an indictment for that offense it was held sufficient to allege that the defendant had in his possession, knowingly and without lawful excuse, certain instruments and tools used in counterfeiting the coin current in this state, being in conformity to the definition of the crime in the Criminal Code. There the act constituting the offense was having in possession, etc., no matter by what means possession was obtained. And so in *Loehr v. People*, 132 Ill. 504, 24 N. E. 68, the indictment being for defacing and altering a book, the language of the statute being, "If any judge, * * * or any person whatever, shall * * * alter, corrupt, withdraw, falsify or avoid any record, * * * the person so offending shall be imprisoned in the penitentiary not less than one nor more than seven years," it was held sufficient to state the offense in the language of the statute, without specifying particularly how the alteration was made. Here, again, the offense consisted in the act of defacing or altering, no matter by what means or how it was done; and so as to the cases there cited and many others relied upon by counsel for the people as sustaining this indictment. In another class of cases, where the act constituting the offense is committed by means of doing certain things, such as obtaining money by means of a confidence game, it has been held sufficient to charge that the accused did unlawfully and feloniously obtain "money by means and by use of the confidence game." These cases, however, are based either upon the express provision of the statute that it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., "unlawfully and feloniously obtain, or attempt to obtain (as the case may be), from A. B. his money, by means and use of the confidence game," or upon the theory that the term "confidence game" has a well-understood meaning, the use of which in an indictment sufficiently apprises the accused of what he is called upon to defend. *Morton v. People*, 47 Ill. 468; *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995.

We said, however, in *Johnson v. People*, 113 Ill. 99 (on page 102): "No principle of criminal pleading is better settled than that an indictment for a mere statutory offense must be framed upon the statute, and that this fact must distinctly appear upon the face of the indictment itself. That it shall so appear, the pleader must either charge the offense in the

language of the act or specifically set forth the facts constituting the same. It sometimes happens, however, that the language of a statute creating a new offense does not describe the act or acts constituting such offense. In that case the pleader is bound to set them forth specifically. This elementary rule is laid down in all standard works on criminal law, and is fully recognized by this court. 1 Whart. Cr. Law, §§ 164-372; *Kilbs v. People*, 81 Ill. 599." And in Whart. Cr. Pl. § 220, it is said: "On the principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has notice, from the mere adoption of the statutory term, what the offense he is to be tried for really is, but in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without a specification of the offense, than it would be under a common-law charge."

In *West v. People*, 137 Ill. 189, 27 N. E. 34, and 34 N. E. 254, will be found a citation of authorities to the effect that the constitutional provision (section 9 of article 2), providing that in all criminal prosecutions the accused shall have the right "to demand the nature and cause of the accusation" against him, is for the purpose of securing to him such specific designation of the offense laid to his charge as will enable him to prepare fully for his defense, and plead the judgment in bar of a subsequent prosecution for the same offense.

The manner in which the offense defined in section 3 of division 1 of the Criminal Code may be committed is "by means of any instrument, medicine, drug or other means." The act of using an instrument is in no way described. The language, "by means" of any instrument, is broad enough to include any and every means by which an instrument could be used for the purpose of causing an abortion. It is therefore clear that, in order to make a good indictment against one for the commission of a crime by means of an instrument, as is said in *Johnson v. People*, supra, the "pleader is bound to set forth the acts specifically"; that is, state with reasonable certainty the manner in which the act was committed. Furthermore, it is not true that this indictment charges the offense in the terms and language of the statute, as will be readily seen by comparing the statements therein made with section 3, supra. Just what is meant by "administering" an instrument to a person it is difficult to understand; and, as we have said, the general statement that an instrument was used upon a person gives no indication of the manner in which it was used. A jury might conjecture or imagine from the allegations the nature of the offense with which the defendant is charged, but it cannot be said that it is so plainly

alleged that it could be easily understood either by him or the jury.

In our opinion, to sustain this indictment would be to substantially lay down the rule that any indictment is sufficient which amounts to an accusation of the commission of a crime. It is not intended to announce any rule which will render nugatory the provision of section 6 of division 11 of the Criminal Code, wisely intended to simplify criminal pleading and dispense with many technical and useless averments heretofore required in indictments; but we are not prepared to hold that a defendant indicted, under a statute of this kind, for a most serious offense, is not fairly entitled to notice, by statements in the indictment, as to the act or acts with which he is charged in the commission of the offense. We have carefully sought for some precedent or authority which could fairly be said to sustain this indictment, and have been wholly unable to find one. We are not willing to establish the precedent by this decision, and accordingly hold that the indictment, and each count thereof, is fatally defective. The judgment of the circuit court will be reversed, and the cause will be remanded. Reversed and remanded.

MAGRUDER, J., dissents.

(175 Ill. 62)

MICKEL v. YORK et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

PARTY WALLS — OWNERSHIP — CONSTRUCTION OR CONTRACT — NEGLIGENT MAINTENANCE.

Where a party wall is constructed by one adjoining owner under an agreement with the other whereby the latter, before using the wall, is required to pay one-half of its value at the time of using it, the builder of the wall until then is its sole owner, and is liable for its negligent maintenance.

Error to appellate court, First district.

Action by Max Mickel against John York and another for damages caused by the falling of a party wall. The judgment of the circuit court for defendants was affirmed by the appellate court (68 Ill. App. 464), and plaintiff brings error. Reversed.

On the 8th of May, 1892, the plaintiff in error, Max Mickel, and his sister, Annie Pitz-ele, were the owners of a lot in the city of Chicago adjacent to the one owned by the defendant in error John York; and on that day the respective parties (York being the party of the first part) entered into a party-wall agreement, containing, among others, the following provisions: "It is hereby mutually agreed by the several parties, in consideration of the premises, that said party of the first part may so build and erect a party wall, twenty and sixteen inches in thickness, on the north side of the said lot of the party of the first part, that the center of said party wall shall be on the division line of the said lots hereinbefore mentioned of the said parties of

the first and second parts, respectively. And this indenture further witnesseth that the said party of the first part does hereby covenant, promise, grant, and agree that the said party of the second part, their heirs and assigns, shall and may at all times hereafter have the full and free liberty and privilege of joining to and using said partition above mentioned, as well below and above the surface of the ground, and along the whole length or any part of the length thereof, any building which he or they, or any of them, may desire or have occasion to erect on the said lot of the party of the second part, and to sink the joists of such building or buildings into the said partition to the depth of — inches, and no further: provided, always, nevertheless, and on this express condition, that the said party of the second part, their heirs and assigns, as aforesaid, before proceeding to join any building to the said partition wall, and making any use thereof or breaking into the same, shall pay or secure to be paid unto the said party of the first, his heirs and assigns, aforesaid, the full moiety or one-half part of the value of said party wall, or so much thereof as shall be joined to or used as aforesaid, which value shall be the cost price at the time when such wall is to be used by said party of the second part, as fixed, estimated, and assessed by three disinterested mason contractors. And said parties further agree and covenant that, if it shall hereafter become necessary to repair or rebuild the whole or any portion of the said party wall or walls, the expense of such repairing or rebuilding shall be borne equally by them, their respective heirs and assigns, as to so much of said portions of said walls as said parties, their heirs and assigns, shall or may use jointly. It is further mutually agreed between the said parties that this agreement shall be perpetual, and at all times be considered as a covenant running with the land." York, after this contract was made, proceeded to build the party wall, and to construct a building upon his property, which was used and occupied by him until the 10th of January, 1893, when it was destroyed by fire. The party wall was left standing, but in so dangerous a condition that on the 19th of January, 1893, the commissioner of public works of the city of Chicago notified York to have the wall of the building taken down at once. On the 18th of January, 1893, Max Mickel and Annie Pitzele joined in a written notice to York to either pull down the wall, or secure it so as to avoid any impending or possible danger, loss, or damage resulting from its unsafe condition. On the 20th of January, 1893, the wall was blown over and upon two buildings owned by plaintiff in error and his sister, crushing the buildings completely. The claim against Campbell results from what was alleged to be a contract with York, by which it is claimed Campbell was to remove the débris and secure the wall. Plaintiff in error brought suit against defendants in error, and a trial was had, upon

which the foregoing facts appeared without dispute. The court instructed the jury to find a verdict in favor of the defendants, and on such verdict the court entered judgment. From that judgment a writ of error was sued out from the appellate court for the First district by the plaintiff, and the judgment was affirmed. He now sues out this writ of error to review that judgment of affirmance.

Pam & Donnelly and Moses, Rosenthal & Kennedy, for plaintiff in error. Moran, Kraus & Mayer and Kerr & Barr, for defendants in error.

PHILLIPS, J. (after stating the facts). It is insisted by the plaintiff in error that the wall, at the time it fell, was owned by York, while York insists, as was the view taken by the court below, that the wall was, from the time of its completion, the property of all of the parties to the contract; that York owned so much of the wall as rested upon his lot, with an easement in the remaining portion; and that Mickel and his sister owned all of the wall which rested upon their lot, with an easement in that portion of the wall which was upon the lot of York. The contract provides that Mickel and his sister, and their heirs, before proceeding to join any building to the wall, and before making any use thereof or breaking into the same, shall pay or secure to be paid unto York, his heirs and assigns, the full moiety or one-half part of the value of the wall, or so much thereof as shall be joined to or used, which value shall be the cost price at the time when such wall is to be used by Mickel and his sister. The contract further provides: "And said parties further agree and covenant that, if it shall hereafter become necessary to repair or rebuild the whole or any portion of the said party wall or walls, the expense of such repairing or rebuilding shall be borne equally by them, their respective heirs and assigns, as to so much of said walls as the said parties, their heirs and assigns, shall or may use jointly." Where a party wall of adjoining buildings rests partly upon the soil of each owner, and was constructed as a party wall, the owners are neither joint owners nor tenants in common of such wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and building of such other. But where a party wall is constructed on the line between adjacent lots, resting partly on each, by one of the lot owners, under a parol or written agreement, by which agreement the other owner agrees to pay one-half the value of the wall when he elects to use it, the builder of the wall owns it absolutely, with a permanent right in him and his grantees to have one-half the wall stand on the land of the

other while the other retains title, and also after it has passed to an assignee with notice of the rights of the owner of the wall. If, however, by agreement, the owner of the lot, who did not build the wall, has a right to elect to pay one-half its value, and use the same, and he does so, he thereby becomes the owner of not only the one-half standing upon his own land, but has an easement in the other half, standing on the lot of the one who built the wall.

In *Glover v. Mersman*, 4 Mo. App. 90 (a case similar to this), it was said: "The plaintiff was not necessarily the absolute owner of one-half the wall because that stood upon his lot. It had been so placed by his license in the agreement of May, 1871. By that agreement the ownership naturally resulting from his title to the soil was modified, if not wholly surrendered, for the time being. A stipulation to the effect that upon building a house against the wall, and paying to the defendant one-half of what it would then cost to build such wall, he should have the right to use it as a party wall, was equivalent to an agreement that until such conditions were fulfilled he should not have the right so to use it. The wall therefore was the sole property of the defendant, and for any negligence or mismanagement in its keeping he was liable, as in every case when such negligence or mismanagement by an owner causes injury to another." In *Brown v. McKee*, 57 N. Y. 684, it was said: "Where, under a parol agreement between adjoining proprietors, one builds a party wall one-half upon the premises of each, the other agreeing to pay one-half the value when he shall use the wall, upon the erection of the wall the agreement becomes valid in equity. The builder owns the wall absolutely until the other elects to use the same, with a permanent right in him and his grantees to have one-half the wall stand on the land of the other, not only while the other retains title, but after it passed to an assignee with notice of the rights of the owner of the wall. If the owner of the land burdened with this easement elect to use the wall and pay half its value, he thereby becomes owner, not only of the one-half standing upon his own land, but has an easement in the other half." In *Gorham v. Gross*, 125 Mass. 232, by indenture between the plaintiffs and defendants either party was authorized to build a wall of brick, with stone foundation, half on the land of each, and half the cost of which was to be paid by the other if he used it. The defendants made a contract with a firm of masons, by which the latter were to furnish all the materials and labor in building the stone and brick work, including the lathing and plastering, according to certain specifications. After the wall had been completed by the masons and accepted by the defendants, it fell, and crushed the building and property upon the adjoining land of the plaintiffs. The court says (page 240): "The whole wall, when completed and

accepted, was, by virtue of the indenture between the defendants and the plaintiffs, owned by the defendants until they should be reimbursed half the cost of it by the plaintiffs. *Richardson v. Tobey*, 121 Mass. 457. For the injury caused to property on the adjoining land by the falling of this wall by reason of its defective and unsafe condition, whether owing to their own negligence, or to that of the masons who had built it, the defendants are responsible." In *Maine v. Cumston*, 98 Mass. 317, the city of Boston, owning certain lots, executed a written agreement to convey to one Blanchard a certain lot, with this condition: "So long as said lot remains unoccupied by a building, the said Blanchard shall permit the proprietor of each adjoining lot, who may build, to erect one-half the thickness of the division wall on said lot, and shall pay to the proprietor so erecting said wall a proportionate part of the cost thereof for such part as he or his assigns may use; and, if Blanchard erects a building on said lot, he shall build one-half of the thickness of the division wall on each unoccupied adjoining lot." By mesne conveyances Blanchard's lot was conveyed to one Ames, who built a house, erecting one-half of a party wall on an adjoining lot owned by the city. By mesne conveyances Ames' title came to plaintiff, and the city sold the adjoining lot, on which one-half the thickness of the party wall rested, to the defendant, who built and used that party wall. On a suit by plaintiff against the defendant to recover the value of one-half of the wall, the court said: "We have no doubt of the liability of the defendant for the cost of the partition wall which he made use of in constructing the house on the lot of land adjoining that of the plaintiff. The property in the whole wall passed to the plaintiff by the deed under which he claims title. * * * The plaintiff, under his deed, which contains an express reference to the terms of the original purchase from the city, had a right to maintain the whole wall as a part of his house until the city, or some one claiming title under the city, built on the adjacent land, and made use of the partition wall, or some part of it. When that took place, then the plaintiff's property in that part of the wall on the adjacent lot ceased, except so far as he might claim a right or easement of support in it as a partition wall, and he became entitled to recover the cost of its erection." To the same effect are *Mason's Appeal*, 70 Pa. St. 26; *Goldschmid v. Starring*, 5 Mackey, 582; *Burlock v. Peck*, 2 Duer, 90; *Jeannin v. De Blanc*, 11 La. Ann. 465; *Lavergne v. Lacosta*, 26 La. Ann. 507; *Sullivan v. Graffort*, 35 Iowa, 531; *Roberts v. Bye*, 30 Pa. St. 375; *Fettretch v. Leamy*, 9 Bosw. 510.

The case of *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, is relied on as sustaining a different principle from that herein announced, and sustained by the foregoing authorities. In that case the contract, as interpreted by

this court, constituted the owners of the adjoining lot joint proprietors of the wall from the moment it was built. That interpretation resulted from various provisions in the contract. It was there agreed that the wall which Holden was to build should continue to be a party wall forever, which the court held to manifestly mean from the time of its erection. It was further provided that the said owners should share jointly in the expense of keeping, maintaining, repairing, and rebuilding the wall, whether Armstrong, the other owner, made use of it or not. The amount to be paid by Armstrong was not one-half of the value of the wall at the time he chose to appropriate it, but one-half the cost of its erection. In the light of these provisions the contract was held to be one in which Holden undertook to advance the money and build a wall for the joint benefit of himself and Armstrong, and by which Armstrong was to become at once invested, jointly with Holden, with the title and ownership; one-half of the cost to be repaid to Holden whenever Armstrong or his grantee should make use of the wall; Holden in the meantime to have sole possession of the wall, as security for such payment. This may be said to have been the interpretation this court put upon the contract, as shown by its language on page 206, 115 Ill., and page 284, 3 N. E., where it is said: "While, however, it is clear that the title or ownership of the wall is joint the moment it is built, and that it so continues, it is also clear that, in order to secure Holden for his advances on the joint account in building the wall, the sole possession of the wall shall be in Holden alone,—or, in other words, that Armstrong shall not be allowed to use the wall until he shall repay those advances. Armstrong has title to one-half the wall, but Holden retains the possession of the whole as a security for his debt. There is no language used applicable to a sale. When Armstrong desires to use the wall, he is not to pay for one-half its value, or a sum to be agreed upon as the price of one-half of the wall, as we should expect in case of a sale. He is simply 'to first pay to said Holden the cost of one-half part of said wall.'" After thus construing the contract in that case, and holding with reference to that construction, the court then proceeded in accordance with the principle herein stated, and said: "Cases, therefore, where parties are, by the deed under which they take title, given one-half of a wall as a party wall when or upon condition of making payment, and cases in which the owner of one lot has licensed the owner of the adjoining lot to build a wall for himself, resting one-half of it on each lot, and reserving the privilege of thereafter purchasing one-half of the wall as a party wall, are not analogous. In all such cases the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing by every conveyance of it until a severance of

the half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass, in those cases, until the payment is made; and so, necessarily, it is constructively a sale by the assignee of so much of the wall. His right to the purchase money is not because he is the assignee of the covenant running with the land, but because he is the vendor of so much of the wall." There is nothing said in *Gibson v. Holden*, supra, in conflict with what is here stated. The principle herein announced is in accordance with what is said in the well-considered case of *Tomblin v. Fish*, 18 Ill. App. 439. The contract in this case expressly provides that plaintiff, before making any use of or joining any building to the wall, shall pay or secure to the defendant York the full moiety or one-half part of the value of the said party wall, or so much thereof as shall be joined to or used, which value shall be the cost price at the time when such wall is to be used. The contract expressly provides, further, that York shall build that wall. By the terms of that contract, York retained the ownership of what he had placed upon the plaintiff's land until he should be paid for it, and he had a right to have it supported on the land of plaintiff under this contract. The wall, having been built on the plaintiff's land under this agreement, which amounts to a license with an interest, is not thereby incorporated and lost in the land or lot, but remains a separate property, still belonging to the builder until he is paid therefor. York therefore was the owner of this wall, and was liable for any and all damage for failing to maintain it in a safe condition. Wood, in his work on Nuisances (volume 1, § 225), says: "Where a party wall is erected by one party, under an agreement that, when the adjacent owner makes use of it, and he shall pay half the cost, it shall become a party wall, it is not such until the condition is complied with; and if, at any time before it is so used, the other adjacent owner is damaged by its fall, or from any defect therein, or negligence in its use, damages ensue, the person erecting it is liable for all such resulting damage." To the same effect are *Glover v. Mersman*, 4 Mo. App. 90, and *Gettwerth v. Hedden*, 30 La. Ann. 30.

York had notice of the dangerous condition of the wall, and had been requested to secure it by the plaintiff and the city officials. It was therefore error in the trial court to instruct the jury to find for the defendant York. From the evidence in this record, we do not find any such contract between the defendants York and Campbell as would create a liability in favor of plaintiff against the defendant Campbell. There was no error in the trial court instructing the jury to find the defendant Campbell not guilty. It was error for the appellate court for the First District to affirm the judgment of the circuit court of Cook county; and the judgments of the ap-

pellate court for the First district and of the circuit court of Cook county are each reversed, and the cause is remanded. Reversed and remanded.

(176 Ill. 64)

GODSCHALCK v. FULMER et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

STATUTE OF FRAUDS—DECLARATIONS OF TRUST—
SPECIFIC PERFORMANCE—CONTRACTS
PARTLY EXECUTED.

1. An agreement that a deed might be taken in the name of another, and held in trust by him for complainant until the payment of a certain trust-deed lien which existed against said land, is an express trust, within Rev. St. c. 59, § 9 (Statute of Frauds), requiring all declarations of trust to be proved by a writing signed.

2. One who took in his own name a conveyance for another by the latter's consent, until a lien was discharged, is not precluded from pleading the statute of frauds to a verbal promise to convey to the alleged real owner, since the equitable rule denying such defense is designed to prevent fraud, where consent was given on the strength of a promise to reconvey.

3. The right to specific performance of a partly-executed contract, though it be not evidenced as required by the statute of frauds, cannot be invoked where the evidence is conflicting and uncertain as to the fact of part performance, and is variant from the allegations of the bill.

On rehearing. Affirmed.

For former opinion, see 45 N. E. 809.

PER CURIAM. This is a bill in chancery by plaintiff in error against defendants in error to set aside a deed of conveyance by Ruben H. Fulmer to Julius P. Roedel, assignee, to the following described real estate: The E. ½ of the S. W. ¼ of section 8, township 16, range 9 E. of the third P. M., in Douglas county, Ill., and to compel the said Fulmer to convey the same to her, claiming to be the owner, the legal title being held by Fulmer, her brother, in trust for her. The bill sets up the fact that plaintiff in error, together with her said brother and other members of the family, after the death of their father, continued to reside on the home place, near St. Marys, in the state of Indiana, until complainant reached the age of 31 years, when she married and moved to Douglas county, this state; that no division of the home place in Indiana was ever had; that, while she remained there, by her labor and attention to the household affairs of the family, she contributed to paying an indebtedness against the home farm, and also in purchasing other lands, the title to which was taken in the name of her brothers; that her said brother Ruben H. Fulmer has continued to reside upon the home place, exercising ownership over it as his own; that, after her marriage and removal to this state, he informed her that, if she would select a place here, he would purchase it for her in lieu of her interest in the Indiana farm; and that, relying upon that promise, she and her husband selected the land in question, then belonging to

Henry Gray, and contracted with him for the purchase thereof at a consideration of \$3,080. The allegation of the bill upon which prayer for relief is based is as follows: "And, upon contracting for the same, oratrix notified her brother Ruben H. Fulmer of the contracting for such farm; and on the 10th day of March, 1887, the contract for the purchase of said land was consummated, and, in consideration of an agreement between oratrix and the said Ruben H. Fulmer, deed was taken to and in the name of said Fulmer, to be by him held in trust for oratrix, for the reason that there were fears that, if the deed was taken in the name of oratrix, oratrix might, through the influence of her husband, squander and lose the farm for debts made by her said husband, and so it was agreed that the deed might be and was taken in the name of said Ruben H. Fulmer, to be by him held in trust for oratrix, until oratrix and her husband would pay off a trust-deed lien, which, at the time of the purchase of the same, existed against said land to the amount of \$1,500 and interest." She then alleges that she went into possession of the land under that arrangement, and has since resided there, making valuable and lasting improvements thereon, and paying all taxes against the land; that the \$1,500 has been paid off, by making a new loan of \$2,200, the excess being paid to her brother in satisfaction of debts due from her and her husband to him; that she has frequently requested her brother to execute a conveyance for the land to her, but that he has neglected and refused to do so; that on the 14th day of August, 1893, her said brother made a deed of assignment, conveying all his estate to Julius F. Roedel, as assignee, for the benefit of his creditors. Complainant then tenders a deed of conveyance for all her interest in the Indiana farm, and prays that Fulmer may be required to make a good and sufficient deed of conveyance, and that the deed of assignment be removed as a cloud upon her title. To this bill the brother filed an answer, which, in effect, is a denial of the allegations of a promise on his part to purchase the land for complainant, and an agreement to hold in trust for her. He also sets up the statute of frauds in bar of the right of complainant to the relief prayed, on the ground that the trust alleged was not declared in writing.

After a re-examination of the voluminous testimony in this record, and the additional arguments filed on the rehearing, we have been unable to reach a different conclusion from that announced in our former opinion. It is impossible to construe the bill of complainant as other than a bill to compel the performance of an express trust. This can be made no plainer than by reference to the allegations above set forth: "And so it was agreed that the deed might be and was taken in the name of said Ruben H. Fulmer, to be by him held in trust for oratrix, until oratrix and her husband would pay off a trust-deed

lien, which, at the time of the purchase of the same, existed against said land to the amount of \$1,500 and interest." Section 9 of the statute of frauds (Rev. St. c. 59) provides "that all declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, * * * or else they shall be utterly void and of no effect." We have uniformly held that agreements like that set up in this bill are, under that section, null and void, unless manifested or proved by some writing signed by the trustee. There is no such proof in this record. It is true resulting trusts, or those created by construction, implication, or operation of law, need not be in writing, but may be proved by parol. But we have also held that, where there is an express trust, there cannot be a resulting or implied trust. *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Kingsbury v. Burnside*, 58 Ill. 310.

It is said by counsel for appellant that if one procures a conveyance to himself, and promises to reconvey to another, and afterwards refuses to do so, he cannot set up the statute of frauds. This proposition is true, the reason being that the title in such case is obtained by fraud and imposition. But here the bill expressly states that the title was taken in the name of Ruben H. Fulmer, by and with the complainant's consent, to be held by him until she paid off the \$1,500 lien.

The case is reargued with much earnestness upon the theory that the bill is one to enforce the specific performance of a contract, and the well-known rule that courts of equity will enforce a specific performance within the statute of frauds, when the parol agreement has been partly carried into execution, is quoted and relied upon. The doctrine is not only firmly established, but rests upon sound reason and justice. Otherwise one party would be able to practice a fraud upon the other. That principle, however, has no application to an action to compel the execution of an express trust.

But, even in the view contended for, the evidence does not sustain the allegations of the bill. In addition to the clause quoted above, setting up the trust agreement, it is averred: "And that said land was conveyed to said Fulmer with said loan of \$1,500 secured by trust deed, and the said Fulmer was to convey said land to oratrix as soon as oratrix and her husband would pay off said \$1,500 trust deed." Nothing is better settled in the law than that a party cannot have a decree specifically enforcing a contract unless he shows that he has fully performed the same on his part or offered to do so. It is not claimed by the complainant below, either in her bill or testimony, that she and her husband have paid "off said \$1,500 trust-deed loan," or offered to do so. It remains a debt against the defendant Fulmer, wholly unpaid except as to the interest. Neither will the specific per-

formance of a contract be enforced unless the contract is certain and unambiguous in all its terms and in all its parts. It must be so certain that the court can require to be done the specific thing agreed to be done (*Koch v. Association*, 137 Ill. 497, 27 N. E. 530; *Wolfe v. Bradberry*, 140 Ill. 578, 30 N. E. 605; *Railway Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291); and it is equally well settled that, to entitle the complainant in such case to the relief, it must clearly appear that a contract was entered into, and its terms and conditions must be clearly established by proof (*McDonald v. Minnick*, 147 Ill. 651, 35 N. E. 367); also that courts will not specifically enforce a contract on terms not expressed in the agreement set up in the bill (*Hatch v. Klzer*, 140 Ill. 583, 30 N. E. 605).

The testimony in this record is in irreconcilable conflict. We are still of the opinion that the preponderance of the evidence is that there was some understanding between the parties, at the time the land was purchased, that it should become the property of the complainant, but it is impossible to definitely determine what the agreement was. The complainant seems, from her testimony, to have understood she was to become the owner of the land without paying anything, her brother agreeing to give it to her in consideration of her interest in the Indiana farm. Her husband's testimony is to the effect that he and his wife were to pay off the \$1,500 trust-deed indebtedness, but that the defendant Fulmer was to repay that money to them. It need scarcely be suggested that the allegations of the bill correspond with neither of these statements. In view of the consideration paid for the land in question, and the interest of the complainant in the home farm in Indiana, as one of the several heirs of her deceased father, it would seem that the averment of the bill that complainant was to pay off the \$1,500 debt for which the defendant Fulmer had become liable is more reasonable than the claim in the proofs that nothing was to be paid. It is clear that the proof does not correspond with the allegations of the bill. But, aside from the question of a complete and material variance between the allegation and proof in this regard, it is impossible to ascertain from the evidence adduced what the agreement of the parties really was. We are unable to find any tenable ground, consistent with the established rules of law, upon which a reversal of the decree below can be based. It must therefore be affirmed. Affirmed.

(175 Ill. 51)

WHITEBREAST FUEL CO. v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

MINES AND MINERALS—COMPENSATION OF MINERS—STATUTORY REGULATION—CONSTITUTIONALITY.

1. Laws 1897, p. 270, § 1, providing that miners shall be paid for all coal mined, including egg, nut, pea, and slack, and such other grades as the coal may be divided into, at such prices

as may be agreed on between the parties, is not unconstitutional, as impairing the right of employer and employé to contract as to the amount of the employé's compensation and the method of its ascertainment.

2. Laws 1897, p. 270, § 1, providing that miners shall be paid for all coal mined, including egg, nut, pea, and slack, and such other grades as the coal may be divided into, at such prices as may be agreed on between the parties, does not prohibit a mine owner from contracting with his employé to pay only for lump coal screened from all the coal mined.

Appeal from circuit court, Fulton county; John A. Gray, Judge.

The Whitebreast Fuel Company was convicted of not paying for all coal mined by an employé, and it appeals. Reversed.

Wm. McNett and G. L. Miller, for appellant. B. M. Chipperfield, State's Atty., for the People.

CARTWRIGHT, J. Complaint was made, under oath, before a justice of the peace of Fulton county, charging appellant with a violation of section 1 of an act entitled "An act to provide for the payment of coal miners for all coal mined by them, and providing additional duties for mine inspectors," in force July 1, 1897, and on a trial before the justice appellant was found guilty, and a fine was imposed. On appeal to the circuit court a jury was waived, and the case was tried upon an agreed statement of facts, and again resulted in a conviction and the imposition of a fine, and from such judgment the case is brought to this court by appeal.

The section which the defendant was charged with violating is as follows: "That every person engaged in mining coal for any corporation, company, firm or individual shall be paid in lawful money of the United States for all coal mined and loaded into the mine car by such person for such corporation, company, firm or individual, including lump, egg, nut, pea and slack, or such other grades as said coal may be divided into, at such price as may be agreed upon by the respective parties." Laws 1897, p. 270.

The following are the material facts as stipulated: For seven years prior to July 1, 1897, the defendant had operated a coal mine at Dufermline, in Fulton county. During that period there was sometimes a demand for what was called "run of the mine" coal, which embraced the entire product as mined, without screening, and a small per cent. of the coal produced was sold in that way to meet that demand. For mining that coal each miner received pay at a certain price per ton for the entire coal mined by him and weighed as it came from the mine. About 95 per cent. of the coal mined was screened for the market, and for such coal the miners were paid a certain price per ton for the screened lump coal, which was a higher price than that paid on the "run of the mine" product, the proportion being about as 60 to 45, but, where the coal was screened and the higher price paid for

the screened lump coal, no account was taken of the nut and slack coal screened out, and nothing was paid upon those grades. The miner named in the complaint had been in the employ of defendant at the mine for about six years, and had received his money and made his settlements for mining upon the basis stated, receiving his agreed payment in that way, the same as the other miners.

It is now insisted that the section in question is an invasion of the constitutional right of the employer and employé to contract with each other as to the compensation of the employé and the manner in which it shall be ascertained, and that it is therefore in conflict with the constitution. We are not prepared to say that such is the effect of the act. The provision is that the owner or operator of a mine shall pay to the miner "at such price as may be agreed upon by the respective parties." It leaves the employer and miner free to contract with each other upon any terms that may be mutually agreeable, without restraint. The agreement may be for a certain rate, according to the time employed or the quantity of coal mined, or upon any other basis. If the compensation is fixed by the amount of coal mined, the act leaves them free to determine the quantity of such coal upon any basis they may see fit. It does not require that it shall be weighed or measured, or compel the parties to adopt any particular mode of ascertaining such quantity. The act does not require that the same price shall be paid for each of the different grades into which the coal may be divided, but only undertakes to require that the employer shall perform his contract by paying at such price as may be agreed upon by the respective parties. We cannot ascribe to the legislature an intention to re-enact, in a somewhat different form, a provision designed to interfere with the freedom of contracting between citizens, and which has been uniformly held to be an encroachment upon the liberty and rights of the laborer and his employer. Before the passage of this act it had been decided that it was not competent for the legislature to compel owners and operators of coal mines to make their contracts by the weight of the coal mined or to require the laborer to have his wages determined by weight (*Millett v. People*, 117 Ill. 294, 7 N. E. 631); that the act for the payment of wages in lawful money and to prevent the truck system was unconstitutional and void, as an attempted deprivation of the liberty and property right of contracting (*Froerer v. People*, 141 Ill. 171, 31 N. E. 395); that the act requiring the owner and operator of a coal mine to weigh coal in the pit cars before screening, and to pay on such weights, was in violation of the constitution, as an attempt to take from both employer and employé the right to fix, by contract, the amount of wages and the mode in which

they should be ascertained (*Ramsey v. People*, 142 Ill. 380, 32 N. E. 364); and that the legislature could not take away from coal miners and their employers the right to ascertain and fix upon the amount due for mining coal in any manner mutually satisfactory to them (*Harding v. People*, 160 Ill. 459, 43 N. E. 624). It appears to have been the design of the legislature to eliminate from this act the objectionable features of former enactments by making contracts enforceable according to their terms, instead of attempting to make contracts for the parties. It is made essential to a violation of this act that a price shall be agreed upon by the respective parties including the various grades of coal specified in the act. In this case a less price was satisfactory to the parties when paid on the basis of "run of the mine" or unscreened coal than when the payment was made on the basis of the screened product. The statement of facts shows that the defendant complied with the terms of its contract, and paid the miner named in the complaint according to the understanding of the parties, as was done in the case of *Ramsey v. People*, supra. In that case the employer, by contract with the miner, paid for the coal mined at a certain price per ton for the screened coal, substantially in the manner in which the appellant was accustomed to pay by an understanding with its miners, and the act requiring payment on the weight of coal before it was screened, regardless of the contract, was held to be in violation of the constitution. In *Jones v. People*, 110 Ill. 590, an act to provide for weighing coal at the mines was under consideration, and it was said that the act left it free for the owner or operator of the coal mine to make contracts with the miners to mine coal for whatever might be agreed upon between them, and where the contract was for the paying of wages in some other way than that specified in the act its provisions did not apply. We have reached the same conclusion as to this act, and must hold that its provisions do not apply where there is a contract for the payment of compensation by different means or upon a different basis than that specified in the act. To hold otherwise would render the enactment unconstitutional. It has been uniformly decided that a laborer cannot be deprived of the right to make his own contracts and exercise his own judgment as to how much he will receive for his labor and what he will receive as payment.

The agreed statement of facts shows that the defendant paid to the miner named in the complaint for the coal mined by him according to the understanding of the parties, which had been carried out for six years between them; that the higher price per ton paid for screened lump coal was intended by the parties as payment for the coal mined; and that no price had been agreed upon by the parties for the nut and slack coal, of

which no account was taken by them. The conviction was wrong, under the facts. The judgment is reversed, and the cause remanded. Reversed and remanded.

(174 Ill. 325)

NEIDERER v. BELL.

(Supreme Court of Illinois. Oct. 24, 1898.)

ADVERSE POSSESSION—EVIDENCE—TAX RECEIPTS
—TRIAL—PROPOSITIONS OF LAW—PUBLIC
LANDS—CERTIFICATE OF ENTRY.

1. Defendant in ejectment, claiming title under the statute of limitations by payment of taxes for seven successive years, under color of title acquired in good faith, is not entitled to the protection of the statute on production of tax receipts held by her, misdescribing the land assessed, so as to include the tract in controversy, where it is plain from the evidence that such tract was not assessed or the taxes paid, or intended to be paid, by her.

2. Defendant's claim of title, in ejectment, under the statute of limitations, by proof of payment of taxes for seven successive years under color of title, acquired in good faith, is not established by tax receipts, where four of them misdescribed the land and all of them misstated the acreage, and the land was actually assessed under a misdescription to another, who claimed title and paid the taxes thereon.

3. Error cannot be predicated on the refusal by the court of propositions of law which merely recite provisions of statutes of the state.

4. Under the statute, the official certificate of the register or receiver of the land office is evidence of an entry on land in his district, and it is not error to exclude the certificate of an entry of the state auditor made to the county clerk.

Appeal from circuit court, Mason county; T. N. Mehan, Judge.

Ejectment by George Bell against Anna Nelderer. From a judgment for plaintiff, defendant appeals. Affirmed.

R. W. Mills, for appellant. Edmund P. Nischwitz and John W. Pitman, for appellee.

CARTWRIGHT, J. This case was before us on a former appeal. *Bell v. Nelderer*, 169 Ill. 54, 48 N. E. 194. It has been again tried by the court without a jury, and the trial resulted in a finding and judgment for the appellee, George Bell, who was plaintiff in the action. The plaintiff showed title, as before, under a deed to him from Mason county, dated July 16, 1896, and the defendant introduced in evidence the same deeds and will. Her defense, as before, was the payment of taxes for seven successive years under color of title acquired in good faith, creating title under the statute of limitations.

The land in controversy is that part of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18, township 20 N., range 9 W., of the third P. M., lying east and south of the bath chute of the Illinois river, containing 34.23 acres. At the trial both parties made claims to possession for themselves or those under whom they attempted to claim, but the acts relied upon were occasional and temporary, not constituting possession. Up to the time when defendant fenced the land, in 1896, it

was never in the actual possession of any one, and there was no improvement of any kind upon it, but it was vacant and unoccupied.

The defendant, to prove payment of taxes on these 34.23 acres in controversy, offered in evidence tax receipts for the years 1886 to 1894, inclusive. These receipts, up to 1891, did not describe this land. Those for 1886, 1887, and 1888 were for payment of taxes on part of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18. The receipt for 1889 was for payment on part of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18, and the receipt for 1890 described the fractional W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18. All of the receipts introduced for the whole period from 1886 to 1894, inclusive, gave the tract as containing 14.48 acres. It was proved by the original survey and field notes, together with a certified copy of a plat of the section from the land office in Washington, that the Bath chute of the Illinois river passes through the N. W. $\frac{1}{4}$ of the section, entering in the N. E. corner, running southwesterly, and passing out on the west side. According to these records, that part of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ lying north of the river, as surveyed, contains 14.48 acres, and that part south, which is the part in controversy, 34.23 acres. They also showed the S. E. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$ as containing 40 acres, and the S. W. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$ 22.82 acres; so that the portion of the N. W. $\frac{1}{4}$ south and east of the river contains 97.05, which is written diagonally on the original plat. Defendant made an attempt to show that these tax receipts which did not describe the land were in fact for the payment of taxes assessed against it. For this purpose she proved that the land taxed was assessed under the description of the fractional N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18, township 20 N., range 9 W., 14.48 acres, and was so carried upon the tax judgment record, except in one instance, in 1890, when a mistake was made by the collector in copying the delinquent list. It was also admitted that in the year 1864, and ever since, the assessors' and collectors' books had described a tract of land by the above description, but it was also agreed that during the same period said books had described a tract as fractional S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18, township 20, range 9 W., 97.06 acres. Plaintiff proved the payment of the taxes on the latter tract from 1886 to 1892 inclusive, by W. Heberling, in whose name the same stood, and for 1893 and 1894 by Heberling sisters, and these parties were claiming title to all of the land in the quarter section south and east of the river.

Only legal titles are considered in an action of ejectment, but in this case the legal title claimed by defendant rests upon color of title acquired in good faith and the payment of the taxes legally assessed against the land, and this she was bound to prove. If, in addition to color of title and good faith,

she paid the taxes actually assessed against the land, she would be entitled to the protection of the statute, although the land may have been misdescribed in the receipts. *Sholl v. Coal Co.*, 139 Ill. 21, 28 N. E. 748. And the opportunity to make such proof was left open to her by the former decision. On the other hand, it must be true that, if some assessment or some tax receipt held by her should misdescribe the land assessed so as to include this tract, when it is plain from the evidence that this tract was not assessed or the taxes paid or intended to be paid by her, she would not be entitled to its protection. It is true that a perfect description of a tract of land will not be overcome by the mere fact that the number of acres is incorrectly stated. Acreage is not descriptive of land, and does not afford as certain means of identification as a description by section or subdivision, but the identity of the land which is assessed may be determined partly from acreage or from its association with the person in whose name it is assessed as owner, as in the case above referred to. As between the state and the owner, the question whether payment has been made on a tract of land is not the same as the question whether a description is sufficient to enforce compulsory payment by a sale of the land. The owner may recognize a description as intended to cover his land, and, although it may be assessed by a wrong name or wrong number, if it can be so identified we do not see why he should not be entitled to the protection of the statute, upon making payment. In this case there is much more than the mere fact that the number of acres in the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ is incorrectly stated in the receipt as 14.48. The taxes for the first four years were paid by Arnold Neiderer, under whose will defendant claims, and, whatever the description was on the books, when he took a receipt he took it for part of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$. It is as fair an inference from the evidence that this receipt was intended by him and the collector as a correction of a misdescription in the assessment, and that the payment was not made or intended to be made on more than the tract of 14.48 acres, as that it was an error of the collector in making it out. It would be very strange if such a change, happening four successive years, should be a mere accident. The collector testified, and his testimony was merely that the payment was the payment of that tax which was extended under the description in the book. The land south of the river stood in the name of W. Heberling, and, although the description was not broad enough, the whole tract south of the river was assessed in that name and the taxes paid, and the tract north of the river stood in the name of Neiderer, and was assessed, although by a description too broad. There is no difference shown in the parts of the section, and the valuation and amount of tax also show that the 14.48

acres was all that was assessed to defendant or Arnold Nelderer. The proof shows that this land was not in fact assessed to defendant or those through whom she claims. It was actually assessed, under a misdescription, to another party, who claimed the title and paid the taxes. The evidence, in our judgment, was not sufficient to show that the payments were of taxes assessed against this land, but, on the contrary, it shows pretty satisfactorily that they were not. We think that the question of fact as to payment of taxes was properly decided.

It is argued that the court should have excluded all the evidence as to the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, but we think it was competent on the question whether this land was assessed. The same may be said of the receipts for payment of taxes on land south of the river.

It is also insisted that the court erred in refusing propositions of law numbered 8 and 9, submitted by the plaintiff. They merely repeated the provisions of the sixth and seventh sections of the limitation act, respectively, and stated that if defendant had complied with such provisions her title was superior to that of plaintiff. It is certainly not necessary to repeat the provisions of the statute law of the state, and to have the court say whether it is the law or not.

It is complained that the court erred in excluding a book certified by the state auditor to the county clerk, in which appeared an entry July 29, 1836, by John Knight, of the N. $\frac{1}{2}$ of section 18, township 20, range 9, 14.48 acres. A book of this character has been held not admissible in evidence to prove an entry of land. *Huls v. Buntin*, 47 Ill. 396. The statute makes the official certificate of the register or receiver of any land office evidence of an entry of any tract of land in his district, but the statute has not made a book of this character evidence. The only statute pointed out by counsel is section 10, c. 133, *Hurd's Rev. St.* 1889, p. 1346. That section relates only to certified copies of original field notes. The judgment is affirmed. Judgment affirmed.

(175 Ill. 575)

SANNER et al. v. UNION DRAINAGE DIST. NO. 1 et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

**DRAINAGE—CLASSIFICATION OF BENEFITED LANDS
—APPEAL—ORGANIZATION OF DISTRICT—
VALIDITY—CERTIORARI—COSTS.**

1. Under the drainage law, providing for an appeal from the commissioners' decision and classifying lands benefited to three supervisors, such appeal must be availed of before complaint can be made in another forum.

2. Under the drainage act it is the duty of the town clerk, on the filing of a petition for the organization of a union drainage district to make improvements, to select three commissioners from the commissioners of highways, and notify them of their selection, and where they shall meet. Paragraph 87 provides that the commissioners must meet at the time and

place mentioned in the notice, and ascertain whether the petition contains the signatures of three adult persons owning land in the district, and whether they are owners of more than one-third of such land, and make a statement of their findings to be filed. Paragraph 88 provides that if, at such meeting, they shall find the facts, as required in paragraph 87, in favor of petitioners, they shall adjourn the meeting, and examine the land. Paragraph 89 provides that at such adjourned meeting they shall enter an order organizing the district. At the meeting mentioned in paragraph 87, the commissioners, in addition to the findings required by that paragraph to be found, added, "We therefore find for said petitioners, and grant the prayer of said petition, and order an adjournment until November 8, 1893." At the adjourned meeting the boundaries of the district were defined, and the lands classified for assessment. *Held*, that the order made at the first meeting did not organize the district, but was simply the order provided for by paragraph 87.

3. Where, in organizing a drainage district, lands of persons not named in the petition, and who were not asked to sign the petition, are included therein, and no notice is given them, as required by the act, the organization is illegal.

4. Certiorari is the proper remedy to test the legality of the organization of a drainage district which includes land owned by persons who were not parties to the petition, and received no notice thereof, since there is no remedy by appeal.

5. Appellee's cost of preparing an amended abstract of the record will not be allowed where it contains matter wholly unnecessary to be incorporated therein, although appellant's abstract was unsatisfactory.

Appeal from appellate court, Third district.

Petition for certiorari by Edward B. Sanner and others against Union Drainage District No. 1 and others to determine the validity of the organization of such district. A judgment dismissing the petition was affirmed in the appellate court (64 Ill. App. 62), and petitioners appeal. Reversed.

Moulton, Chafee & Headen, for appellants.
Hamlin & Kelley, for appellees.

PHILLIPS, J. On October 19, 1893, a petition was filed with the town clerk of Penn township, Shelby county, Ill., addressed to the drainage commissioners of the town of Penn, in Shelby county, and of the town of Milan, in Macon county, state of Illinois, reciting that about 320 acres of land in Macon county and about 1,310 acres in Shelby county had theretofore been connected by ditches, which formed a continuous line of branches draining through the same outlet, constructed by the voluntary action of the owners, and setting forth the petitioners and landowners in the proposed district, and that repairs and improvements are necessary, but cannot be made by voluntary agreement, and praying for the organization of a union drainage district, with boundaries embracing the lands in the petition described. This petition being filed with the town clerk, he complied with the provisions of the statute by selecting three commissioners for said district from the commissioners of highways of the two towns, taking a part from each town, and

notified them of their selection, and when they should meet. At a meeting on the 31st of October, 1893, in accordance with the notification by the town clerk, the commissioners entered an order, in which it was recited that they had examined the petition, together with all the papers in the case, and, having heard the testimony of witnesses duly sworn according to law, together with statements of all interested persons appearing, found the petition contained the signatures of three adult persons owning land in the proposed district, and the affidavits of two credible signers of the petition in support thereof; that they further found the land mentioned in said petition required a combined system of drainage, and that it was then connected by ditches forming a continuous line and branches through the same outlet, and was so connected by voluntary action of the owners; that a large amount of drainage, repairs, and improvements was necessary, and that the organization of a district would be beneficial; and found for the petitioners, and granted the prayer of the petition. This order was made in accordance with the provisions of paragraph 87 of the drainage act (Hurd's Rev. St. 1889, p. 563), but also went further, and granted the prayer of the petition. At that meeting the commissioners adjourned until November 9, 1893, at which time they reported that they had been upon the lands, and had personally examined the same; that they had excluded certain lands which were included in the petition for the proposed district, and included certain lands which were not included in the petition, and defined the boundaries and classified the lands. They subsequently appointed an engineer, who made a report, which was received and accepted, and filed with the town clerk. Notice was given that the commissioners had made an assessment for benefits and classified the land in the district on a graduated scale, and had made an order, under paragraph 89 of the drainage act, to organize the district, making a map thereof showing the boundaries, which map was duly filed. Thereupon E. B. Sanner, Jacob Sanner, and F. M. Sanders appealed to three supervisors. Three supervisors were summoned from Shelby county to hear the appeal. Objection being made that one of the supervisors should have been called from Macon county, the supervisors were of the opinion the point was well taken, and declined to consider the appeal for that reason. Thereupon the clerk summoned two supervisors from Shelby county and one from Macon county to hear the appeal. These three met, when one of the appellants objected, because they had not been convened in time; and this objection was held good, and the board dissolved. The appellants filed in the circuit court of Shelby county their petition for a common-law writ of certiorari to bring before the court the record and proceedings, and upon a hearing the petition was dismissed, and the

writ quashed. Appellants prosecuted an appeal to the appellate court for the Third district, where the judgment of the circuit court was affirmed. This appeal is prosecuted from that judgment of affirmance.

Counsel say, in their brief, "We simply seek to have this court examine and pass upon the acts of this corporation after October 31st, when the organization was had." By the provisions of paragraph 87 of the drainage act the commissioners must meet at the time and place mentioned in the notice, and the clerk shall lay before them the petition and papers in the case, and they must ascertain whether the petition contains the signatures of three adult persons owning land in the district, and whether they are the owners of more than one-third of the land in the district. Under the findings to be made under that section they only determine with reference to whether the petition has been signed as required, and determine, in fact, with reference to the material statements therein, having power to administer oaths and examine witnesses and decide controverted questions. They must make a statement of their findings, to be filed with the papers in the case under the above paragraph. In their meeting of October 31st the commissioners made all these findings, and then added, "We therefore find for said petitioners, and grant the prayer of said petition, and order an adjournment until November 9, 1893." The contention of appellants is that these proceedings organized the district legally, and subsequent proceedings, it is urged, are illegal and void. By paragraph 88 of the drainage act, if the commissioners shall find in favor of the petitioners, as provided in paragraph 87, they shall adjourn their meeting, and in the meantime go upon the lands, and personally examine the same. By the provisions of paragraph 89, at such an adjourned meeting they shall enter an order of record organizing the drainage district. The commissioners had no power to organize a drainage district at the first meeting, and the effect of the order entered by them did not constitute the organization of the district.

It appears that the petition sets forth the names of the owners of land embraced in the proposed drainage district, and their post-office addresses, so far as known. The names of 15 landowners are therein given. Notice was duly posted, in which a copy of the petition was inserted, showing that it would be heard on the 31st day of October, 1893. On that day the commissioners, after finding the facts as to the sufficiency of the petition under the statute, and entering an order to that effect, adjourned to November 9th, at 11 o'clock a. m. Of the 15 landowners whose names are given in the petition one is the estate of C. Barber, deceased. On the organization of the district on the 9th day of November certain lands of J. S. Crawford were included in the district, but he was not named as a lot or land owner. Certain lands of George W. Walte were ex-

cluded, and certain other lands included other than those mentioned in the petition, under the order organizing the district. Certain lands of Walter Parks were included in the district, but he was not mentioned. Certain lands of E. B. Sanner were excluded from the district. The order of October 31st does not find that any persons attached their names to the petition, or asked to have their land included within the district. The land of John S. Crawford, Walter Parks, and George W. Waite seems to have been included in the district by the action of the commissioners without their request, and without notice to them. Eighteen landowners are mentioned as owning land within the district, and four of them,—John S. Crawford, Walter Parks, George Goodman, and George W. Waite,—who are the owners of land described as being included within the limits of the district as made by the order of November 10th, are nowhere shown to have been signers of the petition, or to have been included in the petition as landowners. Their lands are also included in the graduated scale of lands to be taxed.

The question whether the order of October 31st organized the district and constituted it a legally organized district, and that all subsequent proceedings were null and void, is sought to be raised by appellants by this petition for certiorari. The action of the commissioners at the adjourned meeting in adding certain lands to the district and taking other lands therefrom, in giving the description of the lands, and in adjourning from time to time, is sought to be attacked by this proceeding. The prayer of the petition is limited to the proceeding upon which the organization of the district was predicated, and refers to the action of the commissioners in making the classification of the lands, and the appeal thereupon. A remedy is provided for any person interested who objects, and correction of any error in the classification may be made by an appeal to three supervisors, and that must be availed of before one can be heard to complain in another forum. *People v. Chapman*, 127 Ill. 387, 19 N. E. 872. But that does not relate to the order organizing the district as authorizing such appeal. We are not disposed to hold that the order of October 31st went to the extent of organizing this district, but that the finding made in the order of the commissioners of highways was simply the finding provided for by paragraph 87. Because no power existed in them to organize a district at that meeting, an adjournment was made to November 9th, as provided for by paragraph 88. At that meeting certain lands described in the petition were eliminated from the district, and certain other lands not described in the petition were included; and there is nothing in the proceeding showing any connection with the petition by the owners of the lands so included, by their action, or that of any one but the commissioners. It has been held by this court that landowners shall have the right to be heard upon the question whether a petition

has been presented, and whether their lands are involved in a system of drainage, and in all matters pertaining to the organization of a district. One landowner may object to the consideration of the petition by the commissioners upon the express ground that the statutory notice had not been given, and may insist that the annexation of land proposed to be included in the district shall be valid as a whole, and may object because notice had not been given to others. *Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995. It would be against every principle of justice and right to allow land to be included in a district, and made subject to taxation by such inclusion, when the action of the commissioners in creating the district and including the lands therein was without notice to the owners. The notice as required by the statute goes to the right of the commissioners to act, and, unless the lands of the owners are included by their own petition, and by their request as signers, or by having their names included in the petition as landowners by the petitioners, or by having their names appear in the notice, their lands cannot be included in the district; and they, or others whose lands are included, have the right to make an objection, for the objection goes to the entire organization. The commissioners are required to act in accordance with the provisions of the statute, and, if they fail to do so, there arises a necessity for the exercise of the common-law writ of certiorari, as that is the only method by which the legality of their action may be tested and tried. They cannot act without the petition and without the affidavits, and, if they do so, and attempt to find the boundaries of the district entirely without reference to the lands described in the petition, and without notice to the owners, the question may arise on certiorari, where they so proceed illegally, and there is no appeal or other method of reviewing the proceeding. *Miller v. Trustees*, 88 Ill. 26. The legislature has made no provision for an appeal from the action of the commissioners of highways in determining the order of finding the precedent facts,—that a petition is signed by the requisite number of adult landowners in the proposed district, with the affidavits of two credible signers of the petition in support thereof; that the lands mentioned in the petition require a combined system of drainage; and that the lands will be benefited thereby.

Appellees contend that the legality of the organization cannot be raised on a petition for certiorari, and cite *Lees v. Commissioners*, 125 Ill. 47, 16 N. E. 915, as sustaining that contention. A careful examination of that case discloses that there the corporate existence of a municipal body was sought to be challenged by a common-law writ of certiorari, and it was expressly held that such a proceeding could not be resorted to for the purpose of determining whether such a corporation had a legal existence. It has been repeatedly adjudicated by this court that a

writ of certiorari may be awarded to inferior jurisdictions and tribunals where it appears they have exceeded the limits of their jurisdiction, and have proceeded illegally, and no method is provided for reviewing their proceedings by the courts. *Gerdes v. Champlin*, 108 Ill. 137; *Doolittle v. Railroad Co.*, 14 Ill. 381; *Railroad Co. v. Whipple*, 22 Ill. 105; *Railroad Co. v. Fell*, Id. 333. The purpose of a common-law writ of certiorari is to bring the entire record of an inferior tribunal before the court to determine whether such a tribunal has proceeded according to law, and the trial is to be had solely from an inspection of the record. The court cannot consider any matter not appearing of record, and, if the want of jurisdiction or illegality appears from the record the proper judgment is that the proceeding be quashed, but, if the proceeding be regular, the petition must be dismissed, and the writ quashed; and these are the only judgments that can be entered in this procedure. There need be no confusion in regard to what was said in the case of *Lees v. Commissioners*, supra, and what is here said regarding the question of the existence of the district. In that case we said: "In looking into the record, however, in this case, it does not appear to be a proceeding to test the validity of the action of an inferior tribunal, but the petitioner is seeking to use the common-law writ of certiorari to determine whether a certain corporation—a drainage district—has a legal existence." That case recognizes the principle that circuit courts may award writs of certiorari to inferior tribunals within their jurisdiction, where it is shown that the inferior tribunals have exceeded the limits of their jurisdiction, and no appeal is allowed, or other method of reviewing their proceedings provided. In the case of a district in existence and action, and which has been carrying out the purpose of its organization as a going district, the common-law writ of certiorari cannot be used to test the legality of its existence, but the proceeding must be by quo warranto to determine that question. And this is all that is held in the *Lees Case*. Recognizing, as that case does, the right to test the legality of the actions of an inferior tribunal by this writ, where a district is being organized, and before it becomes a legal entity, acting and carrying out the purposes of its existence, a controversy arises in the direct proceeding for its organization, which is tried before the very tribunal provided for determining it, and that tribunal, in the determination of that controversy, acts illegally and without authority, and that proceeding is directly followed by a proceeding by certiorari to test the legality of its action, the common-law writ of certiorari may be used, even though the judgment to be entered under the writ may undo all the work of that inferior tribunal. That is the question presented in this case. There is, in this respect, a broad difference between these two cases, and what is here said is

brought into entire harmony with what is said in the *Lees Case* and the *Griffin Case*.

The proceedings before the three supervisors, and their action, are not necessary to be considered in this proceeding. We are of the opinion, from matters appearing of record in this case, that lands of persons not named in the petition, and which persons were not asked to sign the petition, are included in the district. The petition is a part of the record of this tribunal, and its finding is a part of the record, and the notices given, necessary for them to base action thereon, must be considered as a part of the same record, because the legality of their proceeding is to be determined by their own record; and from all appearing in this case they were without jurisdiction of the lands of four of these landowners. Other landowners have the right to raise that question in objecting to the proceeding herein. The organization was, therefore, illegal.

Counsel for appellees have filed in this case an abstract, and moved to tax the costs to appellants because of the insufficiency, as alleged, of appellants' abstract. Appellees' abstract contains matter that has no place in the record, and is wholly unnecessary to be incorporated in the record or abstract. Appellants' abstract is very unsatisfactory. The motion to tax appellees' abstract is denied. The judgment of the appellate court for the Third district, affirming the judgment of the circuit court of Shelby county dismissing the petition for certiorari, is reversed, and the cause remanded. Reversed and remanded.

BOGGS, J., took no part in the decision of this case.

(174 Ill. 333)

WAHL v. LAUBERSHEIMER.

(Supreme Court of Illinois. Oct. 24, 1898.)

TRESPASS—POSSESSION OF LAND—EVIDENCE—PLATS—VERDICT—HARMLESS ERROR.

1. An owner of unoccupied land need not have it inclosed with a fence in order to constitute actual possession.

2. A plat of land in controversy, which the party testifies to be accurate, is admissible.

3. A plat introduced in evidence in a controversy over a strip of land showed the strip of land marked "4 feet" and "3 feet," which figures the court ordered stricken out, but only one was erased before the plat went to the jury. *Held* harmless error.

4. Although a person is entitled to the immediate possession of land, he can take possession only in such a manner as is not violent and will not provoke a breach of the peace.

5. Irregularity in allowing an amendment of a verdict for plaintiff in trespass, so as to show simple instead of exemplary damages, is harmless, when a remittitur of all but nominal damages is entered, and defendant was clearly guilty.

Appeal from circuit court, Hancock county; George W. Thompson, Judge.

Action by John Laubersheimer against Peter F. Wahl. Judgment was for plaintiff, and defendant appeals. Affirmed.

Miller & Williams and Scofield, O'Harra & Scofield, for appellant. Hooker, Plantz & Hartzell, for appellee.

WILKIN, J. This is an action in trespass *quare clausum fregit*, begun by John Laubersheimer in the circuit court of Hancock county against Peter F. Wahl, the appellant here, claiming damages to the amount of \$500. The declaration alleged that the defendant, "with force and arms, broke and entered the plaintiff's close, in Nauvoo, Hancock county, Ill., being the west 35 feet of the east $150 \frac{1}{12}$ feet of lot 4, block 19, Wells' addition to Nauvoo, and broke and pulled down certain fence posts there standing," etc. Defendant pleaded the general issue and two special pleas. The first special plea alleged that S. M. Walther was in possession of the land in controversy, and by his leave and license the defendant committed the supposed trespass; and the second set up title in the defendant, *liberum tenementum*. Issue being joined on the first plea, and replication filed to the other two traversing the allegations thereof, and similiter added, a jury trial was had, resulting in a verdict for \$25 in favor of plaintiff. By leave of the court the declaration was amended so as to allege that the trespass was maliciously committed. A remittitur was then entered by plaintiff, reducing the amount of the verdict to one cent. After overruling motion for new trial, the court entered judgment for that nominal amount, and costs. Defendant appeals.

The principal ground of reversal insisted upon is that the plaintiff failed to make out his case by the proofs. The act of pulling down the posts, as alleged, is not denied, but it is insisted that they were not upon the plaintiff's premises. The litigation grows out of a dispute between the parties as to the location of the line between the plaintiff's property and that adjoining it on the east. Both pieces are parts of lot 4, block 19, in Wells' addition to Nauvoo. There are four lots in the block, lot 4 being in the southeast corner, fronting south on Mulholland street 198 feet, and extending north 190 feet, and is bounded on the east by a side street. On June 16, 1864, certain parties conveyed to Sigmund M. Walther a part thereof, described as follows: Commencing at the southeast corner of lot 4; thence north $72 \frac{1}{2}$ feet; thence west 74 feet; thence north to north line of said lot; thence west 41 feet; thence south to the south line of the lot; and thence east to the place of beginning. Walther still claims to own the part so conveyed to him, and is in possession of it. Plaintiff claims to own a part of said lot 4 adjoining Walther on the west, described as commencing 115 feet west of the southeast corner of said lot, thence running west 35 feet, thence north 190 feet, thence east 35 feet, thence south 190 feet, to the place of beginning.

As early as 1844 or 1845 a building was erected on this last-described piece, and oc-

cupied by one Davis as a store and dwelling house. The weight of the testimony is that the west wall of the building was on the west line of the lot, and extended east 32 feet, leaving a vacant space of three feet between the east wall and east lot line. This building was of brick, extending back, as nearly as can be ascertained from the evidence, about one-half the depth of the lot. Attached to the east half of the building, on the north, was a frame shed, which extended north to within about $8 \frac{3}{4}$ feet of the north line, and projected east to the east line of the lot. Near the northeast corner of this shed was a well. In 1859, George Ritter went into possession of this building and lot, and continued in possession thereof until 1878, when the building was destroyed by fire. From about the time of the construction of the building on this lot there was a fence constructed between it and the Walther lot, extending from Mulholland street to the north line of lot 4. That fence along the main part of the building, from Mulholland street to the frame shed, was substantially three feet east of the east wall of the building, and from the shed to the north line of the lot on a line with the east side of the shed. On November 18, 1889, George Ritter conveyed the lot, with the ruins of the old building upon it, to his son, Paul Ritter, and he, on December 5, 1889, conveyed it to the plaintiff. The fence between it and the Walther property having been destroyed,—at least the south part of it,—plaintiff undertook to rebuild it, and from that attempt this controversy arose.

The defendant claims to be acting on behalf of Walther, as his agent. When he ascertained that plaintiff was about to rebuild the fence he had Walther execute to him a deed for a strip of land described as follows: "Commencing 115 feet west of the southeast corner of lot 4; * * * thence west 4 feet; thence north to the north line of the lot; thence east 4 feet; and thence south to the place of beginning;"—and it is upon this deed that he attempts to sustain his plea of *liberum tenementum*. We think it perfectly clear that that deed conveyed no title to him. Walther never owned, or claimed to own, that 4-foot strip west of his 115 feet. There is some evidence to the effect that he occupied, with flower beds, etc., a portion of the ground immediately west of his lot, but there is no evidence of such continued adverse possession by him as could in any sense be said to amount to a prescriptive right or title. The real question of fact must therefore be whether plaintiff was placing the posts, which were removed, on the Walther lot, as described in his deed of 1864, or whether, as claimed by plaintiff, they were on the line between the two lots.

A great deal of testimony was introduced to prove the location of the building on the Ritter lot, the space between it and the Walther lot, and the location of the old fence between the two lots, and, after a careful

consideration of the evidence of the several witnesses, we are satisfied that the jury were justified in finding that the posts were placed by plaintiff on the line of the old fence and on the true line between the two pieces of property. The location of the shed in the rear of the brick building, the well, and the line of fence from there north (about which there seems to be no dispute as to its being on the line), considered with the other evidence, makes it clear to our minds that the plaintiff's contention as to the location of the line from there to the street is correct. The conduct of the defendant in attempting to get a deed to four feet of the Ritter lot is an indication that he deemed it important in his controversy with the plaintiff to get some right west of the 115 feet owned by Walther. In fact, he is only able, as we understand the evidence, to make a plausible showing in favor of the position that the posts were being set on Walther's land by measuring, not from the southeast corner of lot 4, where the description in all the conveyances starts, but by beginning at the southwest corner of lot 4 and measuring east. No good purpose would be served by attempting to review the voluminous evidence in this record on the question of the location of the disputed line, but we are, as before stated, fully satisfied that the posts removed were not upon the Walther lot. Therefore the defendant failed to establish his defense under either of his special pleas.

But it is insisted that the plaintiff failed to show title and possession to the 34-foot lot. As we have seen, he had a deed to the property, described by metes and bounds, from Paul Ritter. He claimed possession under that title, and the deed was evidence to show the extent of his possession. The lot was vacant and unoccupied after the fire, and the evidence shows that the plaintiff and his grantors exercised acts of ownership over it which were sufficient to constitute possession. "It is not necessary that a party should have his land all inclosed with a fence before he can be said to be in actual possession. Any class of improvements or acts of dominion that indicate to persons residing in the immediate neighborhood who has the exclusive control of the land will be deemed to constitute possession to the extent of the paper title under which such party entered, so as to enable him to maintain trespass for any injury to the estate." *Eddy v. Gage*, 147 Ill. 162, 170, 35 N. E. 347, 349, and authorities there cited.

Appellant insists that the trial court erred in admitting in evidence a plat of the lot described in the declaration, showing the location of the division fence, etc. The person who made the plat testified that it was accurate in measurements and correct in what it purported to be, and we think it was clearly admissible. On the plat the space supposed to be the strip in question was designated as "4 feet" and "3 feet," and these

figures the court ordered stricken out. One was erased, and the other not, before it went to the jury. It is said to permit the plat to go to the jury without making the erasure was erroneous. We do not regard it necessarily so; but, even if it was, the error was immaterial.

By agreement of the parties the jury were instructed orally, and a lengthy charge was given, which was taken down and appears in the bill of exceptions. Counsel for appellant complain that one of the instructions to the jury was to the effect that, though the defendant was entitled to the immediate possession of the premises, he had no right to take possession in any other than a peaceable manner,—“that is, in such a manner as was not violent, tumultuous, and would not provoke a breach of the peace,”—and this, it is said, was error. It is insisted that though the manner may have been violent, tumultuous, and of such a nature as likely to cause a breach of the peace, still, unless it did in fact so result, the entry would be peaceable and lawful. This position is not correct, and the authorities cited do not sustain it. The instruction, taken as a whole, was as favorable to the defendant as he had any right to ask. See *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12, and cases there cited.

Other instructions contained in the charge are criticised, but upon an examination of them we find no substantial error in them.

The jury found, by its verdict for the plaintiff, “\$25, exemplary damages.” The clerk was ordered to change the form of the verdict from exemplary to simple damages, and also directed plaintiff to amend the declaration by inserting the word “maliciously,” in describing the act alleged as a trespass. Afterwards plaintiff entered a remittitur for all the damage assessed by the jury except one cent. It is insisted by appellant that the court erred in so amending the verdict and directing the amendment of the declaration. We think there was no error in the ruling in either respect. But, if it were conceded that the court proceeded irregularly, we are at a loss to perceive how the defendant was in any way prejudiced thereby. If guilty, as we think the evidence clearly shows he was, he was certainly liable for nominal damages, and that is all the judgment of the circuit court requires him to pay. We are satisfied the appellant had a fair trial, without prejudicial error, and the judgment below will be affirmed. Judgment affirmed.

(175 Ill. 459)

JONES v. FOSTER.

(Supreme Court of Illinois. Oct. 24, 1898.)

CANCELLATION OF INSTRUMENTS — FRAUDULENT REPRESENTATIONS—ADVERSE POSSESSION.

1. While the relation of mortgagor and mortgagee continues, neither party in possession can claim adverse possession against the other.
2. A trustee appointed by a creditor in a

trust deed given to secure the indebtedness will be presumed to have had the right to grant an extension on behalf of the creditor.

3. In order to constitute fraudulent representations sufficient to set aside a deed, it must appear that the party making them knew them to be untrue.

4. A deed will not be set aside for fraudulent representations unless the party claiming relief was injured by the representations.

5. A trust deed was given to secure a mortgage on a number of lots. Two of them were sold to plaintiff, subject to their portion of the mortgage. The property was afterwards sold under the trust deed, but the two lots in question were excepted from such sale because of an extension granted to plaintiff. Plaintiff left the state, and for nearly 20 years neglected to pay any interest or taxes, by which time the incumbrance equaled the value of the lots. The attorney for defendant, the assignee of the mortgagee, being unaware of the extension which had prevented the lots from being included in the foreclosure sale, and supposing such omission had been an oversight, wrote to plaintiff, telling him that defendant had title to, and possession of, the lots, and that he had foreclosed a trust deed on them, in which there was a technical defect, and offering \$5 for a quitclaim deed. Plaintiff, after demanding and receiving \$10, executed the deed. *Held*, that as defendant and his attorney made the representations in good faith, and as plaintiff had not exercised diligence, and had abandoned the property, and as no material injury had been done, the deed would not be set aside.

Appeal from circuit court, Cook county; E. F. Dunne, Judge.

Action by Albert W. Jones against Frank W. Foster. Decree for defendant, and plaintiff appeals. Affirmed.

This is a bill, filed by the appellant against the appellee on August 20, 1896, to set aside a deed executed on August 13, 1895, by appellant to appellee, upon the alleged ground that the deed was obtained by false representations. After a demurrer to the bill was overruled, an answer thereto was filed by the appellee, and replication was filed to the answer by the appellant, the complainant in the court below. After a hearing had upon documentary and oral evidence, the circuit court dismissed the bill for want of equity at the complainant's costs. The present appeal is prosecuted from said decree of dismissal. The facts, as they appear from the evidence, and from a stipulation between the parties, are substantially as follows:

On February 6, 1874, John J. Foster, father of the present appellee, who was the defendant below, had title to lot 3 in section 12, township 41 N., range 18 E. of the third P. M. (except a strip four rods wide off the east side thereof), in Cook county. On that day John J. Foster conveyed said lot to Henry M. Payne. Henry M. Payne subdivided the premises, which consisted of about 40 acres of land, under the name of "Payne's Addition to Evanston." Payne then executed a trust deed to Hugh A. White, as trustee, to secure 24 notes, for \$42,650, payable to the order of said John J. Foster, due, in various amounts, in 8 months, and 1, 2, 3, and 4 years, from that date, bearing different rates of interest; the notes due in 3 and 4 years from date

bearing interest at the rate of 8 per cent. per annum for the third and fourth years. The trust deed covered the lots in controversy in this case, which are described as lot 5 in block 3, and lot 6 in block 6, in Payne's addition to Evanston. It was provided in the trust deed that, upon payment of \$325 for each lot, certain lots should be released, including one of the lots in controversy, and, on the payment of \$231 for each lot, certain other lots should be released, including the other lot in controversy. The trust deed further provided that, if Payne sold or deeded any of the lots, they should be deeded subject to the amount or portion of incumbrance on each lot, which the purchaser should assume or agree to pay, and that the owner of the indebtedness might pay the taxes, and the amount so paid should be considered so much additional secured indebtedness, to draw interest at the rate of 10 per cent. per annum. On June 3, 1874, Payne conveyed to Harrison C. Jones, for \$900, said two lots described in the bill, and conveyed by the deed from appellant to appellee, subject to an incumbrance of \$325 on lot 5, and of \$231 on lot 6, the payment of which the said Harrison C. Jones assumed. Harrison C. Jones conveyed said lots 5 and 6 to the appellant, Albert W. Jones, on February 23, 1879, for \$1,000, subject to an incumbrance of \$162.50 on lot 5, and of \$115.50 on lot 6, which the said appellant, Albert W. Jones, assumed and agreed to pay, as part of the purchase money. Payne having made default in the payment of interest and principal, Hugh A. White, under the power contained in said trust deed, made sale to said John J. Foster on May 13, 1876, of a large part of the property originally conveyed to Payne, but did not include in such sale said lots 5 and 6, here in controversy. White executed a trust deed to said John J. Foster of the premises sold, but said lots 5 and 6 were not conveyed by said trustee's deed. The property sold was sold for \$8,600, being the amount bid by said Foster. Henry M. Payne, the original mortgagor, and Hugh A. White, the trustee, died before August 1, 1895. No proceedings were ever had in court to foreclose said trust deed, and no other proceedings were taken for that purpose, except the sale under the trust deed as above stated. There has been no release recorded, executed by anybody, releasing said lots 5 and 6 from the lien of said trust deed. There are no other incumbrances on said lots, except said trust deed. Said lot 6 was sold for taxes in 1890, and the east half thereof for taxes in 1892. The general and special taxes on the lots were paid by John J. Foster and Frank W. Foster from 1876 to the day of filing the bill herein, with the exception of one or two years, and the total amount of taxes so paid by them is \$220.57.

On March 18, 1876, at Chicago, a receipt, signed as follows: "John J. Foster, by Hugh A. White, His Attorney,"—was executed and delivered to the appellant, which is in the

words and figures following, to wit: "Received from A. W. Jones one hundred and sixty-eight $\frac{19}{100}$ dollars, being 2 payments of interest and principal due on lot 5, block 3, and lot 6, block 6, in Payne's addition to Evanston, leaving 2 more payments of \$139 and interest (each) due in 1 and 2 years from February 6, 1876. This receipt being given on special agreement not to extend to any other party or parties." On September 15, 1876, the appellant paid \$5.84 for the taxes due upon said lots for the year 1875; but the appellant does not appear to have paid any taxes since September 15, 1876. On August 1, 1895, a lawyer named W. H. Pope, acting as attorney for the appellee, Frank W. Foster, wrote to the appellant, then at Greenfield, Mass., the following letter: "Inclosed is a quitclaim deed to some lots in Evanston, Ill., that you owned in 1875 or '76. Mr. Foster has had title to and possession of them since 1876, when he foreclosed a trust deed on these lots and other property given by Henry M. Payne; but I find, on examining the title, a technical defect in the foreclosure of said trust deed, which will necessitate him going into the courts to remedy, unless he can secure a quitclaim deed from you. He will give you \$5.00 for your trouble in executing the deed. If you have a wife, have her execute the deed with you. Please answer at once, and, if you will execute it, I will send on the money." On August 7, 1895, the appellant, at Greenfield, Mass., wrote and sent to W. H. Pope, at Chicago, the following answer to the above letter: "Yours of the 1st inst., with quitclaim deed to Evanston lots, received. If you will send me \$10.00, I will execute and return the deed. I put \$200.00 into these lots, that I never received anything for, and I think you can well afford to pay me \$10.00 for a quitclaim deed." On August 10, 1895, Pope sent from Chicago the following answer to said letter of August 7, 1895: "Your favor of the 7th was duly received. In reply, will say that Mr. Foster is willing to do what is right, and inclosed please find draft on New York for \$10.00. If you are married, have your wife execute and acknowledge the deed jointly with you before a notary public. I inclose envelope for you to return deed in." On August 13, 1895, the appellant wrote to Pope from Greenfield, Mass., the following letter: "Yours of 10th received, with draft for \$10.00. Inclosed please find quitclaim deed of Evanston lots, as agreed. What is the present value of these lots? I have a curiosity to know whether they have advanced more than Englewood lots in the vicinity of Fifty-Eighth street and Wallace street." On August 20, 1895, Pope answered said letter last above named as follows: "Your favor of August 13th, with deed inclosed, was duly received. The present value of the lots in question is about \$500.00 each. I do not think you lost anything by letting them go at the time you did. That property has not

increased in value to amount to anything in the last twenty years." John J. Foster and wife executed to appellee, Frank W. Foster, a quitclaim deed dated August 3, 1895, conveying their interest in said lots 5 and 6.

W. P. Fennell, for appellant. Homer Cooke and Wm. H. Pope, for appellee.

MAGRUDER, J. (after stating the facts). The false representations alleged to have been made by the appellee to the appellant to procure from the latter the deed executed by him, conveying the lots in question, are embodied in the letter written by Pope to the appellant on August 1, 1895. It cannot be denied that the statements made in this letter were incorrect, if not untrue. The impression conveyed by the first sentence of the letter is that the appellant owned the lots in 1875 or 1876, but did not own them on August 1, 1895, when the letter was written. As matter of fact, however, the appellant was at the time of the writing of said letter the owner of the said lots, subject to the incumbrances thereon. When White, the trustee, on May 13, 1876, sold the property conveyed to him by the trust deed executed by Henry M. Payne, under the power contained in said trust deed, he did not sell lots 5 and 6, here in controversy. As to these lots there was never a foreclosure of the trust deed, and therefore John J. Foster, the purchaser at the trustee's sale, obtained no title thereto. It follows, of course, that the appellee, who holds by quitclaim deed from his father, John J. Foster, obtained no title thereto, except that which his father had, namely, the title of a mortgagee. In other words, the quitclaim deed from John J. Foster to the appellee amounted only to an assignment of the mortgage to appellee. The statement in the letter that in 1876 Foster foreclosed a trust deed on these lots and other property, given by Henry M. Payne, is not true, if thereby it was intended to be said that the foreclosure embraced these lots, and not merely that the trust deed covered these lots. The technical defect in the foreclosure of the trust deed, which is referred to in the letter, was the omission of the trustee to sell lots 5 and 6 at all, or to convey them by the trustee's deed which he executed. The statement in the letter that Foster has had title to the lands since 1876 is also incorrect, except so far as his title was that of a mortgagee in possession. Some testimony was introduced by the appellee with a view of showing title under the 20-years and 7-years limitation laws. But, as the relation of mortgagee and mortgagor existed between Foster and appellant, such limitation laws have no application. While the relation of mortgagee and mortgagor continues, neither party in possession can interpose the statute of limitations as a defense against the other. The statute can only commence to run after that relation

has been terminated in some of the modes known to the law. *Norris v. Ile*, 152 Ill. 190, 38 N. E. 762. Inasmuch as the receipt of March 18, 1876, extended further payment upon the mortgage for 1 and 2 years from February 6, 1876, 20 years had not elapsed from the date of the first extension, to wit, February 6, 1877, up to the time of the filing of the present bill, which was on August 20, 1896, even if the statute of limitations in regard to a possession of 20 years can be held to apply. The appellant testifies that he believed the statements in the letter of August 1, 1895, to be true, and executed the deed because he believed them to be true. It appears from the testimony that neither Pope nor the appellee knew of the existence of the receipt dated March 18, 1876. Their testimony is to the effect that they supposed that White, the trustee, had by mistake omitted to sell the lots in question, as the trust deed covered so many lots. They knew nothing of the existence of the receipt until the deposition of the appellant was taken, and the receipt was attached thereto as an exhibit. The receipt shows clearly that White did not sell these lots at the trustee's sale, because on March 18, 1876, he had extended the balance due upon the incumbrance until February 6, 1877, and February 6, 1878. Counsel for appellee suggest that White, the trustee, had no authority to grant such extension; but there is no evidence of want of authority, and it is not necessary for us to consider that question. It may be assumed that, as he was the trustee appointed by John J. Foster in the trust deed to secure the indebtedness, which was owned by John J. Foster, he had a right to represent the beneficiary in the trust deed in the matter of the extension.

It is true that, when a mortgagee acquires an equity of redemption from the mortgagor, equity will scrutinize the transaction with jealous care, to see that the mortgagor has not been oppressively or otherwise improperly dealt with. But while it is true that a court of equity will look closely into such a transaction, to prevent the debtor from being overreached, it is nevertheless true that the mortgagee has a right to buy of the mortgagor the equity of redemption. *Scanlan v. Scanlan*, 134 Ill. 630, 25 N. E. 652; *Conant v. Riseborough*, 139 Ill. 383, 28 N. E. 789. Although the case is somewhat close upon the facts, yet, after a careful consideration of all the circumstances, we have come to the conclusion that no such fraudulent representations were made by the appellee as would justify a court of equity in setting aside the deed. In the first place, the appellant did not exercise due diligence to inform himself as to the correctness of the statements made in the letter of August 1, 1895, of which he complains. If that letter stated that lots 5 and 6 were foreclosed in 1876, he had in his possession the receipt of March 18, 1876, which showed that such foreclosure could not have properly taken place, in view of the exten-

sion granted to him by the terms of the receipt. He neglected to examine the receipt in connection with the letter, although when he received the letter he had the receipt in his possession. In *Douglass v. Littler*, 58 Ill. 342, where the owner of a tax title wrote a letter to a distant owner of the paramount title, and thereby obtained a deed from him, it was said that the owner of the paramount title might, by taking a little time for examination and inquiry, have discovered the defects which he afterwards complained of, and that he was guilty of very great negligence and inattention to his own interests in not making any investigation into the defects claimed to exist in the tax title. In that case the following statement from Kent's Commentaries was quoted with approval: "The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." In *Schwabacker v. Riddle*, 99 Ill. 343, it was held that, in an action for deceit on account of alleged fraudulent misrepresentations in the sale of property, no recovery can be had, unless the plaintiff himself exercises ordinary prudence and care against the deception and fraud practiced upon him.

In the second place, the facts show that appellant had, long years before the letter of August 1, 1895, was written, abandoned this property, and left the state of Illinois. He never paid anything upon the incumbrance upon the property after March 18, 1876, and never paid any taxes thereon after September, 1876. On the contrary, he left the state of Illinois in 1878, and paid no further attention to the property, evidently regarding it as not worth the amount of the incumbrance then existing upon it. He knew when he left Illinois in 1878, 17 years before he received the letter of August 1, 1895, asking him for a deed, that when he abandoned the property there was an incumbrance upon it. He must have known that a neglect for 17 years to pay any principal or interest upon the incumbrance would naturally lead to some steps on the part of the owner of the indebtedness to secure a foreclosure thereof. The correspondence shows that the appellant regarded his interest in the land as worth little, because of its small value as compared with the incumbrance upon it, and that the real inducement to the execution of the deed asked for by the appellee was his own conviction of the small value of his interest, as indicated by his conduct in abandoning the property 17 years before. In *Douglass v. Littler*, *supra*, such abandonment was regarded as a circumstance going to show that the party claiming to be defrauded did not so much rely upon the representations made to him as upon the pre-existing belief that he had lost his interest in another way, and by other means.

In the third place, it is well settled that, in order to constitute such a fraudulent representation as will induce a court of equity to set aside an executed deed, it must not only appear that the representations are untrue, but also that the party making them knew them to be untrue at the time of making them. *Tone v. Wilson*, 81 Ill. 529; *Schwabacker v. Riddle*, supra; *Grier v. Puterbaugh*, 108 Ill. 602; *Campbell v. Hillman*, 15 B. Mon. 508; *Stitt v. Little*, 63 N. Y. 427; *Byard v. Holmes*, 34 N. J. Law, 296. We are satisfied from the evidence that neither the appellee nor his attorney, at the time the letter of August 1, 1895, was written, knew anything about the extension which had been granted by the terms of the receipt of March 18, 1876. It does not appear that they knew that an attempt was not made to foreclose the mortgage against these lots, as well as against the rest of the property, in May, 1876. So far, therefore, as the representations in the letter appear to have been false in view of the receipt of March 18, 1876, it cannot be said that such representations were known to be untrue at the time of making them.

But, in the fourth place, it is a well-settled principle, in regard to false representations, that fraud without damage is neither sufficient to support an action at law, nor a ground for relief in equity. Fraud and injury must concur, to furnish a ground for judicial action. In an action for fraudulent representations, the plaintiff must not only show that the representations were made, and that they were false and fraudulent, but he must also show affirmatively that he has been injured thereby. 8 *Walt, Act. & Def.* pp. 442, 453; *Bartlett v. Blaine*, 83 Ill. 25; *Werden v. Graham*, 107 Ill. 169; *Nye v. Merriam*, 35 Vt. 438; *Freeman v. McDaniel*, 23 Ga. 354; *Taylor v. Guest*, 58 N. Y. 262; *Hanson v. Edgerly*, 29 N. H. 343. If this principle be applied to the facts of the case, it cannot be said that the appellant suffered any injury from the representations made to him in the letter of August 1, 1895, even if such representations were false. This will appear from the following considerations: When the appellant purchased these lots from Harrison C. Jones, he assumed and agreed to pay the proportionate parts of the incumbrance represented by the trust deed, which rested upon these particular lots. He therefore occupied the same position, so far as his obligation to discharge these parts of the incumbrance was concerned, as the original mortgagor occupied in relation to the same. Where a conveyance is made subject to a mortgage upon the premises, the payment of which the grantee, by the terms of the deed, assumes, he thereby becomes personally liable for the mortgage debt. It has been held that where a deed poll, which recites that it is subject to certain incumbrances on the property, and that the party of the second part thereto assumes and agrees to pay such incumbrances and liabilities, is accepted by the grantee, he is

liable, in an action of assumpsit, to pay the incumbrances therein mentioned. *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762; *Bay v. Williams*, 112 Ill. 91; *Dean v. Walker*, 107 Ill. 540; 8 *Walt, Act. & Def.* p. 497; *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081. This being so, the debt represented by the mortgage upon the lots was a debt due to the mortgagee as much from the appellant as from the original mortgagor, Payne. The testimony shows that in 1878, about four years after the mortgage or trust deed was executed, appellant left the state of Illinois, and has ever since that time been a nonresident of the state. Section 18 of the limitation act provides that if, after the cause of action accrues against a person, he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action. *Pells v. Snell*, 180 Ill. 379, 23 N. E. 117. Section 11 of the limitation act provides that no person shall commence an action, or make a sale, to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within 10 years after the right of action or right to make such sale accrues. We have held that said section 18, providing for the deduction of the time of the absence from the state of a debtor departing after the right of action accrues, applies to a suit to foreclose a mortgage; the mortgage being a mere incident of the debt, and being barred when the debt is barred. *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 918. It is therefore evident that the right to foreclose the incumbrance resting upon these lots has not been barred as against appellant. Only 4 years of the 10 years which the mortgage had to run had passed in 1878, when appellant ceased to be a resident of Illinois. If the period of his absence be deducted, the bar of 10 years cannot be successfully applied to an action to foreclose the mortgage. The testimony in the case shows that these lots are worth only about \$1,000. The testimony also shows that the whole amount due upon the incumbrance upon the lots, including principal and interest and taxes paid by the mortgagees, and interest upon such payments of taxes, amounts to at least \$1,000. The incumbrance upon the lots being as much in amount as the lots are worth, the appellant suffered no injury by the representations made to him. He was offered \$5 for a quitclaim deed. He declined the offer, and himself proposed to receive \$10 for a deed. The \$10 were paid to him. Before he can derive any benefit from this land, or receive any title thereto which will be a substantial benefit to him, he must pay off an incumbrance amounting to the full value of the land. In view of this state of things, it cannot be said that fraud and injury concur in this case. In other words, the appellant has not shown affirmatively that he has been injured by the representations which he charges to have been falsely made to him.

In view of the considerations thus presented, we are inclined to the opinion that the circuit court committed no error in dismissing the bill. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(175 Ill. 537)

MERRITT et al. v. CITY OF KEWANEE.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL IMPROVEMENTS — PETITION — SUFFICIENCY.

1. Under Laws 1897, p. 101, § 4, providing that cities of a certain class can pass local improvement ordinances only on petition of the owners of a majority of the abutting property, a petition for a local improvement, signed as owners by the husbands of the owners, is insufficient, it being a substantial variance, within section 9, invalidating such proceedings only for a willful or substantial variance.

2. Under said provision a tenant in common cannot sign a petition in behalf of his co-tenants.

3. Laws 1897, p. 101, §§ 4, 7, requiring a petition of the owners of a majority of abutting property addressed to the board of public improvements as a condition precedent to the making of such improvement, requires a written and signed petition.

4. Where the petition under said provisions is signed by the husbands of the owners as owners, and not as agents for their wives, it cannot afterwards be ratified by the wives, since the signing was not under a pretense of agency.

5. The petition required by said provisions being a condition precedent, an ordinance void because of a defectively signed petition is not validated as against objecting abutters by the subsequent ratification of the petition by the signers.

Appeal from Henry county court; A. R. Mock, Judge.

Proceedings by the city of Kewanee against H. Clay Merritt and others to confirm an assessment for a local improvement. There was a judgment of confirmation, and the objectors appeal. Reversed.

This is a proceeding in the county court of Henry county, begun by a petition filed on August 23, 1897, by the city of Kewanee, for the confirmation of a special tax on contiguous property for the purpose of paving a part of a street known as "Tremont Street," in that city. The proceeding was instituted under the act of the state of Illinois approved June 14, 1897, in force July 1, 1897, entitled "An act concerning local improvements" (Laws Ill. 1897, p. 101). Attached to the petition is an ordinance numbered 10 of said city, providing for such pavement, and that the cost thereof shall be raised by the levy of a special tax on contiguous property. The ordinance was adopted on August 17, 1897. The petition sets forth that prior to the passage of the said ordinance a petition was filed with the board of local improvements of said city, which was signed by the owners of more than one-half of the property proposed to be improved, and which prayed that said street should be paved with vitrified brick. The petition also alleges that on August 7, 1897, the board of local improvements passed

a resolution setting forth the filing of said petition last named, a description of the improvement, and estimate of the cost of the same, and the manner in which such cost should be provided for; that, on August 7, 1897, notices were posted, calling a meeting on August 17, 1897, of persons interested; that a meeting was held on said last-named date; that said resolution was amended by submitting a corrected estimate of the cost, and providing that funds therefor, excepting the costs of street and alley intersections, should be raised by special taxation of contiguous property, instead of assessment as theretofore proposed; that the board of local improvements prepared a draft of an ordinance for said improvement, and submitted the same, together with the estimated cost, etc., to the city council; that the ordinance so submitted is ordinance No. 10, above referred to; that the president of said board appointed Theron H. Chesley as a suitable person to apportion said special tax between said city and the owners of the property, and to apportion the same among the lots, blocks, etc., liable to the assessment for the improvement. The petition prays for an order directing said Chesley to make a true and impartial assessment upon the city and upon the property benefited by such improvement, and that he apportion the same among the lots, blocks, etc., contiguous thereto, and that he give notice of the filing of the assessment roll prepared by him. On August 24, 1897, an order of court was entered, granting the prayer of the petition; and an affidavit of the said Theron H. Chesley was made as to the assessment made by him under said order, which affidavit is attached to and made a part of the assessment roll. An order was made by the county court on August 25, 1897, that the assessment roll be set for hearing on September 10, 1897, and that notice thereof be published. Objections were filed September 10, 1897, by H. Clay Merritt, appellant, and others. The hearing was continued to October 13, 1897, and an order was made that objectors amend their objections on or before October 13th. The court overruled the objections, except as hereinafter stated, to which order overruling their objections appellants excepted. The court entered an order confirming the special tax, except as to the points to be passed upon by the jury. The hearing was continued until January 3, 1898, when final decree was entered, holding the assessment of the special tax to have been legally made. The objections not overruled were to the effect that the property of the objectors would not be benefited to the amount of the assessment, and that such property was assessed more than its proportionate share of the cost of the improvement. These latter objections were set for hearing December 6, 1897, and the hearing thereof was continued to December 8, 1897, whereupon the objections not theretofore overruled, and which should be heard by a jury, were

waived, and objectors were defaulted as to such objections. In the final decree, entered on January 3, 1898, the court found that said ordinance numbered 10 was legal and valid, and confirmed the assessment in every particular. The present appeal is prosecuted from such judgment of confirmation.

C. C. Wilson and J. R. Moore, for appellants. William Lawson, City Atty. (Charles K. Ladd, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The present proceeding is brought under the act of June 14, 1897, "concerning local improvements." That act makes material changes in the mode of making local improvements by special taxation and special assessment. The act provides for the creation of a board of local improvements, which, in cities having a population of 25,000 or more, is made to consist of five members, and, in cities having a population of less than 25,000, and in villages and incorporated towns, is made to consist of three members. The city of Kewanee has a population of less than 25,000 inhabitants. The board of local improvements in cities having a population of less than 25,000 consists of the mayor of the city, and a superintendent of streets, and a public engineer, to be appointed as provided in the act, or two members of the city council, in case the last two named officials have not been provided for by ordinance. Section 4 provides that, when any city shall, by ordinance, provide for the making of any local improvement, it shall therein prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both. Section 7 provides that all ordinances for local improvements to be paid for wholly or in part by special assessment or special taxation shall originate with the board of local improvements; that petitions for any such public improvement shall be addressed to said board; that the board shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board; that the board shall by the same resolution fix a day and hour for the public consideration thereof, which shall not be less than 10 days after the adoption of the same; that the board shall also cause an estimate of the cost of such improvement to be made in writing by the public engineer, if there be one,—if not, then by the president, over his signature,—which shall be itemized to the satisfaction of the board, and made a part of the record of such resolution; that notice of the time and place of such hearing shall be given in the manner stated in said section 7; and that if, upon such hearing, the board shall deem such improvement desirable, they shall adopt a resolution therefor, and prepare and submit an ordinance therefor, as in said act provided. Section 8 provides that at the time fixed for such hearing the board

shall meet, and hear the representations of any person desiring to be heard on the subject of the necessity for the proposed improvement, the nature thereof, or the cost as estimated; that, after such hearing, in case of objection, the board shall adopt a new resolution, abandoning the proposed scheme, or modifying the same, or adhering thereto; that, if the proposed improvement is not abandoned, the board shall cause an ordinance to be prepared therefor, to be submitted to the city council; and that such ordinance shall prescribe the nature, character, locality, and description of such improvement, and shall provide whether the same shall be made wholly or in part by special assessment, or special taxation of contiguous property; and, if in part only, shall so state. Section 9 provides that with any such ordinance presented by such board to the city council there shall also be presented a recommendation of such improvement by the said board, signed by at least a majority of the members thereof. Section 10 provides that together with the ordinance and recommendation shall be presented to the city council an estimate of the cost of such improvement, itemized so far as the board shall think necessary, over the signature of the engineer of the board, if there be one, and by the president if there be no engineer, who shall certify that, in his opinion, the estimate does not exceed the probable cost of the improvement proposed, and the lawful expenses attending the same. Section 4 also provides that "in cities, towns or villages having a population of less than 25,000, ascertained as aforesaid, no ordinance for making any local improvement shall be adopted, unless the owners of a majority of the property in any one or more contiguous blocks abutting on any street, alley, park or public place shall petition for such local improvement." Section 5 provides that: "No ordinance for any local improvements, to be paid wholly or in part by special assessment or special taxation, shall be considered or passed by the city council or board of trustees of any such city, village or town, unless the same shall first be recommended by the board of local improvements provided for by this act." Section 34 provides that: "Whenever the owners of a majority of the property in any one or more contiguous blocks abutting on any street, alley, park, or public place, shall petition for any local improvement thereon, the board of local improvements, in any city, village or town, shall take the steps hereinbefore required for a hearing thereon, but at such hearing shall consider only the nature of the proposed improvement, and the cost thereof, and shall determine, in the manner above provided, the nature of the improvement which they will recommend, and shall thereupon prepare and transmit to the legislative body a draft of an ordinance therefor, together with an estimate of the cost, as above described, and shall recommend the passage thereof, which recommendation shall

be prima facie evidence that all the preliminary steps required by law have been taken; and thereupon it shall be the duty of such legislative body to pass an ordinance for the said improvement, and take the necessary steps to have the same carried into effect." Section 9 also provides that: "The recommendation by said board, shall be prima facie evidence that all the preliminary requirements of the law have been complied with; and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same willful or substantial."

One of the objections made by appellants in the court below was that the ordinance No. 10 was invalid upon the alleged ground that the owners of a majority of the contiguous property did not petition for said improvement, and that no petition signed by the owners of a majority of said property was ever presented to the board of local improvements before the passage of said ordinance, and that no local ordinance was passed or adopted by the city council of the city of Kewanee authorizing said assessment. The petition addressed to the board of local improvements, in this case, which was offered in evidence, contained the names of 52 persons who claimed to be owners of contiguous property representing 4,196 feet and a fraction. Counsel for the appellants say in their brief: "The petition in this case asking for the improvement purports to embrace the lots on both sides of the street to be improved, measuring 7,571.6 feet, a majority being 3,785.9 feet." Counsel for the appellee say in their brief: "The total frontage of the private property upon this improvement is 7,473.2 feet, requiring a petition signed by the owners of 3,736.6 feet of frontage to authorize this improvement." The difference between counsel as to the total frontage and as to the number of feet which constitute a majority of the frontage seems to arise out of the fact that counsel for appellants include in their estimate certain property abutting upon the street to be paved which belongs to the city, while counsel for appellee exclude such abutting property so belonging to the city. We do not deem it necessary to decide the question whether it was proper or not to include in the estimate this city property. It may be conceded, for the purposes of this decision, that the appellee is correct in fixing the total frontage at 7,473.2 feet, and fixing a majority of the frontage at 3,736.6 feet. As the persons signing the petition represented 4,196 feet, the petition to the board of local improvements was signed by more than a majority, if all the signatures were the signatures of the owners of the property in any one or more contiguous blocks abutting upon the street to be paved.

The evidence, however, shows that the petition to the board of local improvements was signed by certain persons who were not owners of any property abutting upon the

proposed improvement. Lots abutting thereon were owned by married women, and the petition was signed by the husbands of these women in their own names as owners, and not as agents of their wives. It also appears that certain lots abutting upon the improvement were owned by several tenants in common, and that the petition was not signed by all of the tenants in common owning such lots. For instance, one person, who owned an undivided one-third of a lot, signed the petition as the owner of the whole of it. In another case, one person, who owned an undivided one-eighth part of a lot, signed the petition as the owner of the whole of it. After deducting from the number of feet purporting to be signed for by owners of the abutting property, to wit, 4,196 feet, those lots and parts of lots which were owned by married women and by tenants in common, where the husbands of the married women signed as owners, and where one tenant in common signed for the other tenants in common owning a particular lot, the petition was not signed by the owners of a majority of the abutting property. Section 4 of the act of 1897 states that, in cities having a population of less than 25,000 "no ordinance for making any local improvement shall be adopted unless the owners of a majority of the property in any one or more contiguous blocks abutting on any street, alley, park or public place shall petition for such local improvement." The requirement of the statute is thus imperative that the owners of a majority of the abutting property shall petition for the improvement. As the evidence shows that the petition in this case was not signed by the owners of a majority of the abutting property, after excluding the signatures so made by married men and so made by tenants in common, then the ordinance prepared by the board of local improvements and submitted to the city council, and which lies at the basis of this assessment proceeding, was invalid. *Thorn v. Commissioners*, 130 Ill. 594, 22 N. E. 520.

Counsel for appellee say that the statute does not require that any petition shall be signed. The words of the statute are, "unless the owners * * * shall petition for such local improvement." It seems to be claimed that the local improvement can be petitioned for without the presentation of a petition in writing. We think, however, that the statute contemplates a written petition, as may be seen by reference to the language used in section 7, where it is said, "Petitions for any such public improvements shall be addressed to said board." It is not customary to speak of an oral petition to a public body as being a petition addressed to such body. In *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632, the charter of the city of Amsterdam provided that no street should "be paved by said city unless the owners, owning a majority of the amount of lineal feet fronting on the part of the street proposed to be

paved, petition therefor; and the same shall be ordered by a vote of two-thirds of the common council." It will be observed that, in the statute referred to in the Miller Case, the same words are used as in the Illinois act of 1897, to wit, "petition therefor"; and yet it was held in that case that, upon a petition purporting to be signed by the owners of a majority of the lineal feet fronting on that part of the street to be paved, an assessment levied for paving, ordered on a petition which, though believed to represent such owners, did not in fact do so, was void for want of jurisdiction. In that case the referee found that the owners of the required frontage upon the street "did not sign the petition," and the court held that the common council did not acquire jurisdiction to lay the pavement.

Counsel for appellants claim that the evidence in this case failed to show that the married women whose husbands signed the petition had given their husbands any written authority to do so, and also failed to show that the tenants in common not signing had given any written authority to their co-tenants who did sign, and that, therefore, the signatures were invalid. This contention is based upon the assumption that, if the signatures thus made were made by the agents of the parties not signing, their authority to do so should have been in writing, upon the alleged ground that the assessment was a charge upon the real estate, and, as such, involved such an interest in land as, under the statute of frauds, required the authority of the agents to be in writing. We do not deem it necessary to pass upon the question whether there was here any such interest in land as operated to make the signatures void because of the absence of written authority to the supposed agents. It may be conceded, for the purposes of this case, that oral authority was sufficient to authorize the signatures of the owners of the lots to the petition to the board of local improvements. So far as the tenants in common are concerned, there is no claim that they had any authority, either oral or written, to sign the names of the other tenants in common of each lot which they represented. Neither is it claimed that there was any ratification by the tenants in common not signing of the acts of those who did sign. It must, therefore, of necessity be true that the signature of one tenant in common of a lot was not the signature of the owners of the other undivided interests in the lot. It follows that each tenant in common who signed the petition only signed for the individual part of the lot which he owned, and not for the undivided portions thereof which he did not own. The husbands who here signed their names did not sign the names of their wives by themselves as agents, but signed their own names as owners. The petition begins, "We, the undersigned, owners of property abutting," etc. The evidence does not show that the husbands so signing had

any previous oral authority to sign the names of their wives to the petition. It is claimed, however, that their acts in so signing the petition were ratified by their wives subsequently. Certain ratification papers were introduced in evidence, executed by a number of these married women in October, 1897, long after the ordinance for the improvement was passed, and long after the petition upon which this proceeding is based was filed in the county court. These ratification papers purported to be acknowledged before notaries public. Their admission was objected to by the appellants, and the objections were overruled. We know of no statute which makes the acknowledgment of such an instrument proof of its execution. The married women signing these ratification papers were not placed upon the stand so as to give the objectors an opportunity to cross-examine them, but the papers themselves were introduced, with no other proof than that of the signatures thereto. Whether this was a proper mode of proving ratification or not, we are of the opinion that such papers did not have the effect of ratifying the acts of the husbands of these married women in signing the petition to the board of local improvements, so as to give force and effect to the proceedings of the corporate authorities which were based upon said petition. It is laid down in many of the books that "a ratification is only effectual where the act is done by a person professedly acting as agent of the party sought to be charged as principal." 1 Am. & Eng. Enc. Law, p. 431. Mechem, in his work on Agency (section 127), says: "The act ratified must also have been done by the assumed agent as agent in behalf of the principal. If the act was done by him as principal, and on his own account, it cannot thus be ratified." There are some cases which hold that it is not indispensable, in order to bind the principal, that the contract shall be executed in the name and as the act of the principal. But, as a general thing, it will be found that in the latter class of cases the language of the instrument is such that it can be gathered therefrom that the party describes himself and acts as agent, and intends thereby to bind the principal, and not to bind himself. *Stackpole v. Arnold*, 11 Mass. 27; *Story, Ag.* (8th Ed.) §§ 147, 160a; *Townsend v. Corning*, 23 Wend. 435; *Townsend v. Hubbard*, 4 Hill, 351; *Hypes v. Griffin*, 89 Ill. 134; *Mears v. Morrison*, Breese, 223; *Powers v. Briggs*, 79 Ill. 493; *Railroad Co. v. Middleton*, 20 Ill. 629; *Bank v. White*, 159 Ill. 136, 42 N. E. 312. In the case at bar there is nothing upon the face of the petition signed, nor in any of its terms or language, to indicate that the parties signing represented any other person or persons than themselves.

Independently, however, of the question whether or not the ratification in this case was ineffectual by reason of the manner in which the petition was signed, the ratification cannot have the effect which is sought

to be given to it, for another and more substantial reason. It is true, as a general rule, that if an agent assumes to do an act which he has no authority from his principal to perform, such act, if not unlawful, may be ratified by the principal, and the ratification relates back to the performance of the act. It has been said that "in ordinary cases the ratification extends back to the beginning, and operates upon all that has since been done." *Mechem*, Ag. § 168. But this rule is subject to an exception. A ratification cannot relate back so as to cut off the intervening rights of third persons. *Williams v. Butler*, 35 Ill. 544. "If, prior to the ratification, the principal has put it out of his power to perform the contract ratified, by conveying the subject-matter thereof to a third person, who took the same in good faith, or, if third persons have in good faith acquired an estate or interest in, or a lien or claim upon, the subject-matter, by attachment, judgment, or otherwise, these rights cannot be cut off at the mere volition of the principal. Nor will the principal, by ratifying, be permitted to impose substantial duties or obligations upon third persons which would not exist if the ratification had not taken place." *Mechem*, Ag. § 168; *Cook v. Tullis*, 18 Wall. 332; *McCracken v. City of San Francisco*, 16 Cal. 624; *Taylor v. Robinson*, 14 Cal. 306; *Wood v. McCain*, 7 Ala. 800; *Pollock v. Cohen*, 32 Ohio St. 514. In other words, a ratification can only be made when the principal possesses at the time of the ratification the power to do the act ratified. The party ratifying should not merely be able to do the act ratified at the time when the act was done, but also at the time when the ratification is made. *McCracken v. City of San Francisco*, supra; *Cook v. Tullis*, supra. The ratification is the first proceeding by which the principal becomes a party to the transaction. *Cook v. Tullis*, supra. It is said that ratification by the wives whose husbands signed the petition as owners in this case operated upon the signing of the petition precisely as though the authority to do so had been previously given. If this were true, it would only be true so far as the wives themselves are concerned. But, acting upon the petition signed by the husbands who were not owners, as a basis, the board of local improvements made a recommendation of the improvement to the common council, and submitted to the common council the draft of an ordinance. This ordinance was passed and adopted by the common council. The petition, as originally signed, was, therefore, the foundation of the ordinance which was adopted on August 17, 1897. The ratification by the married women of the acts of their husbands in signing the petition could not have the effect to validate an ordinance based upon that petition. The statute expressly requires that a petition by the owners shall precede the passage of the ordinance. "No ordinance * * * shall be adopted, unless the owners of a majority," etc., "shall pe-

tion for such local improvement." In October, 1897, when the ratification papers above referred to were executed, the ordinance had already been adopted, and the rights of the present appellants, as objectors, to insist upon the invalidity of the ordinance, had already accrued. When the ratification took place, the married women so ratifying did not have it in their power to sign their names to a petition for the improvement provided for in the ordinance passed on August 17, 1897. The ordinance which had been adopted was "an ordinance for making a local improvement," as shown by the terms of section 4 of the act, and the owners of a majority of the abutting property must "petition for such local improvement"; that is to say, for the local improvement mentioned in the ordinance. In October, 1897, the wives of these signers could not sign a petition for the improvement specified in the ordinance which was actually passed, because the petition upon which that ordinance was based was required to precede, and did precede, the ordinance itself. The ordinance of August 17, 1897, based upon the insufficient petition, was a consequence flowing from that petition, which could not be embraced within the curative effect of the ratification sought to be made. By the terms of section 9, the recommendation made by the board of local improvements is made *prima facie* evidence that all the preliminary requirements of the law have been complied with. Hence, in the present case, when the petition and the recommendation and the ordinance were introduced in evidence, the city made a *prima facie* case, and the burden of proof was upon the objectors to show, if such was the fact, that the petition had not been signed as required by the act. Section 9 says that, "if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding unless the court shall deem the same willful or substantial." It is difficult to understand just what is meant here by the word "willful." It seems impossible to believe that the men who signed their own names as owners to this petition did not know that they themselves were not the owners, but that their wives were the owners, of the property for which they signed. Their acts in so signing would seem to have been, in a certain sense, willful, if not fraudulent. But, whether this is so or not, we think the proof here made shows that there was a "substantial" variance between the requirements of the law and the mode of signing the petition. Where the law requires that owners shall sign the petition, and parties who are not owners sign the petition, there certainly is a substantial variance between the law and the act done. It sufficiently appears from the testimony of these signers themselves that their wives were the owners of the property; and, while some of the proof introduced to establish ownership may not have been competent for that purpose, there was other proof that was com-

petent. The word "owner," as here used in the statute, means owner in fee. *Illinois Mut. Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman, 236; *Wright v. Bennett*, 3 Scam. 258; *White-side v. Divers*, 4 Scam. 336; *Jarrot v. Vaughn*, 2 Gilman, 182. Although the ordinance was *prima facie* valid in view of the recommendation made by the board of improvements, yet, when the proof showed that the petition had not been signed by the owners of a majority of the abutting property, the void character of the ordinance was established. It is well said that an act which is void at the time it is done cannot be ratified. Even the legislature cannot impart life to a void proceeding. *Mechem, Ag.* § 114; *Day v. McAllister*, 15 Gray, 433; 1 Am. & Eng. Enc. Law, p. 430; *McDaniel v. Correll*, 19 Ill. 226; *Miller v. City of Amsterdam*, supra; *Marshall v. Silliman*, 61 Ill. 218. Unless a valid ordinance is shown, there is nothing upon which the subsequent assessment proceeding can rest. Such a valid ordinance is the foundation for an improvement by special assessment or special taxation, and cannot be dispensed with. *City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782; *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443; *City of East St. Louis v. Albrecht*, 150 Ill. 510, 37 N. E. 934. In proceedings for the collection of taxes or special assessments or special taxes, the requirements of the statute must be strictly followed. *McChesney v. People*, 148 Ill. 221, 35 N. E. 739; *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926. We are of the opinion that the county court erred in not sustaining the objection that the petition for the improvement in this case was not signed by the owners of a majority of the property in any one or more contiguous blocks abutting on the street proposed to be paved. For the error in refusing to sustain the objection, the judgment of confirmation entered by the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(175 Ill. 101)

LIPPMAN v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

SPECIAL ACTS—CONSTITUTIONALITY—SEARCHES.

1. 3 Starr & C. Ann. St. 1896, c. 140, pars. 1-5, for the protection of manufacturers and bottlers of certain beverages from loss of casks, bottles, etc., is in conflict with Const. art. 4, § 22, prohibiting the passage of special laws, since it does not embrace all who are engaged in a particular calling.

2. 3 Starr & C. Ann. St. 1896, c. 140, § 4, providing for the issuing of a search warrant on complaint under oath of any manufacturer, bottler, or dealer in beverages that he "believes" that a person, in violation of the act, is using or has used upon his premises any of plaintiff's casks, bottles, etc., is unconstitutional, as it permits a search without an affidavit that a crime has actually been committed.

Error to criminal court, Cook county; Theodore Brentano, Judge.

Louis Lippman was convicted of using marked and registered bottles, and he brings error. Reversed.

Zolotkoff & Zoline, for plaintiff in error.
E. S. Cummings, for defendant in error.

CARTWRIGHT, J. On the affidavit of John A. Carey, agent of the Gottfried Brewing Company, a warrant was issued by a justice of the peace of Cook county, directed to all sheriffs, coroners, and constables of this state, commanding them to search the premises of the plaintiff in error for 400 beer bottles, and 40 casks, barrels, kegs, and boxes, having the marks of said company on them, and, if the same or any part thereof should be found upon such search, to bring the same before the justice, and arrest the plaintiff in error, and bring him also before the said justice, to be disposed of according to law. Return was made on the warrant by the constable who executed it that he found 27 bottles marked "Gottfried Brewing Co."; and he brought the same before the court, and arrested plaintiff in error, and brought him also. The prosecution was instituted under an act entitled "An act to protect manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes." Rev. St. c. 140, entitled "Trade-Marks." Plaintiff in error was found guilty, and fined. He appealed to the criminal court of Cook county, and, at the trial there, the following facts were agreed upon: The Gottfried Brewing Company is a corporation, organized for the purpose of brewing beer. It complied with the provisions of said act by filing in the office of the secretary of state and in the office of the county clerk of Cook county a description of the names and marks on its bottles and boxes, and by publishing the same. On the bottles are the words "Gottfried Brewing Co., Chicago, Ill.," and "This bottle is never sold," or "Golden Drop," and "Gottfried Brewing Co., Chicago," cast or blown in the glass. The words "Gottfried Brewing Co.'s Golden Drop Beer, Chicago, Tel. South 429," are stamped or marked on the boxes. The defendant is a bottler of lager beer in Chicago, and on July 2, 1894, filled with lager beer 27 bottles so marked. It was proved that he did not have the written consent of the brewing company to make such use of the bottles. He was again convicted, and fined \$13.50 and costs, and sued out the writ of error in this case to review the proceedings.

It is conceded that defendant violated the provisions of the act under which he was prosecuted, but it is claimed that the act is unconstitutional, and the case is brought here direct from the trial court on that ground. The provisions of the constitution which it is claimed are violated by the enactment are section 22 of article 4, which prohibits the general assembly from passing a special law

granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever, or in any other case where a general law can be made applicable; and section 6 of article 2, which protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The act in question applies only to manufacturers, bottlers, and dealers in ale, porter, lager beer, soda, mineral water, and other beverages. The term "other beverages," under the settled rule of construction, includes only beverages of the same kind or class as the particular antecedent terms of description employed in the act. The object of the act, as gathered from its provisions, is to protect and benefit that class of persons. It gives to them the exclusive right to register the names and marks of ownership, stamped or marked on their casks, barrels, kegs, bottles, or boxes, and gives to them the exclusive privileges and protection arising therefrom. It confers upon them the power to call upon the state and its officers and judiciary to act as collectors of their bottles, kegs, and boxes which they have voluntarily scattered over the state among their customers. It attempts to place at their disposal the extraordinary right of the search warrant, by which they may arm a constable or other officer with process to intrude upon the premises or the home of any citizen to recover their bottles, kegs, and the like. The object of the act is not only evident from its provisions, but also from its title, where the legislature is required to express its general purpose, and which they have expressed as follows: "An act to protect manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes." While, perhaps, no precise and comprehensive definition of the word "privilege," as used in constitutions, has been attempted, the right to employ remedies for the collection of debts, the recovery of property, and the enforcement of rights has always been included in the term as used in the federal constitution. It seems that the peculiar benefits, advantages, and rights conferred by this act upon the persons named in it, and the right to employ an unusual remedy for the recovery of their property, must be classed as privileges; and this does not seem to be denied in the argument. It is argued, however, that the law conferring these privileges is not a special, but a general, one, because it applies to all persons similarly situated. General laws have been defined to be those which relate to or bind all within the jurisdiction of the lawmaking power, while a special law is limited in the object to which it applies. It is often the case, however, that the rights and protection given by a law cannot be enjoyed by every citizen by reason of the subject to which the law relates. If the law is general, and uniform in its op-

eration upon all persons in like circumstances, it is general in a constitutional sense, but it must operate equally and uniformly upon all brought within the relation and circumstances for which it provides. On the other hand, if it is limited to a particular branch or designated portion of such persons, it is special. *People v. Wright*, 70 Ill. 388; *People v. Cooper*, 83 Ill. 585; *Hawthorn v. People*, 109 Ill. 302. Although general in its character, a law may, from the nature of the case, extend only to particular classes, such as minors, married women, laborers, bankers, or common carriers. Such a law is not obnoxious to the provisions of the constitution if all persons of the class are treated alike under similar circumstances and conditions; but it is not a proper application of the definition to say that a law is general because it applies uniformly to all persons in the conditions and circumstances for which it provides, although only a particular branch of a class or some particular description of persons. If an act should attempt to confer privileges only on persons of a certain stature, it could be said to apply uniformly to all people answering such description, and yet it would be absurd to say that such a law would be a general one. The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances.

This act singles out one branch of a class of manufacturers and dealers who may have occasion to use, or who do use, in their business, bottles, barrels, kegs, or other packages for their goods. It selects those whose particular manufacture or stock consists of certain varieties of drink. No other person who manufactures any product, or sells it in casks, barrels, kegs, bottles, or boxes, can avail himself of the privilege of registering his trade-marks, or of the consequent protection; but the act denies to him the privileges afforded to those named in the act. The grocer, farmer, fruit dealer, merchant, druggist, or other dealer or manufacturer cannot avail himself of the privileges or remedy afforded by this act to protect himself against the loss of his property under the same circumstances. The purpose of this act, passed in behalf of the persons named in it, is not to recover bottles stolen, embezzled, or fraudulently obtained by false tokens or pretenses, but to make the proceedings under it, as to such persons, a substitute for the action of replevin. The general search warrant law of the state covers all the cases just mentioned, and was on our statute book when this act was passed. There are and were general laws in force, applicable uniformly to all persons in the state, for the recovery of personal property wrongfully obtained by another. This law was needless for that purpose, and it could only have been passed to give to the particular persons named in it additional privileges, by making the criminal law supersede the writ of replevin. The plain purpose

of the act is to make the officers of the state detectives, searchers for and collectors of beer bottles, beer kegs, and the like. It is for a mere private benefit, having no relation to the police power or the protection of the public against frauds or injurious preparations; since, if the brewer or dealer consents, the bottles or kegs may be refilled with any sort of drink different from the marks, and it will be no offense under the act, however injurious to the public. The citizen or the health officer can neither institute a prosecution, nor cause search to be made, but in either instance it must be by the owner or agent. The public has no rights under it, and neither the title nor any provision indicates any public purpose.

In the case of *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, the decision turned upon the provision of the bill of rights that no person shall be deprived of property without due process of law, but the question whether the act which was being considered violated that provision involved the question whether the act was a general, public law. It was conceded that the act prohibiting keeping open a barber shop on Sundays would be valid if of general and uniform application to all laborers, and the constitutionality of such a law is thoroughly established. The distinction was there pointed out that where legislation concerns laborers, and there is no reasonable ground of distinction or division into classes, the general class includes all laborers, and, barbers being only a branch of that class, the law was not general. There is no difference in the application of the principle in the different cases, and the decisions cited in support of the claim that a law is general although applying only to a subdivision of a class do not support the claim. In *Hawthorn v. People*, supra, the act embraced all persons in the state brought within the relation defined by it, and it did not appear that there were any with similar rights or relations excluded from it. In *Cohn v. People*, 149 Ill. 486, 37 N. E. 60, the trade-mark law of 1891 was held to be general, on the ground that it extended to every association, person, and corporation within the state desiring to avail itself of its privileges. In *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, the statute, which was held to be a general law, applied to all wage-earners in the state, and did not attempt to select from that class any particular branch of such laborers. The law exempting the wages of a defendant who is the head of a family, to a certain amount, from garnishment, embraces all heads of families in the state. There is an exception to the exemption law where the claim is for the wages of a laborer or servant, but it includes every laborer and servant. There are laws giving to certain classes a special lien, but they are based on what has been deemed a reasonable ground of distinction,—that the material, services, or keeping enhance the value of property, or are necessary to existence. A me-

chanic's lien law has never distinguished between those who erect buildings of different kinds or different material; and, although uniform in application, such laws have always been regarded so far obnoxious, as conferring special privileges, that they are subject to strict construction. If this act is valid, it would be equally so if its benefits were confined to brewers alone, or to the manufacturers of soda or the dealers in mineral waters. It would then, as it does now, embrace only a part of the manufacturers of or dealers in products which require the use of barrels, boxes, or bottles. In conferring upon the persons named in the act the exclusive privileges given thereby, of which other citizens are deprived, the constitutional provision is violated.

Section 6 of article 2 of the constitution is as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized." Section 4 of the act in question provides as follows: "In case the owner or owners of any cask, barrel, keg, bottle or box so marked, stamped and registered as aforesaid, shall, in person or by agent, make oath in writing, before any justice of the peace or police magistrate, that he has reason to believe, and does believe, that any manufacturer or bottler of ale, porter, lager beer, soda, mineral water or other beverage, or any other person, is using, in any manner by this act declared to be unlawful, any of the casks, barrels, kegs, bottles or boxes of such person or his principal, or that any junk dealer or dealer in casks, barrels, kegs, bottles or boxes, or any other dealer, manufacturer or bottler, has any such cask, barrel, keg, bottle or box secreted in, about or upon his, her or their premises, the said justice of the peace or police magistrate shall issue his search warrant and cause the premises designated to be searched as in other cases where search warrants are issued, as is now provided by law; and in case any such cask, barrel, keg, bottle or box, duly marked or stamped and registered as aforesaid, shall be found in, upon or about the premises so designated, the officer executing such search warrant shall thereupon arrest the person or persons named in such search warrant, and bring him, her or them before the justice of the peace or police magistrate who issued such warrant," etc. The search warrant provided for can be issued only at the instigation of the owner of the property to be searched for, or his agent, and, as already shown, is to be employed merely for the maintenance of his rights by making the officers of the state searchers for his bottles, kegs, etc. The premises of a citizen cannot be intruded upon, under a search warrant, for any such private purpose. Bishop, in his work on Criminal

Procedure (volume 1, § 716), states the rule by quoting from the opinion in *Robinson v. Richardson*, 13 Gray, 454, as follows: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings or for the maintenance of any mere private right, but their use was confined to cases of public prosecutions instituted and pursued for the suppression of crime or the detection or punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because without them felons and other malefactors would escape detection." The record in this case illustrates the well-understood purpose of the act as well as the manner of its prosecution. The complaint and warrant are each a printed form, not intended to describe a particular offense, but made in advance to fit all cases, ready to be sworn to, without regard to the facts of particular cases. The property charged to be in the possession of the defendant, and directed to be seized and brought before the court, is a part of the printed matter, for use on all occasions. The printed complaint describes the property as "four hundred of said bottles and forty of said cases and boxes," and the warrant as "said forty casks, barrels, kegs, boxes, and said four hundred bottles, or some part thereof." No wonder there should be a variance between such an affidavit or warrant and the facts of the particular case, as there was here.

This section of our constitution is identical with the fourth amendment to the constitution of the United States, except that it substitutes the word "affidavit" for "oath or affirmation." It is a step beyond the constitution of the United States, in requiring the evidence of probable cause to be made a permanent record in the form of an affidavit; otherwise, it is the same. It has been uniformly held, wherever the question has arisen under a statute or constitution containing such provision, that the oath or affirmation must show probable cause arising from facts within the knowledge of affiant, and must exhibit the facts upon which the belief is based, and that his mere belief is not sufficient. *U. S. v. Tureaud*, 20 Fed. 621; *Johnston v. U. S.*, 30 C. C. A. 612, 87 Fed. 187. The constitutional provisions on this subject had their origin in the abuse of executive authority, and their design is to substitute judicial discretion for arbitrary power, so that the security of the citizen in his property shall not be at the mercy of individuals or officers. The general statute authorizing search warrants, contained in the Criminal Code, fully recognizes this rule by the requirement that the judge or justice of the peace shall be satisfied that there is reasonable cause for the

belief of the affiant, before he shall issue his warrant. Wherever a statute requires probable cause, supported by oath or affirmation, the complaint must set up facts, and cannot rest on mere belief, which will not satisfy the requirement. *Blythe v. Tompkins*, 2 Abb. Prac. 468; *People v. Heffron*, 53 Mich. 527, 19 N. W. 170; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619. A search warrant can only be granted after a showing made before a magistrate, under oath, that a crime has been committed; and the law, in requiring a showing of probable cause, supported by affidavit, intends that facts shall be stated which shall satisfy the magistrate that suspicion is well founded. The mere expression of opinion, under oath, is no ground for the warrant, except as the facts justify it. *Cooley, Const. Lim.* (4th Ed.) 372: "The warrant is not allowed to obtain evidence of an intended crime, but only after lawful evidence of an offense actually committed." *Id.* 374. The act now under consideration does not even require an affidavit that any offense has been committed, and an affidavit which fulfills its conditions belongs to a class universally condemned by every authority, when used to disturb a citizen in the security guaranteed him by the constitution. It requires nothing but the belief of the party making the affidavit; and, as he is not required to state any fact or satisfy the magistrate that there is reasonable ground for his belief, he may just as well swear by wholesale, according to the printed form, to 400 bottles and 40 kegs, as to his affidavit to the facts of a particular case. The act attempts to transfer the judicial discretion, which the constitution intended should be exercised by the magistrate, from that officer to the party making the affidavit. The vesting of such discretion in the magistrate has been the main purpose of constitutional provisions of this character, while this act destroys the protection secured, and permits the affiant to pass upon the question of probable cause. The search warrant appears to be intended as a means of collecting evidence. The act not only avoids the requirement of an affidavit that any crime has been committed, but it provides that the party accused shall be arrested in case beer bottles or other property described in the act is found about his premises; and, when such property is brought before the court, the act makes no provision for the disposition of it. It is only after a search by the officer for bottles, kegs, and the like that he learns whether he is to arrest the defendant or not, and, if he fails to find them, no arrest is to be made. This shows that the object of the search warrant is to obtain evidence, and, if it is not obtained, that is the end of the prosecution. Such a search is an unreasonable one. In *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594, the proceeding was against the offending thing itself, where the public was interested in its destruction for the purpose of stopping immoral practices and crime, and

it was immaterial whether service was had on the person in whose possession it might be found. There is no such element in this case, but the only purpose is to aid the individual to collect his property. The search provided for in the act is unreasonable, under the authorities, for the reasons we have given, and the provision is in violation of the constitution.

These questions were neither considered nor decided in *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, which is the main reliance of counsel to sustain this act. The New York statute is much more comprehensive than this act, and includes dealers in milk and cream, and manufacturers and dealers in medicines, medical preparations, perfumery, and compounds or mixtures, as well as those embraced in the terms of this act. The validity of that statute was tested on the claims that it granted a monopoly to the manufacturers of beverages by prohibiting the resale or gift by a purchaser of the contents of a bottle which the manufacturer refused to sell, and that it destroyed or unlawfully decreased the trade in empty bottles, which is a legitimate trade, and entitled to the equal protection of the law. The statute was held not subject to the first objection, and it was said that a buyer of the contents could sell the same in the bottle, and deliver the bottle with the contents. As to the second objection, it was held that the additional care required of a dealer in buying empty bottles was not an unreasonable restriction. The statute only applied where the bottle was not purchased with the contents from the person or corporation whose trade-mark was on it; and, in the three cases heard together, the judgments in two were reversed because there had been deposits of money as security for the return of the bottles, which amounted to a conditional sale of them. The decision is not an authority on any proposition in this case. The judgment is reversed. Judgment reversed.

(59 Ohio St. 80)

WRIGHT et al. v. FRANKLIN BANK et al.
(Supreme Court of Ohio. Nov. 1, 1898.)

TRUSTS—DEBTS OF TRUSTEE—LIABILITY OF ESTATE—ATTACHMENT—EXECUTION—PROPERTY SUBJECT—DEEDS—MORTGAGES—RECORDATION—ASSIGNMENTS FOR CREDITORS.

1. Lands held in trust cannot be sold on execution for the payment of the debts of the trustee, and judgments against such trustee are not liens upon such lands.

2. Any vested interest in lands, whether held by legal or equitable title, may be attached and sold, as upon execution, to pay the debts of the owner.

3. A mortgage upon an estate, or any interest therein, legal or equitable, to be valid as against third persons, must be signed, acknowledged, witnessed, and recorded, as provided in sections 4106, 4133, Rev. St.

4. An attachment levied upon an equitable interest in real estate has preference over an unrecorded mortgage on such interest.

5. A deed of assignment for the benefit of creditors, in due form, made and delivered in

a sister state, where the parties at the time resided, and conveying real estate situated in this state, takes effect from the time of its delivery, and has preference over an unrecorded mortgage upon such real estate.

6. As against subsequent bona fide purchasers without notice, a deed of conveyance of lands duly executed must be recorded as provided in section 4134, Rev. St., but such record is not required as against other parties.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by James C. Wright against the Franklin Bank and others to enforce and marshal liens against the estate of Thomas B. Youtsey. George P. Wilshire, receiver of the First National Bank of Newport, was subsequently made a party. A judgment was rendered, from which the receiver and plaintiff bring error. Affirmed.

The facts as disclosed by the record necessary to a full understanding of this case are as follows: In the year 1892, Thomas B. Youtsey and others became the owners of a tract of land in Hamilton county, Ohio, known as the "Hyde Park Syndicate Property." The interest of Mr. Youtsey in the property was somewhat greater than the undivided one-sixth part thereof. The legal title to the property was taken in the name of James E. Mooney, in trust for the persons composing the syndicate. As such trustee he had full power to sell, convey, or lease the property, or any part thereof, at such times, to such persons, and upon such terms as he might deem best. To enable Mr. Youtsey to pay for his interest in the property, the plaintiff in error James C. Wright executed as maker, for the accommodation of Mr. Youtsey, promissory notes, payable to the order of the latter, which were discounted by the First National Bank of Newport, Ky., of which Mr. Youtsey was the cashier at the time, and of which the other plaintiff in error, George P. Wilshire, is now the receiver. The proceeds of the notes so discounted were applied by Mr. Youtsey to the payment of his proportion of the purchase money of the syndicate property. Prior to January 16, 1895, the total amount of the notes executed by Mr. Wright for the accommodation of Mr. Youtsey, and discounted and used by the latter in paying for his interest in the property mentioned, was \$14,650. January 16, 1895, to secure Mr. Wright, Mr. Youtsey executed and delivered to him the writing of which the following is a copy: "January 16, 1895. James C. Wright has in the First National Bank several notes payable to my order. All these notes were made by him for the purpose of enabling me to raise money with which to pay my interest in the Hyde Park Syndicate in Hamilton county, Ohio, and I have used said notes for that purpose. My interest in said syndicate is liable for the payment of said notes. The interest of said James C. Wright is that for the execution of said notes by him, and all previous and subsequent similar ones, he is to have, from the profits of said venture, six

thousand dollars. This does not include money loaned by him to me in said venture, for which he holds my notes. T. B. Youtsey." The notes attempted to be secured by said instrument, five in number, and amounting to \$14,650, have never been paid. The First National Bank of Newport, Ky., ceased to do business after January 18, 1897, and January 21, 1897, the plaintiff in error George P. Wilshire was appointed its receiver, and qualified as such. January 18, 1897, the defendant in error the Franklin Bank began an action in the common pleas court of Hamilton county, Ohio, against Thomas B. Youtsey to recover \$20,000, and in the same case caused a writ of attachment to issue, and to be levied upon Youtsey's equitable interest in the Hyde Park Syndicate property. January 19, 1897, by the confession of Mr. Youtsey, it obtained a judgment against him for the amount of its claim. January 21, 1897, Mr. Youtsey, who was a citizen of Kentucky, and a resident of Newport, Campbell county, in that state, executed a deed of assignment for the benefit of his creditors to the defendant in error C. W. Nagel. This deed of assignment was recorded January 22, 1897, in the county clerk's office of Campbell county, Ky., and January 25, 1897, in the recorder's office of Hamilton county, Ohio. January 23, 1897, the plaintiff in error James C. Wright began an action in the common pleas court of Hamilton county, Ohio, against Thomas B. Youtsey, to recover of him the sum of \$25,717.81. Embraced in the sum sued for by Wright, and forming a part of his cause of action, was his claim against Mr. Youtsey for \$14,650 and interest, the amount of the liability of Mr. Youtsey to Mr. Wright, as accommodation maker, of the five notes hereinbefore mentioned, the proceeds of which Mr. Youtsey had used in paying for his interest in the Hyde Park Syndicate property. By confession of Mr. Youtsey, Mr. Wright obtained a judgment against him immediately for the amount sued for, upon which an execution was issued forthwith, and levied upon the interest of Mr. Youtsey in the Hyde Park Syndicate property, which had been attached by the Franklin Bank. The day that the judgment was obtained and the execution levied,—January 23, 1897,—Mr. Wright began the action, from the judgment in which the petition in error in this case is prosecuted, against the Franklin Bank, Mr. Nagel, assignee, and others, to enforce and marshal the liens against Youtsey's interest in the Hyde Park Syndicate property. In his petition and the amendment thereto Mr. Wright asserts and relies upon the lien which he claims to have obtained by virtue of the writing of January 16, 1895, signed by Mr. Youtsey, and hereinbefore set out. The judgment which Mr. Wright obtained against Mr. Youtsey he subsequently assigned to the First National Bank of Newport, and the plaintiff in error George P. Wilshire, receiver

of that bank, is entitled to the benefit of said assignment, and to the lien, if any, which Mr. Wright obtained by the above writing of January 16, 1895, and he was, therefore, by supplemental pleading, made a party to the action in the lower court, and filed his answer and cross petition, and he is before this court as one of the plaintiffs in error. Upon the hearing of the cause by the circuit court it adjudged that the Franklin Bank had a superior lien upon Mr. Youtsey's interest in the Hyde Park Syndicate property by reason of its attachment, and that C. W. Nagel, assignee of Mr. Youtsey for the benefit of his creditors, upon the sale of Mr. Youtsey's interest, would be entitled to the balance of the proceeds of sale of the property, after the satisfaction of the claim of the Franklin Bank. The petition in error in this court is prosecuted to reverse the judgment of the circuit court.

Mackoy & Lowman, for plaintiffs in error. Healy & Brannan and Burch & Johnson, for defendant in error Franklin Bank. Gustavus H. Wald, Charles B. Wilby, and L. J. Crawford, for defendant in error C. W. Nagel.

BURKET, J. (after stating the facts). The defendants in error do not seem to contend that the body of the writing of January 16, 1895, signed by Mr. Youtsey, is insufficient in form to create a lien upon his interest in the syndicate property; and for the purposes of this case it may be conceded to be so. To properly dispose of this case it is necessary to consider the principles of law applicable to the subject-matter in hand generally, which we now proceed to do. It has been held by this court that, where an owner of land contracts to sell the same to another person, such vendor holds the title in trust for the purchaser, to the extent that the purchase money has been paid. *Churchill v. Little*, 23 Ohio St. 308; *Manley v. Hunt*, 1 Ohio, 257; *Minns v. Morse*, 15 Ohio, 569; *Lefferson v. Dallas*, 20 Ohio St. 68; *Butler v. Brown*, 5 Ohio St. 211. It has also been held that lands held in trust for another cannot be levied upon and sold upon execution against the trustee to pay his debts; and judgments against the trustee are not liens upon the lands held by him in trust for another. *Manley v. Hunt*, 1 Ohio, 257. In that case the court say: "It would be productive of much mischief to make trust estates liable to judgments against the trustees. Such a principle never has been, and, we trust, never will be, recognized in this state." That case was followed and approved in *Butler v. Brown*, 5 Ohio St. 215. From these holdings it follows that lands held in trust cannot be taken in execution against the trustee for the payment of his debts. But lands held subject to liens, whether legal or equitable, may be taken under execution or attachment, and sold with the liens resting thereon; or, if no purchaser can be found, the liens, including the execu-

tions and attachments, may be marshaled, and the proceeds of the sale distributed according to the rights of the parties. Lands held in trust for another are thus preserved for the beneficial owner, free from the debts of the trustee; but lands burdened with liens are liable to be seized in execution for the payments of the holder's debts. This difference between trusts and liens reconciles many cases which otherwise seem in conflict. Lands held by a properly executed, but unrecorded, deed, are also free from the debts of the grantor, whether attempted to be reached in an assignment for the benefit of creditors made by him, or upon an attachment, judgment, or execution against him. The title under such a deed is good as against everything except a subsequent bona fide purchaser without notice.

By section 5374, Rev. St., lands and tenements, including vested interests therein, are made subject to the payment of debts, and liable to be taken on execution, and sold at judicial sale; and by virtue of section 5555, Id., lands and tenements, whether held by legal or equitable title, are made liable to be seized and sold under attachment for the payment of debts. To make the statutes as to real estate, and all interests therein, consistent, the general assembly, in 1887, so amended section 4106, Rev. St., as to require deeds and mortgages of any estate or interest in real property to be signed by the grantor or mortgagor, and acknowledged before a proper officer in the presence of two witnesses, and to be recorded in the office of the recorder of the county. Laws 1887, p. 133. Mortgages so executed, whether on an estate in real property or on only an interest therein, take effect from the time of the delivery to the recorder, and deeds so executed, conveying the estate, or only an interest therein,—that is, an equity,—take effect from delivery, except as against subsequent bona fide purchasers without notice, and as against such the deed must be also recorded. These amendments of the statutes require all instruments in the nature of a mortgage, either legal or equitable, to be signed, acknowledged, witnessed, and recorded; and, until so signed, acknowledged, witnessed, and delivered for record, the same are without effect as to third persons. The statutes on this subject before the amendments of 1887 were substantially different from the present acts, and the decisions of this court construing those statutes are not applicable to the statutes as now enacted.

Coming now to this case, it is clear that the paper signed by Mr. Youtsey was intended to create only a lien in favor of Mr. Wright, and not a trust. The paper cannot be construed to create both a lien and a trust, as they are the opposites of each other. In a trust the property is held for another, while in the case of a lien it is held by the holder for himself, but burdened with a charge, commonly called a lien, in favor of another. The law applicable to liens must, therefore, rule

this case, and not the law applicable to trusts. Neither does this case depend upon the law of purchasers for value, but upon the law of the priority of an attachment or deed of assignment for the benefit of creditors over a defective unrecorded mortgage. By virtue of section 5555, Rev. St., the interest in the syndicate property, even though it was only an equity, could be attached and sold as upon execution, and the purchaser would receive a good title to such interest in the syndicate, and the Franklin Bank and the assignee under the deed of assignment would receive the proceeds of the sale without the aid of a court of equity. Should there be no bidder, the liens could be marshaled, and the proceeds of the sale distributed; but the lien of the attachment and the conveyance under the deed of assignment would remain in full force as legal rights fastened upon the estate held by an equitable title, and would both have preference over the defective and unrecorded mortgage held by Mr. Wright. If Mr. Wright's paper had been acknowledged, witnessed, and recorded, it would have operated as a legal mortgage upon an estate held by an equitable title, and would have taken priority over the attachment and deed of assignment; but, as the case stands, his paper created no charge or lien, legal or equitable, upon the interest in the syndicate property, as against third parties asserting legal rights.

The deed of assignment was executed and delivered in the state of Kentucky, where all the parties resided, and conveyed property in Hamilton county, in this state. Such a deed could not be filed with the probate judge, and take effect from the time of its delivery to him, as required by section 6335, Rev. St. The deed in this case was in due form, and took effect from the time of its delivery to the assignee. Johnson v. Sharp, 31 Ohio St. 611. This was two days before the suit to marshal liens was commenced, and therefore no question of lis pendens arises in this case. True, the deed of assignment was not recorded in the office of the recorder of Hamilton county until two days after the commencement of the action to marshal liens, but such record is only necessary as to subsequent bona fide purchasers without notice, and there is no such purchaser in this case. The deed of assignment, therefore, passed title from its delivery.

Much reliance is placed by counsel for plaintiff in error upon the case of Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566, but that case is in full accord with the views here expressed. There is no error in the record. Judgment affirmed.

(59 Ohio St. 60)

OGLESBY v. THOMPSON.

(Supreme Court of Ohio. Oct. 11, 1898.)

PARTNERSHIP—ACCOUNTING—BURDEN OF PROOF—JUDGMENT.

1. In a suit for an account by one partner against another, no judgment can be rendered

in favor of either party for any sum until the account has been stated, and the balance due either, if any, thus ascertained.

2. The burden of proof in such case is on the plaintiff to furnish the evidence requisite to enable the court to state the account; and, if he fails in this, he fails in his action, and the petition should be dismissed, unless, for good cause shown, a new trial is allowed.

(Syllabus by the Court.)

Error to circuit court, Warren county.

Action by William C. Thompson against Joseph M. Oglesby, executor of the will of Thomas F. Johnson, deceased. There was a judgment for plaintiff in the common pleas, and defendant appealed to the circuit court, where plaintiff obtained a judgment, and defendant brings error. Reversed.

W. F. Eltzroth and W. Chester Maple, for plaintiff in error. W. C. Thompson, in pro. per.

MINSHALL, J. The plaintiff below, William C. Thompson, on April 27, 1894, commenced in the common pleas court of Warren county an action against Joseph M. Oglesby, executor of Thomas F. Johnson, deceased, alleging that he and the deceased, on or about the 1st day of October, 1880, entered into a partnership for the practice of the law at Lebanon, Ohio, and continued therein from that day until January 1, 1891; that, during the time, they, as such partners, did a large amount of business; and that the amount of fees collected by the deceased alone amounted to not less than \$21,000. The plaintiff admits that he received part of the fees, but does not state how much; that no settlement had ever been made between the parties, nor between the plaintiff and the administrator. He claims that at least \$8,000 is due him, and prays that an account may be taken of the affairs of the partnership. The defendant admitted his representative character of the deceased, but denied all the other allegations of the petition. After a judgment for the plaintiff in the common pleas, the defendant appealed to the circuit court. The case was heard on the pleadings and the evidence, and the court rendered judgment for the plaintiff for the sum of \$1,395.30, upon the following finding of facts: "First. That a partnership existed between the said plaintiff and the said Thomas F. Johnson, as in said plaintiff's petition set forth, and that the same is unsettled. Second. That said Thomas F. Johnson received all the fees, in what was known as the 'Ryan & Milroy Case,' in Hamilton county, Ohio, amounting to the sum of \$2,548.53, for which he has never accounted to the said plaintiff; and that the said plaintiff is entitled to the one-half thereof, to wit, the sum of \$1,274.26, together with interest thereon from the date of the filing of this suit, April 27, 1894, and amounting to the sum of \$121.13, in all the sum of \$1,395.30, and ought to recover the same. Third. And the court does further find that they are unable to state the account be-

tween the parties as to any other matter of the partnership." The defendant excepted to the judgment rendered upon this finding of facts, and prosecutes this proceeding in error for its reversal.

It is difficult to see how this judgment can be permitted to stand. The court found that a partnership had existed as alleged, but did not undertake to state the account between the parties. It declared its inability to do so. It found, however, as to one transaction, that the decedent had collected all the fees, and not accounted for any part to the plaintiff, and rendered judgment for the amount. The judgment is not warranted by the finding. For aught that appears, on a settlement of the account, the plaintiff may be indebted to the estate of the decedent, or the real balance in favor of the plaintiff may be much less than the judgment. The plaintiff had the burden of showing that, on a settlement of the accounts of the partnership, a balance was due him. If the evidence offered was insufficient to show this, then he would necessarily fail in his action for the want of proof; for the finding will admit of but one interpretation, and that is that there had not been sufficient evidence offered to enable the court to state an account. It is always the duty of a court in a suit for an account to state it, if possible, from the evidence offered; but, if this is not possible according to the rules by which issues of fact are determined, it can do but one thing,—dismiss the action for an account. An ascertainment of the state of the accounts is a necessary predicate to the rendition of any judgment in favor of the plaintiff. *Ashley v. Williams*, 17 Or. 441, 21 Pac. 556; *Maupin v. Daniel*, 3 Tenn. Ch. 223; *Hall v. Claggett*, 48 Md. 223; *Slater v. Arnett*, 81 Va. 432; *Davidson v. Wilson*, 3 Del. Ch. 307, 317; *Rick v. Neltzy*, 1 Mackey, 21. In *Ashley v. Williams*, it is correctly said that "where there are issues as to the existence of the partnership, and the condition of its accounts and business, the burden of proof is on the plaintiff, and, if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily falls." See, also, *Maupin v. Daniel*, supra. This is the purport of all the cases. No other rule could be adopted consistently with the ends of justice. A partner has no right to recover of his co-partner any part of the earnings or profits of the business, until it has been ascertained that earnings or profits have been made, and an account stated between the parties as to the amount received by each. The cases of *Evans v. Montgomery*, 50 Iowa, 325, *Bevans v. Sullivan*, 4 Gill, 383, *Martin v. Smith*, 53 N. Y. Super. Ct. 277, and *Langell v. Langell*, 17 Or. 220, 20 Pac. 286, cited by the defendant in error, do not conflict with this view or the cases above cited. They go no further than to hold that it is the duty of the court to state an account if possible, and that absolute accuracy is not necessary. This may be said to be true of all litigation; abso-

lute certainty is not required. Disputed facts, in civil suits, are determined upon reasonable probabilities,—a mere preponderance of evidence is sufficient to determine the affirmative of an issue. The cases referred to, however, afford no authority for saying that the court may speculate as to the state of the accounts, or allow a recovery for an item, without any proof as to the state of the accounts as between the partners. In *Slater v. Arnett*, supra, the syllabus is as follows: "Where suit in equity is instituted to settle the accounts of a dissolved firm, one of the members being dead, and the report of the master to whom the accounts have been referred shows that, after diligent search, he has been unable to discover and report any evidence whatever to base a statement of the true condition of affairs between the members of the late firm, and of its assets, etc., the court, not being able to proceed to judgment upon suppositions and presumptions without evidence, can do no better than to withhold its hand, and to leave the parties to stand where they have placed themselves before the suit was brought."

We are, then, of the opinion that the judgment should be reversed, and cause remanded to the circuit court for further proceedings. The plaintiff, on motion, may be awarded a new trial, if he can make the proper showing; and, if not, his motion should be overruled, and his petition dismissed. Of course, his "showing" must involve assurance to the court that he can produce evidence not produced at the former trial, and which he could not then, by the use of ordinary diligence, have produced, tending to show that an account may be stated between the parties touching the partnership. Judgment reversed, and cause remanded to the circuit court for further proceedings.

(59 Ohio St. 65)

ANDREWS v. JOHNS et al.

(Supreme Court of Ohio. Oct. 11, 1898.)

ASSIGNEE'S FEES—"PROCEEDS OF REAL ESTATE SOLD"—PERCENTAGE ON CREDITOR MORTGAGE, WHEN.

1. The term, "proceeds of the real estate sold," found in section 6357, Rev. St., implies money arising from the sale actually received and accounted for as such by the assignee. Upon money so received he is entitled to the percentage compensation named in the section above cited.

2. But where the land offered for sale by the assignee is bid in by a mortgage creditor whose mortgage is the first lien, and the bid is less than the amount of the debt so secured, taxes, and costs, the mortgagee is not required to pay over to the assignee, nor into court, the amount of such bid, and in such case the assignee is not entitled to the percentage compensation provided in said section.

(Syllabus by the Court.)

Error to circuit court, Butler county.

Allen Andrews, assignee of Mary Johns, Jr., and Susan Johns, filed an account as such assignee. Albert Hughes, mortgagee and cred-

itor of the insolvents, prosecuted exceptions to such account, which were tried on appeal in the court of common pleas, and the exceptions were sustained in part. Motion for new trial was heard and overruled, and, on error to the circuit court prosecuted by the assignee, the judgment of the common pleas was affirmed, and the assignee brings error. Affirmed.

On request, the court of common pleas stated its findings of fact and law separately, as follows: That on July 8, 1893, Mary Johns, Jr., and Susan Johns, made an assignment under the statute for the benefit of creditors to Allen Andrews, who gave bond in the sum of \$20,000, and duly qualified as said assignee, and executed said trust, and on said day filed a petition for the sale of said real estate. That said real estate was at the time incumbered by mortgages as appears of record, and that the assignee, at the request of the mortgagees and the assignors, delayed the sale of said property until the same was advertised and sold as appears of record. That no other property or assets of any character came into the hands of said assignee, and that said real estate was bid off and purchased at the sale so made by said assignee by said defendant Albert Hughes, who held the first mortgage lien on said real estate, and that the same sold for the sum of \$5,900, which was not sufficient to pay the taxes, costs, and mortgage claim of said Albert Hughes. That the proceeds of said sale were distributed by the order of the probate court as appears of record. The court finds that said assignee, in and about the sale of said property and in the discharge of his said trust, rendered services as follows: Filing petition for sale of real estate; obtaining waiver and service of summons; consultations with mortgagees; appraisement, advertisement of sale, offering for sale, and auctioneering same; conference and consultations with bidder and mortgagees and their attorneys in regard to said sale; negotiations and consultations with mortgagees and creditors in regard to setting aside appraisement; advertising, offering for sale, and auctioneer's services for second time; re-advertising and offering for sale the third time, and auctioneer's services; making sale; procuring orders; attendance at court; looking after real estate and proceedings in court; confirmation of sale, deed, and distribution of proceeds; and that said services were of the value of \$250. And that said assignee presented to said probate court, as required by law, a bill of items for said services, which bill of items was duly verified as required by law. And that in the discharge of said trust said assignee employed as his attorneys Messrs. Morey, Andrews & Morey, who rendered legal services, in and about the sale of said real estate and discharge of said trust at the instance and request of said assignee, as follows: Filing petition, praecipe, and waiver, and obtaining order of appraisement; making return of same; obtaining order of sale;

advertising sale; attending sale; obtaining alias order; advertising and offering for sale the second time; setting aside appraisement; obtaining new order of sale; advertising and attending sale the third time; confirming sale; order for deeds and distribution; services on motion of Albert Hughes; and all legal services in said assignee's application to sell real estate,—and that said services were of the value of \$148, which were duly paid by said assignee to said attorneys. And that there is no fund in the hands of said assignee with which to pay for said legal services of said assignee, except the proceeds of the sale of said real estate. And the court, from the foregoing facts, finds as conclusions of law that said assignee should be allowed the said sum of \$148 so paid by him to his attorneys, and that he should be allowed as commission the sum of \$33.70 on so much of the proceeds of said sale as were collected by said assignee for the payment of costs and taxes, but that he is not entitled to be allowed any commission on the balance of the proceeds of said sale, as the same were retained by said Albert Hughes on his mortgage lien; and that said assignee is not entitled to receive anything by way of extraordinary services so rendered by said assignee, for the sole reason that there is no fund out of which to pay the same except the proceeds of said sale, which said Albert Hughes, as the purchaser of said real estate, is entitled to retain on his mortgage lien. It is therefore considered and adjudged by the court that said assignee pay and distribute said \$5,900, being the proceeds of said real estate, as follows: First, taxes, \$135.22; second, costs, including \$148 attorney's fees, all costs amounting to \$346.10; third, to said assignee, as commission (his claim for extraordinary services being disallowed), \$33.70; fourth, to said Albert Hughes on his mortgage lien the balance of the proceeds of said sale, being \$5,384.98. It is ordered that the costs of this appeal be paid by said Allen Andrews, assignee, and said Albert Hughes, each paying one-half thereon, and execution is awarded therefor.

Morey, Andrews & Morey, for plaintiff in error. Alex F. Hume and P. C. Conklin, for defendant in error Albert Hughes.

SPEAR, C. J. (after stating the facts). The legal question for this court to decide is this: Is an assignee, under an assignment for the benefit of creditors, entitled to a percentage compensation upon the bid of the purchaser of real estate sold by such assignee, and bid in by the holder of a mortgage, the first lien, whose claim exceeds in amount the amount of the bid? It is contended by plaintiff in error that an assignee is entitled to such commission because the statute awards it; and, if the language of the statute does not in terms allow it, yet fairness and justice to the assignee require such construction be given the statute, for

otherwise the assignee is denied compensation for services which the law compels him to render and which inure to the benefit of the mortgagee. Sections of the Revised Statutes bearing upon the subject are 6350 to 6350e, 6351, 6352, 6356, and 6357. These sections provide that the assignee shall proceed at once to convert all the assets received by him into money, and to sell the real and personal property assigned to him, either for cash or upon such other terms as the court (the probate court) may order, of which sale due return shall be made to the court, and such sale shall be set aside or confirmed, as the court may order; and, if confirmed, the court shall order the assignee to make a deed to the purchaser for the real estate sold. The court shall order the payment of all incumbrances and liens upon any of the property sold, or right or credits collected, out of the proceeds thereof, according to priority; provided that the assignee may, in all cases where the real estate to be sold is incumbered with liens, or where any questions in regard to the title, or the dower estate of the wife or widow of the assignor, require a decree to settle the same, commence a civil action therefor in the common pleas court or probate court of the proper county, making all persons in interest parties to such proceedings, and upon hearing the court shall order a sale of the premises for the payment of incumbrances, and the proceeds of the real estate so sold, after the payment of liens and incumbrances, shall be reported to the court by the assignee, and disposed of as provided in this chapter. Creditors shall present their claims within six months to the assignee for allowance, and immediately after the expiration of said six months the assignee shall file in the court a report of the claims presented, with the amounts thereof, etc. At the expiration of eight months an account shall be filed with the court by the assignee, containing a full exhibit of all his doings up to the time of filing.

Whenever, on settlement, the same shall show a balance remaining in the hands of the assignee, subject to distribution among the general creditors, a dividend shall be declared by the probate judge payable out of such balance equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor; of the making of which dividend, and of the time of payment thereof, notice shall be given. Before any dividend is declared, the assignee may be allowed the following commission upon the amount of the personal estate collected and accounted for by him, and of the proceeds of the real estate sold under an order of court for the payment of debts, which shall be received in full compensation for all his ordinary services, that is to say: For the first \$1,000, at the rate of 6 per centum; for all above that sum, and not exceeding \$5,000, at the rate of 4 per centum; and for all above \$5,000, at the rate

of 2 per centum. And, in all cases, such further allowance shall be made as by the court shall be considered just and reasonable for his actual and necessary expenses, and for any extraordinary services not required of an assignee in the common course of his duty; also such reasonable counsel fees as may be necessary for the proper administration of said assignment, whether performed by the assignee as attorney, or such other as may be employed by him; but that no such further allowance, extraordinary expenses, or services, or attorney's fees, shall be allowed by the court unless a bill of items be filed showing such actual and necessary or extraordinary expenses and services, or attorney's fees, together with the affidavit of the person incurring such expenses or performing such services, showing that the same were performed for and were necessary to the assignment, and that the amount charged is reasonable, etc.

It will be observed that the provision is, where the land sold is incumbered, that the incumbrance be satisfied. "The court shall order payment of all incumbrances and liens out of the proceeds," is the language, but the ultimate object sought is the satisfaction of the liens,—payment, if proceeds arise from the sale, but, in any event, satisfaction and cancellation, in order that the assigned estate may be settled. The term "proceeds," when used in connection with sale, as the lexicographers seem to agree (see Webster, the Standard, Rapalje, and Bouvier), means a sum of money derived from the sale of property. If money be derived from the sale, then it has yielded "proceeds," and an order distributing such "proceeds" may follow. If none have been so derived, then there are no funds in the hands of the court for distribution. If this conclusion be correct, then it would be fair to construe section 6357 as though the words "collected and accounted for" had been inserted after the words "proceeds of real estate," and the meaning of the whole section would be that the commission is to be computed on the money obtained from both sources. But, where no proceeds have been collected and accounted for, the proper order would seem to be one which would provide for such necessary costs as the statute authorizes, and satisfaction of the liens, and for a conveyance which will vest in the purchaser all the title of the assignor at the time of the assignment, and thus close out the trust as regards that piece of property, and not an order attempting to distribute that which is not within the control of the court.

Now, where the land exposed for sale by an assignee, which is incumbered by a mortgage constituting a first lien, has been bid in by the mortgagee for a sum less than the amount owing on his mortgage, there can be no "proceeds," in the sense of money for distribution; for the legal effect of the bid and sale, followed by confirmation and deed,

is only to satisfy the mortgage and the debt pro tanto, and vest in the mortgagee (purchaser) the equity of redemption of the assignor, and is not to produce a fund for distribution. It has never been the law or practice in this state to require a mortgagee, purchasing under such circumstances, to pay the amount of his purchase either to the officer making the sale or into court. The reason is that, having already the legal title subject to the equity of redemption of the mortgagor, the purchaser is in a sense the owner, and requires only a satisfaction in a legal manner of the equity of redemption, and of any subsequent liens, followed by possession, in order to give him a complete title to the land. To require the mortgagee to pay over to the assignee in money the amount of his bid, to be followed by a repayment to him by the assignee of all or the major part of the sum, would not only be the requiring of a vain thing, a ceremony illogical and useless, but it would in many cases work downright injustice. It is easy to conceive a case—indeed, common knowledge embraces many—where the mortgagee has invested his entire property in the mortgage, and, being without adequate credit, has not power to acquire the means for the making of such deposit, and, if such deposit were a condition of acceptance of his bid, would be barred entirely from bidding, and be compelled to stand by and see the property purchased by a stranger upon terms which would be destructive of his interests, and yet be powerless to interpose. It would also give color to the pretense that after having mortgaged his property, and received full value from the mortgagee, the mortgagor, by resorting to some twist of the law, could practically destroy, or at least greatly impair, the security of the mortgage,—a proceeding shocking to the moral sense as well as contrary to the analogies of the law in other cases. True, a mortgagee invests his funds subject to the law as to foreclosure, but this fact does not warrant an unnecessary sacrifice of his interests, even in part.

If no "proceeds," within the fair construction of the statute, arise from the sale, then it would seem to follow, necessarily, that there can be no percentage commission. This form of compensation is analogous to that provided for administrators, and is, primarily, for the risk, responsibility, and trouble involved in the collecting and disbursing of money. *Platt v. Longworth*, 27 Ohio St. 159. If no money is collected and disbursed, then no percentage is earned. See, also, *Shaw v. Association*, 6 Ohio Cir. Ct. R. 41. This conclusion is in accord with the practice in sales by sheriffs and master commissioners, where the right to poundage is involved,—a practice based upon the statute, and prevalent, so far as we are aware, in all sections of the state.

The cases of *Ingham v. Lindemann*, 37 Ohio St. 218, and of *McLain v. Simington*, Id. 660, are cited in support of the plaintiff's con-

tention. We think they do not sustain it. The case first named does not touch upon the point of percentage at all, while in the other the commissions referred to do not appear certainly to have been percentage on money collected, although probably they were; but, if they were such, it still does not appear that the mortgaged property was bid in by the mortgagee. In the absence of such showing, the presumption is that it was not; for we can hardly think that the court would have omitted mention of so important a circumstance, had it been the fact.

A case more nearly analogous to the one at bar is that of *Stone v. Strong*, 42 Ohio St. 53. The controversy in this court arose upon the record of a proceeding by an administrator in the probate court to sell land to pay debts, where the land which was incumbered by mortgage and judgment liens was bid in at the sale of the administrator by the owner of the mortgage, which was the first lien. After holding that, where proceedings for such sale are properly instituted, the executor or administrator, under section 6165, Rev. St., is entitled to compensation and charges for making the sale, to be first paid before applying the proceeds to the mortgage or other liens, and that such compensation is to be computed by the per centum authorized by section 6188 on the money arising from such sale to be administered, yet, "if a mortgagee, whose lien is fixed by the court, becomes the purchaser at such sale, the executor or administrator is not entitled to a per centum compensation on that part of the purchase money applicable to the satisfaction of his mortgage."

The two sections referred to are as follows:

"Sec. 6165. The money arising from the sale of real estate shall be applied in the following order: First. To discharge the costs and expenses of the sale, and the per centum and charges of the executor or administrator thereon, for his administration of the same. Second. To the payment of mortgages and judgments against the deceased, according to their respective priorities of lien, so far as the same operate as a lien on the estate of the deceased at the time of his death; which shall be apportioned and determined by the court, on reference to a master or otherwise. Third: To the discharge of claims and debts, in the order mentioned in this title."

"Sec. 6188. Executors and administrators may be allowed the following commissions upon the amount of the personal estate collected and accounted for by them, and of the proceeds of the real estate sold under an order of court for the payment of debts, * * * which shall be received in full compensation for all their ordinary services, that is to say," etc.

It will be noted that this provision for compensation is identical with that provided for assignees by section 6357. The commission is to be upon the amount of the personal estate collected and accounted for by

them, and of the proceeds of the real estate sold, and is to be in full compensation of all their ordinary services.

But it is contended that this decision was induced by the term, "money arising from the sale of real estate," found in section 6165, and but for that the court would have placed a different construction upon section 6188, where the term "proceeds" is used. With this assumption we cannot agree. We have already found that when applied to sales the term "proceeds" means money arising from the sale, and we are to conclude that the legislature used the terms in the two sections as synonymous, which, in proper terminology, they are. Nor is there any expression in the opinion which gives color to the claim of counsel. Says Johnson, C. J., on page 57: "His per centum is to be computed on the money arising from the sale for his administration of the same. Where no money arises to be administered, there is nothing on which to compute commissions. This percentage was intended to compensate for the trouble and responsibility of collecting and paying out the money. * * * Here the mortgagee is the purchaser, and, so far as the purchase money was applicable to her liens, it operated as a satisfaction of her mortgages."

It is further contended that, in the case of an assignee, the sale of real estate is peremptory, while with an administrator it is optional. We know of no such distinction. The statute (section 6136) does not seem to countenance it, and no decision is cited in its support. We do not believe any can be found. The administrator has no occasion to resort to the real estate unless he ascertains that the personal estate will be insufficient to pay the debts, but, if he does ascertain that fact, his duty to proceed to sell appears to be just as imperative as in the case of an assignee.

Upon the proposition that, by the construction of the sections affecting assignments here made, an injustice results to the assignee, in that he is denied compensation for labor which he is required to perform, it would seem sufficient to say, as suggested by counsel, that the hardship is not greater than in the case of a second mortgagee who forecloses his mortgage only to see the first mortgagee take all the proceeds, leaving his expenses to be borne without any results; or the case of an administrator, as in *Stone v. Strong*, where the first mortgagee is the purchaser. Besides, the assignee is not compelled to perform the services. He accepts the trust voluntarily and with whatever risk may attend its performance. If he finds it burdensome, or unremunerative, he may at any time resign. In response to this the suggestion is offered that the situation in respect to the question of compensation would not be altered by a resignation, for it would then become the duty of the court to appoint a trustee who would be entitled to compen-

sation upon the same basis. Of course, such trustee would be entitled to whatever compensation the law gives, as well as an assignee. In the administration of the estates of deceased persons the statute permits, under certain circumstances, that administration be committed to one of the principal creditors, and the practice to so appoint is not uncommon. Possibly practical difficulties might stand in the way of the appointment of a mortgage creditor as trustee of an insolvent estate, but every consideration of fairness would entitle him to a potent voice in the selection of such trustee, and in making such choice it would not be difficult, it is here suggested, to find persons abundantly competent who would be satisfied to do the work for the chance presented of obtaining the legitimate compensation allowed by law. Ordinarily the duties involve routine work only, and that which may be performed by persons of fair acquaintance with legal business, and only rarely do they involve work of a difficult order, or calling for the exercise of more than ordinary talent or experience. Presumptively, at least, the provisions of the statute relating to assignments were enacted in the interest of creditors, and it is the duty of all courts to give such construction to the statute, and to direct the administration of the trusts in such manner, as will reasonably secure this end. Complaints are common of objectionable practices in this respect in some localities, where, it is charged, the effort seems to be to conduct assignments as though they had been provided, primarily, for the benefit of assignees and their attorneys. The faith of the people in the impartial administration of the law by the courts would be enhanced by a correction of the abuse, if it exists, and by the adoption of methods of administration by which the rights of creditors may be fully protected and enforced, and the trust estate not depleted by extravagant charges and costs, and no injustice to any would result.

It is not necessary to a decision of this case to refer to the order of distribution made by the probate court, but, nevertheless, comment upon it seems pertinent. It orders the assignee to make distribution of \$5,900, being proceeds of the real estate sold, of which he was ordered to pay to the mortgagee (purchaser) \$5,384.98. No such fund was in the hands of the assignee, and it is difficult to see what purpose such form of order accomplishes save to confuse. The inference from it would be that the amount of the bid had been paid to the assignee by the mortgagee, or that he was obliged to pay. Neither assumption was true. The court having found that the land was bid off by the owner of the first lien for a sum less than his debt, taxes, and costs, an order that the purchaser pay such taxes as were due, and such costs as might properly be required of him under the statute, which

would be such costs, and such only, as were made necessary by the foreclosure, and upon such payment a deed be made by the assignee, would have met the situation as it existed, and worked out the proper legal result. True, the statute speaks of the probate court ordering payment of incumbrances, liens, etc., but this presupposes that proceeds have actually been received. Where, however, a lien, as in this case, has been satisfied by the bid, but the debt not satisfied, the making of an order in such form is wholly unnecessary, and is an incongruous performance. Whether or not the assignee was entitled to a commission on the costs and taxes paid by the mortgagee (purchaser) we need not inquire, as no cross petition has been filed complaining of the order in that respect. We think the circuit court was not in error in affirming the judgment of the common pleas to the effect that, as against the first mortgagee (purchaser), the assignee was not entitled to percentage compensation, and the judgment will be affirmed.

(175 Ill. 634)

SPRINGFIELD CONSOL. RY. CO. v.
HOEFFNER.

(Supreme Court of Illinois. Oct. 24, 1898.)

CARRIERS—INJURIES TO PASSENGERS—DAMAGES—
INSTRUCTION—MISNOMER—EVIDENCE—
SUFFICIENCY—RES GESTÆ.

1. An instruction that plaintiff can recover if the jury find certain facts which comprise all the elements essential to a recovery is not erroneous on the ground that it sums up and gives prominence to plaintiff's evidence, and omits a contrary theory shown by defendant's evidence.

2. An instruction that the jury must believe that plaintiff was not negligent in preparing to alight from defendant's car while it was in motion sufficiently calls the jury's attention to evidence respecting plaintiff's negligence in attempting to alight from a moving car.

3. Where a passenger notifies the conductor that she wishes to alight, and the car slows up on nearing the place, but starts suddenly when she is preparing to alight, she may recover for injuries resulting from being thrown to the ground by the jerk.

4. Evidence that plaintiff was a passenger upon the cars of the "Consolidated Street-Railway Company" and the "Springfield Consolidated Railway" is sufficient to show that she was a passenger on the cars of the Springfield Consolidated Railway Company.

5. An instruction that plaintiff may recover if the jury find certain facts is not erroneous for failure to direct that such facts must be found by preponderance of the evidence, if the jury have been so directed in another instruction.

6. An instruction that plaintiff can recover on certain facts if she gave the conductor reasonable notice to stop the car does not assume that the notice given by plaintiff was reasonable.

7. An instruction to assess such damages as, in the judgment of the jury, will compensate plaintiff for her injury, pain, and suffering is not erroneous as permitting the jury to fix the damages without regard to the evidence.

8. In an action for personal injuries, plaintiff's statement that she was hurt, made immediately after she was thrown from defend-

ant's car, and before she was picked up, is admissible as part of the *res gestæ*.

9. Though it appear upon the trial that plaintiff did not bring the action in her real name, defendant cannot, after verdict, withdraw its plea, and plead in abatement.

Appeal from appellate court, Third district.

Action by Libby Hoeffner against the Springfield Consolidated Railway Company. There was a judgment for plaintiff, which was affirmed in the appellate court (71 Ill. App. 162), and defendant appeals. Affirmed.

This is an action on the case for a personal injury, brought by the appellee against the appellant company. Plea of the general issue was filed, and the trial in the circuit court before the judge and a jury resulted in a verdict in favor of the appellee. Judgment was rendered upon the verdict. An appeal was taken to the appellate court, and the judgment of the circuit court has been affirmed. The present appeal is taken from such judgment of affirmance.

The facts are substantially as follows: On the evening of September 27, 1895, the appellee and her brother-in-law, one John H. Hoeffner, together attended a show on exhibition at the Springfield Fair Grounds. About half past 9 o'clock they there took an open trailer, following and attached to a closed car of the defendant company, used as a motor, to return. When the conductor came to the appellee to collect her fare, she notified him that she wished to get off at the crossing of Ninth and Reynolds streets in Springfield, and requested him to stop the car there to enable her to do so; and again, when about four blocks from that crossing, she told the conductor, in reply to a question from him, that she desired to get off at the corner of Ninth and Reynolds streets. On reaching the crossing, the speed of the train was slackened so that it was travelling very slowly. Her brother-in-law alighted on the north side of the street, the cars going south. As the cars continued to slacken their gait and go more slowly, she arose, and prepared to alight when the car should stop on the other side of the crossing. She stood with one foot on the car and the other on the footboard, and was holding onto the brass arm of the seat. While she was in this position, and while it seemed that the car was about to stop, and she was about to alight, the car, without stopping, started forward with a sudden and violent jerk, breaking her hold, and throwing her upon her back, so as to cause the injuries complained of, the most serious of which was to her spine. Her brother-in-law came up to her at once, and asked if she was hurt, to which she answered, "Yes." It was with difficulty that she reached her home, about four blocks distant, where she immediately went to bed, and sent for her family physician, who came at about 11 o'clock, and upon examination ascertained, and on the trial testified, that she was seriously hurt.

Wilson & Warren, for appellant. E. E. Bone and Orendorff & Patton, for appellee.

MAGRUDER, J. (after stating the facts).

1. The first complaint made by counsel for appellant in their brief is that the first instruction given on behalf of the appellee by the trial court was erroneous. The instruction thus complained of is as follows: "The court instructs the jury that if you believe, from all the evidence in this case, that the plaintiff became and was a passenger upon a car of defendant, and that her fare was paid to the conductor, and that the plaintiff gave to the conductor on such car reasonable notice of her desire to get off of said car at the corner of Ninth and Reynolds streets, as alleged in her declaration, it then and there became and was defendant's duty to stop said car at said place, upon arriving at the same, a sufficient length of time to enable plaintiff to alight therefrom in safety; and if the jury further believe, from all the evidence, that the defendant thereafter ran its said car to the said corner of Ninth and Reynolds streets, and was then and there in the act of slowing up or stopping said car, and that the plaintiff was then and there exercising all due care and caution for her own safety, and that while so exercising said care and caution she was preparing to alight from said car when it should come to a stop, and that such act or acts by her of preparing to alight at the time, under all the circumstances and in the manner shown by the evidence, were not negligence or carelessness on her part, and that the defendant then and there did not so stop the said car as that the plaintiff could safely alight therefrom, but suddenly started said car in such manner that it thereby then and there threw the plaintiff to the ground, and that such starting of the car was negligence on the part of the defendant, and that the plaintiff was thereby injured as charged in her declaration, and that plaintiff was during all the time in the exercise of due care and caution for her own safety, then the defendant would be liable to the plaintiff for such injury, and in such case you will find for the plaintiff."

The first objection made to this instruction is upon the alleged ground that it attempts to sum up all the facts in behalf of the appellee which the evidence tends to prove, and omits all the facts which the evidence tends to prove in behalf of appellant. In other words, appellant's counsel invoke against the correctness of the instruction the rule, frequently announced by this court, that an instruction is erroneous which sums up all, or a part of, the facts the evidence tends to prove on one side, and omits all on the other. Such an instruction is regarded as calculated to mislead the jury, inasmuch as it tends to impress upon their minds that the facts recited are the only ones that are important in the case. *Pennsylvania Co. v.*

Stoelke, 104 Ill. 201. While the rule thus laid down is undoubtedly correct, yet the doctrine which holds an instruction vicious when it attempts to summarize the facts or elements in a case essential to a recovery, but falls in some important particular, does not apply to an instruction which merely fails to embody in it evidence tending to establish a distinct antagonistic theory. "All the law requires is that an instruction, based upon some particular hypothesis warranted by the evidence, which undertakes to summarize the elements in the cause essential to a recovery upon that theory, must not omit any essential matter." *City of Chicago v. Schmidt*, 107 Ill. 186. In *Railroad Co. v. Eggmann*, 159 Ill. 550, 42 N. E. 970, we said: "This court has frequently criticised the practice of giving instructions thus summarizing the case. It has, however, never held such an instruction to be reversible error when it embraced all the elements essential to a recovery, omitting nothing material." We are of the opinion that the first instruction given for the appellee is not liable to the charge thus made against it.

The particular respect in which the instruction is urged to be obnoxious to the objection here urged is said to lie in the fact that it ignores the evidence tending to prove that the appellee stepped from the car before it came to a stop. It is said that one ground of defense set up by the appellant in the court below was that the plaintiff was guilty of contributory negligence, because she stepped off the car while it was moving. It has been held by this court that it is not negligence per se for a passenger to board or alight from a street car operated by horse power while it is in motion (*Railway Co. v. Williams*, 140 Ill. 275, 29 N. E. 672); also, that it is not negligence per se for a passenger to board or alight from a street car propelled by electricity while it is in motion (*Railway Co. v. Melxner*, 160 Ill. 320, 43 N. E. 823); also, that it is not negligence per se for a passenger to get on or off a moving street car, whose motive power is a cable (*Railroad Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407). In all such cases of getting on or off street cars while they are in motion, whether such cars are propelled by horse power, electricity, or cable, the question whether or not the passenger has used due care for his safety, or whether or not he has been guilty of contributory negligence, is a question of fact to be submitted to the jury, and to be determined by them from the circumstances surrounding the case. The first instruction here complained of told the jury that they must believe from all the evidence that the appellant ran its street car to the corner of Ninth and Reynolds streets, and was then and there in the act of slacking up or stopping said car, and that the appellee was then and there exercising all due care and caution for her own safety, and that, while

so exercising said care and caution, she was preparing to alight from said car when it should come to a stop, and that such act or acts by her of preparing to alight at the time, under all the circumstances, and in the manner shown by the evidence, were not negligence or carelessness on her part, etc. It thus appears, by reference to the instruction itself, that it does not ignore the fact that the car was in motion when appellee attempted to alight, but leaves it to the jury to determine whether, in making such an attempt on her part, she was exercising due care for her own safety. The first instruction stated the law with substantial correctness. In *Railway Co. v. Mumford*, 97 Ill. 560, where a person on a street car told the driver the place where he desired to get off, and was notified by the driver that they had reached that place, and, when he was in the act of stepping off, the car started up with a sudden jerk, which threw him upon the ground, inflicting a serious injury, it was held that this was a clear act of negligence on the part of the railroad company; that it was the duty of the company to have stopped the car a sufficient time to allow the passenger to get off; and that, even if the car was stopped at the proper place, it was negligence to start it with a sudden jerk without the exercise of any precaution for the safety of those attempting to get off. In the *Mumford Case*, it was also held that, when the driver of a street car had been notified that a passenger desired to get off at a certain place, and had agreed to stop at such place, an instruction telling the jury that if the passenger, when near the place named, undertook to get off the car while it was going slowly, the driver having no notice of his intention, he could not recover for a personal injury, although the car started forward as he was stepping off, and threw him to the ground, was properly refused. Street-car companies are obliged to stop a reasonable time to allow passengers to get on or off the car, and the question of what is a reasonable time is in every case a question for the jury. If the manager of a car sees, or ought, in the exercise of reasonable care, to see, that a passenger is in the act of getting on or off the car, it is negligence on the part of the company if he starts the car suddenly. *Crow. Electricity*, §§ 723, 724.

It is furthermore said that one of the defenses made by the appellant below was that the appellee was not shown by the testimony to have been riding upon one of the defendant's cars. This contention is based upon the fact that the plaintiff speaks of the appellant company as the "Consolidated Street-Railway Company," and her brother-in-law speaks of it as the "Springfield Consolidated Railway," whereas its real name is the "Springfield Consolidated Railway Company." Technical accuracy as to the proof of the name of a corporation is not re-

quired. 16 Am. & Eng. Enc. Law, p. 136; Chadsey v. McCreery, 27 Ill. 253. It was a question of fact whether or not the appellee was a passenger upon a car of the defendant, and this question of fact was expressly submitted to the jury by the first instruction given for appellee.

It is claimed that the first instruction is defective, because it requires the jury to make their findings from all the evidence, instead of making them from a preponderance of the evidence. This objection is without force. It is true that the plaintiff, in order to recover in an action of this kind, must prove, by a preponderance of the evidence, that such plaintiff was in the exercise of ordinary care, and that the defendant was guilty of such negligence as contributed to the accident. Instructions were given by the court for the appellant, which expressly required the jury to find these facts from a preponderance of the evidence, before the appellee would be entitled to recover. It is sufficient that the attention of the jury was called to the question of establishing the case by a preponderance of the evidence in the instructions given for the defendant, without referring to the subject in the first instruction given for the appellee.

It is also objected to the first instruction that it assumes that the notice given by the appellee to the manager of the street car to stop at a certain crossing was a reasonable notice. The instruction makes no such assumption. It requires the jury to find that the plaintiff gave to the conductor reasonable notice of her desire to get off. This left the jury to determine whether the notice was reasonable or not.

2. It is urged by counsel for appellant that the fourth instruction given on behalf of the appellee was erroneous. The fourth instruction thus complained of is as follows: "The court instructs the jury that if, under the evidence and instructions of the court, you find the defendant guilty, then, in assessing the plaintiff's damages, if any such damages as are alleged in her declaration are proved, you have a right to take into consideration the nature, extent, and character of the injury sustained by her, so far as the same is shown by the evidence, if any such are so shown, the pain and suffering undergone by her in consequence of such injury, if any such is shown by the evidence, and assess damages in such sum as, in your judgment, will compensate the plaintiff for such injury and pain and suffering." It is said that this instruction is wrong, because it leaves it to the jury "to assess the damages in such sum as, in your judgment, will compensate the plaintiff for such injury and pain and suffering." The contention is that the jury could assess such damages only as the evidence warranted, and that by authorizing them to fix such damages as, in their judgment, would compensate the plaintiff, they were allowed "to roam at will," and to proceed without any

regard to the evidence. The instruction is not, in our opinion, objectionable in the respect here indicated. An instruction is not wrong which tells the jury that in making an estimate of damages they shall exercise their judgment upon the facts in proof by connecting them with their own knowledge and experience, where the reference is to their general knowledge, "which they are supposed to possess in common with the generality of mankind." They are authorized to test the truth and weight of the evidence by their knowledge and judgment derived from experience, observation, and reflection. *City of Chicago v. Major*, 18 Ill. 349; *Coke Co. v. Graham*, 28 Ill. 73. Where an instruction in an action for damages for a personal injury authorized the jury to award such reasonable sum as would compensate the plaintiff for the impairment of his power to earn money in the future, and such reasonable sum as would compensate him for the pain and anguish suffered by reason of his injury, it was held that these elements were, from necessity, left to the sound discretion of the jury. *Railroad Co. v. Cole*, 163 Ill. 334, 46 N. E. 275; *Railway Co. v. Then*, 159 Ill. 535, 42 N. E. 971; *Railroad Co. v. Carr*, 170 Ill. 478, 48 N. E. 992. Damages for such injuries as are named in the fourth instruction must necessarily be left to the sound discretion and judgment of the jury, basing their exercise of such discretion and judgment upon the evidence in the case, and bringing to bear on such evidence their general knowledge and experience as business men.

3. It is said that the trial court erred in admitting the declaration of the appellee that she was hurt, in answer to a question from her brother-in-law. Hoeffner, her brother-in-law, when upon the stand, was asked the following question: "You may state what happened after she was thrown to the ground;" and he answered, "I walked up to her, and asked her if she was hurt, and she says, 'Yes.'" Hoeffner had just alighted from the car, and came up to the appellee as she was thrown to the ground. The question addressed to her was so near the time of the injury that her answer thereto may be regarded as a part of the *res gestæ*. We have recently commented upon this character of proof in the two cases of *Railroad Co. v. Carr*, *supra*, and *Railroad Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996. The rule laid down in these cases is that declarations as to the pain and suffering of the injured party, when made by such party, are only competent if made at the time of the injury so as to constitute a part of the *res gestæ*, or when made to a physician during treatment. The answer of the appellee to her brother-in-law's question in this case comes within the rule laid down in the cases referred to, so as not to be incompetent testimony.

4. Upon the cross-examination of the appellee it was developed that her real name was Libby Beale, instead of Libby Hoeffner, although she had taken the name of Libby

Hoeffner, and been known by that name for some time. After the jury had returned their verdict, the defendant entered its motion to suspend further proceedings in the case, and for leave to withdraw the plea of the general issue, and to file a plea of misnomer. This motion was denied, and its denial is assigned as error. There was no error in the action of the court in this regard. The objection to the prosecution of the suit by the plaintiff in the name of Libby Hoeffner should have been raised by a plea in abatement. The general rule is that a misnomer of the plaintiff can only be pleaded in abatement, and is no ground for setting aside the proceedings. 16 Am. & Eng. Enc. Law, p. 129; 1 Chit. Pl. *248, *451; *Sallsbury v. Gillett*, 2 Scam. 290; *Moss v. Flint*, 13 Ill. 570. Moreover, the evidence shows that the appellee had gone by the name of Libby Hoeffner ever since 1889. Therefore, if a plea in abatement had been filed, a sufficient replication thereto would have been that the appellee was as well known by the name of Libby Hoeffner as by the name of Libby Beale. 16 Am. & Eng. Enc. Law, p. 430; *Schoonhoven v. Gott*, 20 Ill. 46; *Lucas v. Farrington*, 21 Ill. 31. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 494)

RAGOR et al. v. BRENOCK et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE—PARTITION—PROCEEDS OF SALE—PRIMARY AND SECONDARY RELIEF—APPEAL—CONFLICTING EVIDENCE—CONCLUSIVENESS OF FINDINGS—PRACTICE IN EQUITY.

1. It was not error to strike from the files the cross bill of certain defendants, which was filed without leave, and at a time when the cause had been pending before the master for more than a year, and was ready for hearing, and where such cross bill was inconsistent with, and antagonistic to, the answer of one of such defendants, which had been previously filed, and where the other had been defaulted.

2. Where it was the primary purpose of a bill to have a certain deed, absolute on its face, declared a mortgage, and the right of complainants to redeem therefrom judicially determined, and a prayer for partition was added to enable the court to afford to complainants such additional relief as they would be entitled to receive by reason of having obtained such primary relief, parties defendant, who had invoked no such aid of the court in their behalf, had no ground of complaint because they were not accorded relief, by way of partition, when it did not appear from the record that they were entitled thereto.

3. On appeal, the findings of the chancellor, unless clearly erroneous, will be accepted where the testimony was conflicting, and where the correct solution of the question was dependent on a variety of considerations, as to the weight and merit of which he possessed superior facilities for determining.

4. Where husband and wife, under an agreement for a separation, conveyed to a trustee, without warranty, and for the benefit of each, equally, certain lands, of which the husband held the legal title, and in which complainants were interested as tenants in common, of which infirmity in her husband's title the wife had full knowledge, it was error, on decreeing distribution of the proceeds of a sale thereof,

by consent of the parties, pending a bill for partition, to charge, as against the husband, the full amount decreed to be paid complainants, on the theory that he should be deemed to have warranted to his wife that he was seised of an unincumbered title in fee to such lands.

Error to circuit court, Cook county; Oliver H. Horton, Judge.

Bill by Sophia Ragor and another against John Brenock and others, to have a certain deed declared a mortgage, and complainants' interest in the property in question determined, and partition decreed. From a decree granting to complainants substantially the relief prayed, Andrew Ragor and certain other defendants prosecute error. Affirmed in part.

George B. Finch, for plaintiffs in error. Smith, Blair & Smith, for defendants in error.

BOGGS, J. This was a bill in chancery filed by Sophia Ragor and Anna Luce. The bill alleged the complainants were the daughters of one John Ragor, who died intestate on the 25th day of November, 1882, leaving surviving him the complainants and Elizabeth Ragor, his daughters, and Andrew Ragor, Peter Ragor, Frank Ragor, and Jacob Ragor, his sons; that said deceased, on the 14th day of July, 1875, was the owner of the title to the undivided one-third of certain premises described in the bill by metes and bounds and government subdivisions, consisting of about 300 acres of land situate in Cook county, and known as the "Ragor Farm"; that the title to the remaining two-thirds of said Ragor farm then rested in Peter Ragor; that on said last-mentioned date the said John Ragor, being indebted to the said Peter Ragor in the sum of between \$8,000 and \$10,000, for the purpose of securing such indebtedness, executed and delivered to said Peter a warranty deed conveying to him all interest of the said John in and to the said land; that Peter afterwards intermarried with one Emeline Brenock, and afterwards, by a deed of trust dated November 19, 1887, said Peter and said Emeline, his wife, conveyed the entire premises, so as aforesaid known as the "Ragor Farm," to one John Brenock as trustee, by which trust deed said grantors thereof devoted the said land to the uses and purposes of the said grantors and their children according to the terms of a marital settlement entered into between them, in pursuance whereof the said deed of trust was executed. The bill charged the said Emeline had full notice of the fact that the said deed from the said John to her husband, Peter, was in fact and effect but a mortgage; that the amount due and secured to be paid by the said deed operating as a mortgage had been paid by the rents and profits of the land which said Peter had received. The bill then stated the names of the heirs of the said John Ragor, deceased, at the time of his death, and also that Elizabeth, one of the children of the said John, had subsequently died leaving nei-

ther husband, child, children, nor descendants of child or children, and set out the interest which descended to the complainants by virtue of their inheritance from their father and said Elizabeth, their sister; and also, in the same connection, showed the proportions in which the other children of said John, if otherwise entitled to a share in said alleged mortgaged premises, would inherit the same. The prayer of the bill was that the said warranty deed executed by John Ragor to Peter Ragor should be declared to be a mortgage, and that the rights and interests of said two complainants, as heirs of said John Ragor, deceased, in and to the said land in the said deed described, should be ascertained and declared by decree of the court, and "that a partition or division of said realty should be made between your oratrixes and such defendants to the bill as should in the suit establish valid title to the remaining interests in the land." The bill named as defendants thereto the children of said John Ragor (other than the complainants), Emeline Ragor, wife of Peter, and John Brenock, trustee for Peter and Emeline, and other persons supposed to be interested in the premises, who need not be here further named or designated. Frank and Jacob Ragor were duly served with process, but suffered default. Andrew Ragor filed an answer neither admitting nor denying the allegations of the bill, but denying that the complainants were entitled to the relief prayed for, or any part thereof. Peter Ragor filed an answer in effect admitting the allegations of the complainants' bill, and also filed a cross bill, the purpose whereof need not be further referred to at this time than to say it was designed to procure relief against his wife and John Brenock with relation to matters growing out of the execution of the trust deed to Brenock and the subsequent acts of the parties to that instrument. Emeline C. Ragor and the trustee answered the original bill and also the cross bill filed against them, and answers were filed on behalf of all the other parties defendant, and the cause was, on the 12th day of March, 1891, referred to the master in chancery to take and report the testimony. Subsequently a decree was entered by consent of all the parties to the proceeding, authorizing the trustee, in whom rested the legal title to the entire premises, to sell the same to one Kemper K. Knapp, at and for the consideration of \$140,000. The decree recited that the parties agreed the land could not be partitioned if decree for that relief should be awarded, and that they therefore ratified the sale to Knapp, and agreed that whatever rights any of the parties to the cause should be found to have in and to the lands should be transferred to, and declared to vest in, the proceeds of the said sale to Knapp, and that such proceeds should stand and be regarded as representing the interests of all the parties in the land, and the court so decreed.

On the 20th day of February, 1892, Andrew and Frank Ragor, without leave of the court first had and obtained, filed what they denominated a "cross bill," in which, in substance, they reiterated the allegations of the original bill, except they insisted Jacob Ragor, because of advancements made to him by his father, John Ragor, had no interest in the premises except such as he received by inheritance from his sister, Elizabeth Ragor, deceased, and prayed for partition and distribution to them of a proportionate part of the proceeds of the sale accordingly. On the 29th day of February, 1892, the cross bill was ordered stricken from the files on the motion of the said Emeline Ragor and John Brenock, and a motion entered by Frank Ragor to set aside the default as to him was denied. Leave was granted Andrew Ragor to amend the answer filed by him. Andrew amended his answer by striking out that portion which denied the complainants' right to the relief prayed for, and by adding thereto allegations confessing the complainants' right to recover according to the prayer of the bill.

On the 16th day of March, 1892, the cause came on to be heard upon the issues formed by the pleadings and upon the report of the master in chancery, and upon testimony, oral and documentary, produced in open court. The court found and decreed the said deed from John to Peter Ragor was but a mortgage given to secure the sum of \$10,000 due from John to Peter, together with interest thereon at the rate of 6 per cent. per annum from the 14th day of July, 1875, and decreed there should be allotted and paid to the complainants in the bill, Sophia Ragor and Anna Luce, out of the proceeds of the sale to Knapp, a certain specified sum, which said complainants have accepted and are satisfied with, and to which no objection is made by any party to the proceeding. The decree made no provision for the payment of any portion of the proceeds of the sale to either said Andrew, Frank, or Jacob Ragor, and of this they complain, and seek reversal of the decree by this writ of error.

It appeared from the proofs that the indebtedness to secure which the said John Ragor executed the conveyance in question was that of his son Jacob. The amount of this indebtedness exceeds by far any possible interest of the said Jacob Ragor in the proceeds of the sale of the land; hence no wrong was done Jacob by the decree. The primary purpose of the bill was to procure a declaration of the court that the deed from John to Peter Ragor was but a mortgage, and for a decree authorizing complainants, Sophia Ragor and Anna Luce, to redeem their interests in the land therefrom. The secondary purpose was to obtain an allotment of their interests after the deed should be declared a mortgage and a redemption therefrom made. The bill alleged that the complainants thereto, Sophia Ragor and Anna Luce, had repeatedly applied to Peter Ragor to convey to them their just

share of said premises; that said Peter had frequently admitted the legality and equity of their claims, and delayed them by promises that they should have and enjoy all their rights and equities in the premises; that in August, 1889, said Emeline Ragor, and the other parties holding title for her as her trustee, arranged for the execution by the said Emeline Ragor of three promissory notes to be executed by Emeline Ragor and secured by deed of trust upon the premises in question, to be delivered to the said complainants in discharge of their claims and rights in the said premises, but that such adjustment of their interests was not concluded. The bill also negatived any imputation of laches on the part of the said complainants to the bill, and disclosed a right in the complainants to the bill to recover, based, in part at least, upon circumstances peculiar and personal to them, and to an extent distinct and independent in its character from any right of the other heirs of the said John Ragor, deceased. The bill did not purport to have for its purpose the recovery of the interests of any other persons than the complainants therein, nor were the rights and interests of the other persons set forth in the bill, except in so far as such would incidentally and necessarily appear historically in the statement of the rights and claims of the complainants. The complainants did not assume to declare that the other heirs of their father were still entitled to the same rights which they claimed or that the other heirs desired to engage in litigation to secure any rights in the land, but framed the bill upon the theory that the rights and interests of all other persons should be determined by the court. The complainants had not the power to force their brothers, plaintiffs in error, to join with them in contesting the question whether the said deed was in fact a mortgage, and did not assume such power, but made the said plaintiffs in error defendants to the bill, and all other persons known to have, or claiming to have, any interest in the premises, and prayed "that a partition or division should be made of the several parcels of land comprising said real estate above described, between your oratrix and those of the defendants above named who shall in this suit establish valid title thereto, respectively, according to their respective rights and interests therein."

Plaintiff in error Frank Ragor did not answer the bill, but was defaulted. Andrew Ragor filed an answer denying the complainants were entitled to the relief prayed for, and, so far as the plaintiffs in error Andrew and Frank Ragor were concerned, the cause was submitted, on the 9th day of February, 1891, to the master in chancery for proofs upon this state of pleading. The cause was pending before the master until the 16th day of March, 1892, and while it was so pending, and but a few days before the proofs taken before the master were reported, the said Andrew and Frank, without having sought or

obtained leave of the court so to do, placed upon file an instrument which they denominated a "cross bill." This pleading was, by order of the court, stricken from the files, and neither of the plaintiffs in error sought permission of the court to refile the same. Its allegations were in direct contradiction to the allegations of the answer filed by Andrew. A cross bill must be founded upon matters of defense stated in the answer to the original bill. 2 Barb. Ch. Prac. 129; McDougald v. Dougherty, 14 Ga. 679. When, as here, a cross bill is inconsistent with, and antagonistic to, the answer, it may be properly stricken from the files. Andrew subsequently obtained leave to amend his answer, and did amend it by striking out the averments denying that complainants had any right of recovery, and adding as follows: "And confesses to complainants' right to recover under the prayer of the bill." But, after so amending the answer, no effort was made to obtain leave to refile the cross bill or to refile the same.

When the cross bill was filed Frank and Jacob Ragor were in default. After the cross bill had been stricken Frank moved the court to set aside the default as to him, but did not advance any reason in aid of the motion or otherwise support it, and the motion was overruled. A party who, for want of an answer, has been defaulted, has no right to file a cross bill. Rev. St. c. 22, entitled "Chancery," § 30. Jacob did not join in the cross bill or seek to have the default as to him set aside. Moreover, when this cross bill was filed the cause had been at issue, and referred to the master, for more than a year, and the parties had taken the proof before the master. The cause was ready for hearing, and the cross bill would, had it been filed, have necessitated further pleading and further delay to the complainants. Therefore the court, in view of the situation and in view of what has been hereinbefore said with reference to the cross bill and to the rights of the parties to file the same, did not err in striking the cross bill from the files.

It is, however, urged that the original bill should be deemed and treated as a bill for partition, and that in such proceedings the statute requires the court to ascertain and declare in its decree the rights, titles, and interests of all the parties, and give judgment accordingly. As we have remarked hereinbefore, the primary purpose of the bill was to have a deed absolute upon its face declared to be a mortgage, and the rights of complainants to redeem therefrom judicially declared; and the prayer for partition was added because of the equitable rule that a court of chancery, having obtained jurisdiction for the purpose of rendering a certain character of relief, may retain the case for the purpose of affording additional relief to which the party has become entitled by reason of being the recipient of the primary relief. But here the plaintiffs in error, who

complain they were not accorded relief by way of partition, were unwilling to join, and did not join, in invoking the aid of the court to grant, in their behalf, relief against the deed or to establish in them a right to redeem from it. Whether they desired to have the deed regarded as a mortgage, and to have the right to redeem therefrom, was a matter for their determination, and for the employment upon their part of the appropriate and proper pleadings and procedure to bring their rights before the court for determination. The application to have the deed declared a mortgage was not made until some 15 years after the execution of the deed. The complainants in the original bill negatived all imputation of laches or acquiescence, and averred express promises that their rights should be fully preserved. It does not necessarily appear from the record that the said plaintiffs in error Andrew, Frank, and Jacob, or either of them, were entitled to the same relief, by way of partition of the proceeds of the sale of the land, as was decreed to their sisters, the complainants in the bill.

It only remains to be determined whether the plaintiff in error Peter Ragor has any just ground to complain of the action of the court. It appeared from the pleadings and proof that the married life of the said Peter and his wife, Emeline, was so unhappy that they determined to live separate and apart, and that they entered into a voluntary agreement that the wife should have the care and custody of the children (the number, sex, or ages of whom are not disclosed by the record), and that the husband and wife should convey to John Brenock, as trustee for the parties, the entire tract of land known as the "Ragor Farm"; and that in pursuance of such agreement the said Peter and wife, on the 19th day of November, 1887 (about three years before the filing of the bill), executed and duly acknowledged an instrument conveying the said farm to John Brenock, father of said Emeline. This deed, after reciting the fact that the grantors were husband and wife, and, because of the differences between them, were unable to live together happily, and had voluntarily agreed to live separate and apart, recited further as follows: "And whereas, it is agreed by the party of the first part to give to said party of the second part a one-half interest in all property now owned by him, which one-half interest in said property is to be received by her in full satisfaction of all claim or claims which she has, or may have, against him or his property for the support of herself or of the children of the said marriage." This recital was followed by a conveyance of all said Ragor farm to the said Brenock in trust, upon conditions which need not be here particularly specified, further than to say the trust was for the benefit of the husband and wife. The deed contained the following provisions: "And upon the further

trust, upon the request of the said parties of the first and second part made to him in writing, to convey said premises to said parties for such price, and upon such terms of payment, as they, by said written request, shall direct; and upon the further trust that when either of the said parties of the first part or second part requests, in writing, a sale of said premises, and has a purchaser therefor for a given price and upon given terms, then to convey the said premises to said purchaser for said price and upon said terms, unless the other of the said parties shall, within sixty days thereafter, purchase the interest of the one desiring to sell at the price and upon the terms of the proffered sale; and upon any sale of said premises the said trustee, after paying all expenses of the sale, will divide the purchase money equally between the parties of the first and second parts hereto, and, after deducting from each share any money due him by virtue hereof, then to pay the balance to the respective parties, as herein entitled." It further appeared that Brenock accepted the trust, entered into possession of the land, and proceeded to execute the provisions of the trust deed.

On the 1st day of May, 1889, the said Peter addressed a note to the said John Brenock and his said wife, Emeline, inclosing an offer of another party for the purchase of the Ragor farm at and for the sum of \$54,000, upon specified terms of payment, and notified them that he desired the offer should be accepted and the premises sold at that price, or that his interest in the farm should be purchased by them at the same price and upon the same terms and conditions. The wife elected to purchase the interest of the husband, and, having complied with the terms of the sale, the land was conveyed to one John Coughlin, to be by him held as trustee for the said Emeline. The said Emeline paid to the said John Brenock the amount required to be paid in cash according to the terms of the sale, and notes for the deferred payments were executed by her, secured upon the land. The trustee, Brenock, paid moneys out of said purchase price, from time to time, to the said Peter and to others for his use, and held said notes in his possession at the time of the institution of this suit, and the notes, together with a report of the payments made to the said Peter or for his use, were filed with the court as a part of the files of the cause, under an order made by the court with reference thereto. The court, by its decree, adjusted the accounts between the said Peter and the said John Brenock, and decreed that Peter was entitled to receive, and should be paid, out of the proceeds of the sale to Knapp, the sum of \$8,929.04, as being the balance due him.

A number of complaints are preferred against the adjustment thus made by the court. In this respect it is first contended that at the time Peter demanded that the

farm should be sold at the sum of \$54,000, or that his interest therein should be purchased at that sum proportionately, Peter, by reason of excessive indulgence in intoxicating liquors, had become and was mentally incapacitated to transact business, and that the said wife, Emeline, and the said John Brenock, well knew this. The insistence is therefore that the said Peter should not be bound or concluded by the sale of his one-half interest in the farm to his wife for the sum of \$27,000, as the court decreed he should, but should be deemed the owner of the undivided one-half thereof at the time of the sale of the farm to Knapp, and therefore entitled to receive one-half the sum paid by Knapp for the farm, to wit, the sum of \$70,000, less sums disbursed to or for him by the said John Brenock. The trial court found, and recited as one of the findings of the court, that the said Peter, at the time in question, "was in full possession of his mental faculties and capable of giving a legally binding assent as to matters affecting his real estate." We find testimony in the record tending at least to show that his mental faculties had been somewhat impaired, but there was testimony to the contrary, and the correct solution of the question was dependent upon a variety of considerations, as to the weight and merit of which the chancellor had superior facilities to those enjoyed by us for arriving at a correct conclusion. After a thorough consideration of all the testimony bearing upon this point, and much reflection thereon, we are unable to say that we have a clear conviction as to the truth of the matter, or that we would be justified in declaring that the chancellor was clearly and palpably in error in his judgment thereon. In such state of case we have repeatedly held the finding of the trial court should be accepted and acted upon by this court. *Higgins v. Wisner*, 170 Ill. 220, 48 N. E. 692, and cases cited. The refusal of the court to adjudge that said Peter should not be bound by the sale of his interest of the land at and for the price of \$27,000 cannot, therefore, be declared to be error.

But we think the court erred with respect of another item for which Peter was required to account. The court decreed the complainants in the original bill, Anna Luce and Sophia Ragor, were entitled to receive out of the proceeds of the sale of the land to Knapp the sum of \$9,111.80, such being the amount of their interest in the said one-third part of said land after the deduction of the amount necessary to redeem their interest in the land, upon the theory that the deed of said one-third to said Peter by his father, John Ragor, was but a mortgage. The court charged this sum of \$9,111.80 in the statement of the account of the said Peter as an item of indebtedness of the said Peter, and deducted the same from the amount which otherwise would have been decreed to be paid to the said Peter. In making this charge to Peter

the court proceeded upon the theory that Peter should be deemed to have warranted to his wife that he was seised of a good, complete, and unincumbered title in fee to the lands, and that, as it appeared his claim to a portion thereof was but that of a mortgagee, he should be required to account for a sum sufficient to make perfect and good the title to the farm. The deed executed by Peter to the trustee contained no covenant of warranty, and was executed, as it expressly averred, only for the purpose of giving to the wife a one-half interest in all the property the husband owned. The chancellor announced his finding and conclusions, orally, and thus directed a decree to be framed. We learn from this oral announcement, which is preserved in the certificate of evidence, that the chancellor found that Mrs. Emeline Ragor, before execution of the deed to the trustee, Brenock, had full knowledge and notice of the character of the deed executed by said John Ragor to her husband, and was fully advised as to the rights of the complainants, Sophia Ragor and Anna Luce. Moreover, we find that fact abundantly established by the proof. Mrs. Emeline Ragor, therefore, was not deceived or imposed upon in any manner. She knew that by the settlement with her husband she obtained but one-half of whatever right he had in the farm, and she had full knowledge of the infirmity which affected alike the interest of herself and that of her husband. In every equitable point of view she was the owner of but the undivided one-half of the interest possessed by her husband, and her undivided one-half was subject, equally with his, to the defect of which they both had knowledge. When she purchased his one-half of the land for \$27,000 she knew she was thereby obtaining only such interest as he had in an undivided one-half in the land, she being then the owner of the like interest in the other undivided one-half. In good conscience, all she could require at the hands of her husband is that he should account for a sum sufficient to make good to her an undivided one-half interest in the land. The court, therefore, should not have charged, as against Peter, the full amount decreed to be paid to Anna Luce and Sophia Ragor, viz. \$9,111.80, but only the one-half thereof, viz. \$4,555.90, for the amount necessary to pay the other one-half should have been borne by Mrs. Emeline Ragor. The court, aside from the item of amounts paid to Anna Luce and Sophia Ragor, found that Peter should receive the sum of \$18,040.84. From this sum should be deducted the sum of \$4,555.90 (being one-half the amount decreed to be paid said Anna Luce and Sophia Ragor), which would leave to be paid to Peter the sum of \$13,484.94, instead of the sum of \$8,929.04, as found and decreed by the court.

The decree of the court, so far as it disposes of the rights of Andrew, Frank, and Jacob Ragor, is affirmed. As to Peter the

decree is reversed, and the cause remanded, with directions to the court to restate the items of the account of said Peter in accordance with the views herein expressed, and to enter a decree awarding him the said sum of \$13,484.94. In all other respects the decree is affirmed. The costs in this court shall be paid as follows: One-half by Mrs. Emeline Ragor, and the other one-half by Andrew, Frank, and Jacob Ragor. Decree affirmed in part.

(175 Ill. 514)

**HUMISTON, KEELING & CO. v.
WHEELER.**

(Supreme Court of Illinois. Oct. 24, 1898.)

**TRIAL — PEREMPTORY INSTRUCTIONS — WAIVER —
TENANTS — EVICTION — ABANDONMENT — DESTRUCTION
OF PREMISES — LIABILITY FOR RENT —
APPEALS.**

1. A motion to peremptorily instruct for defendant, made at the close of plaintiff's evidence, is waived by a failure to renew it by motion or by an instruction at the close of all the evidence.

2. On an issue whether a lessee was evicted by the lessor's entering into possession, evidence is admissible that the lessee had abandoned the premises, and leased other quarters for his business, before the entry by the lessor.

3. A five-story building was leased with the exception of the fourth floor, office room on the second floor, and a space in the rear of the basement, which were retained by the lessor. Afterwards the interior of the building was burned out, but the walls were intact, and part of the lower floors remained. The first floor and the basement were not burned, but the former was covered with debris so as to be untenable. *Held* that, conceding the lease was only of "portions of the building," there was not an entire destruction of the building, within the rule that the destruction of the entire subject-matter extinguishes the agreement to pay rent.

4. An objection to remarks of counsel cannot be first urged on appeal.

Appeal from appellate court, First district.

Action by Charles G. Wheeler against Humiston, Keeling & Co. From a judgment of the appellate court (70 Ill. App. 349) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Flower, Smith & Musgrave, for appellant.
Sigmund Zeisler, for appellee.

CARTWRIGHT, J. Appellee obtained a judgment in the superior court of Cook county against appellant for \$3,750, the balance due, by the terms of a lease, for the rent of certain premises in Chicago from March 13, 1891, to May 1, 1892, after crediting \$2,400 received by appellee from other tenants, to whom he rented the premises during a portion of said period after their abandonment by appellant. The judgment has been affirmed by the appellate court.

The arguments in this court are devoted largely to questions of fact, such as whether the premises rented were totally destroyed by a fire on March 13, 1891, and whether there was a surrender of the lease and an acceptance by the plaintiff as landlord, and whether

the taking possession by the plaintiff constituted an eviction. These questions were involved in the trial court and appellate court, but have now been conclusively settled in favor of plaintiff by the judgment of the appellate court.

At the conclusion of the evidence for the plaintiff the defendant moved the court to instruct the jury to find the issues for defendant, and the motion was denied, but defendant then proceeded to offer evidence in its behalf, and the motion was not renewed or an instruction asked at the close of all the evidence. The motion was therefore waived. *Railway Co. v. Velie*, 140 Ill. 59, 29 N. E. 706; *Railway Co. v. Red*, 154 Ill. 95, 39 N. E. 1086. The question of the sufficiency of the evidence to sustain a verdict was not raised as a question of law, and we are precluded from considering questions of fact, as such. We must confine ourselves to such assignments of error as we are authorized to pass upon, and can only consider the evidence or facts proved in their relation to such assignments.

Only one ruling of the court during the trial is pointed out and complained of in the argument. This alleged error was in permitting plaintiff to prove that after the fire which occurred in the premises the defendant rented other quarters and made a lease for the same. As already said, it is argued here that there was an eviction by the plaintiff, and both parties agree that that question was in issue before the jury. Upon that issue it was an important question whether the tenant had abandoned the premises before the expiration of its term and before the entry by the plaintiff. In order to constitute an eviction, the tenant must abandon the premises on account of the act of the landlord, and, if defendant had already abandoned them, the entry by plaintiff would not constitute an eviction. In case of an abandonment without fault of the landlord or in consequence of his act, he may re-enter, and again rent the premises, and credit the lessee with the proceeds, and his so taking possession does not relieve from the payment of rent. 12 Am. & Eng. Enc. Law, 751; Wood, Landl. & Ten. § 477. The evidence was that plaintiff rented to defendant Nos. 143 and 145 Lake street, in Chicago, from May 1, 1890, to May 1, 1892, with the exception of office room on the second floor, the fourth story, and stairs connecting with the front east door, and a space in the rear of the basement, 10 by 20 feet, for grinding purposes, which were retained by plaintiff. Plaintiff was also to have the right to grind drugs by the use of the gas engine, and was to pay one-fifth of the cost of running it. If water gave out in the fourth story he was to be allowed to pump sufficient water by the use of the engine, and both parties were to have common use of the elevator. Defendant agreed to pay \$4,800 a year as rent, in monthly installments of \$400, one half in cash, and the other half in drugs. At the expiration of the lease

the premises rented were to be returned to plaintiff in as good condition as when entered upon, loss by fire or unavoidable accident or ordinary wear excepted. On the leased premises there was a building of five stories and a basement, with a frontage of 30 feet, and running back from the street 165 feet, out of which the portions stated were excepted. Defendant occupied the premises from May 1, 1890, until March 13, 1891, when most of the interior of the building was burned out. The walls remained intact. The roof and fifth story were destroyed. Some of the flooring at the front and rear of the fourth floor remained. The third had a few feet more at the back end, and 12 or 13 feet at the front end, on which goods, desks, and shelves were left. Of the second floor, about 25 feet remained in the rear and about 45 or 50 feet at the front end. The first floor was not burned, but was covered by debris from the floors above, which had fallen upon it, and the basement was not burned. The building was rendered unfit for occupancy by this condition, and defendant left it. Before the evidence objected to was offered, plaintiff had testified, without objection, that shortly after the fire he informed one of defendant's officers that he had let the contract for repairing the store, and expected them to occupy it or find a tenant, and they said they had taken a new store, and that when he called on defendant at its new store the last of March, to collect rent for that month, they paid him for 13 days only, and tendered him a receipt for the same in full of all rents. A letter from defendant to plaintiff, dated June 8th, was also in evidence, in which it was stated that defendant was not, and had not been, a tenant of plaintiff since the morning of March 14th. The fact which the evidence objected to tended to prove had already been proved without objection and was not in controversy, so that defendant could not have been harmed by the ruling; but the evidence was proper on the question of abandonment, to show that defendant did not intend to return to the premises.

The only instruction complained of is the first given at the request of plaintiff. It is as follows: "The court instructs you, as a matter of law, that where a lease is made of a portion of a building, and such portion is damaged by fire, and the premises rented are rendered untenable, but the premises are not totally destroyed, but are capable of repair, those facts will not relieve the tenant from his liability to pay rent, unless the lease so provides. And if you believe, from the evidence in this case, that the premises leased by the plaintiff to the defendant in this case were rendered untenable by fire, but were not totally destroyed, and were capable of repair, then that fact did not relieve the tenant from its liability to pay rent, as provided by the lease." It is alleged against this instruction that it was too broad, but we find no fault in it. The lease was of

the premises 143 and 145 Lake street, and the description in a lease or conveyance would unquestionably carry the land as well as the building. Shep. Touch. 90. It is contended that, on account of the exceptions from the general description, the lease is to be regarded as a lease merely of portions of the building. The lease was not of certain portions of the building without the land, but of the land and building, except certain minor portions of the building. The legal rights of the parties would, of course, be the same if plaintiff had leased the excepted portions to another person instead of retaining them, and it certainly could not be said that, if he had leased the fourth floor and office and space for grinding to some third person, such person would have acquired any interest in the land except such as was necessary to the enjoyment of the particular rooms. If the plaintiff had then leased the premises, except such interest, to defendant, the lease would surely convey an estate in the land which the tenant of particular rooms had not acquired. The rule is that when land and building are rented the tenant is not excused from the covenant to pay rent by the loss of the premises by fire, if anything remains to which the lease may attach. There is no implied warranty of the landlord that the premises shall remain tenable to the end of the term, and if they are injured or rendered untenable, but not destroyed, the tenant is not relieved from his covenant, but may repair the damage, and restore them to their former condition, and enjoy them to the end of the term. 3 Kent, Comm. 465; Peck v. Ledwidge, 25 Ill. 109; Smith v. McLean, 123 Ill. 210, 14 N. E. 50; 12 Am. & Eng. Enc. Law, 741. Many authorities have recognized an exception to the common-law rule that the destruction of the leased premises does not release the tenant from his covenant to pay rent. This exception has been made where the destruction was total, so that there was nothing upon which the lease could operate, and its ground is that the destruction of the entire subject-matter of the contract extinguishes the estate for years, and, the interest of the lessee being entirely destroyed, the agreement to pay rent is extinguished. This is the case where a room or apartments or a building is leased and destroyed. The exception requires that the building, or portions of the building, leased shall be not merely damaged or injured, but destroyed. Smith v. McLean, supra. Total destruction, perhaps, does not mean such a destruction as does not leave one stone lying upon another, but it must be such as destroys the leased property in its character as a room or a building. The question, under the exception, is as to the condition to which the thing leased has been reduced by the fire, and here the walls and basement were intact. The building, as a building, was not destroyed, but required a new roof and new floors above the first floor.

It was in a condition that defendant might have made repairs and occupied it, and the new roof and floors would properly have been termed repairs, and not the creation of a new building. If the defendant had a right to do that, and to continue to occupy the premises to the end of the term, it would not be relieved, under any rule, from the payment of rent. There is no question here that if the lease was of the land and building, as we conclude it was, there remained something to which the lease attached, even if the building was destroyed, but this instruction was applicable to the claim of defendant that the lease was only of the portions of the building which it had a right to occupy. The evidence showed that there was not an entire destruction, even of the building, and stated the correct rule as applied to that condition.

The only other error assigned which we have a right to consider is that counsel for plaintiff made an unwarranted statement to the jury touching the relative wealth of the parties. The language purported to be in reply to a statement of defendant's counsel that plaintiff was a rich landlord; but, whether it was proper or not, no ruling of the court was asked or obtained, and, under repeated decisions of this court, there is nothing to be reviewed under that assignment. The judgment of the appellate court is affirmed. Judgment affirmed.

(175 Ill. 183)

CHICAGO & A. R. CO. v. BLAUL.

(Supreme Court of Illinois. Oct. 24, 1898.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—DAMAGES.

1. One who knows that a flagman is usually stationed at a crossing is not negligent in attempting to cross the tracks, in the absence of any warning or signal of danger.

2. Whether a party injured exercised due care is a question for the jury.

3. \$5,000 damages are not excessive for an injury to the spine, liable to result in permanent paralysis.

Appeal from appellate court, Second district.

Action by Elizabeth Blaul against the Chicago & Alton Railroad Company. From a judgment of the appellate court affirming a judgment for plaintiff (70 Ill. App. 518), the defendant appeals. Affirmed.

George S. House, for appellant. Donahoe & McNaughton, for appellee.

PER CURIAM. The appellate court, speaking through Mr. Justice ORABTREE, in deciding this case delivered the following opinion:

"This was an action on the case, brought by appellee, to recover damages for injuries sustained by her in consequence of a collision with one of appellant's trains of cars, which came in contact with a buggy in which appellee was riding, at the intersection of ap-

pellant's railway tracks with Fifth avenue, in the city of Joliet. There was a trial by jury, resulting in a verdict and judgment for appellee for \$5,000. This court is asked to reverse the judgment upon the sole ground that the evidence does not show appellee was in the exercise of ordinary care for her own safety at the time of the accident which caused her injury. It appears from the evidence that on December 8, 1894, appellee left her home, in Chicago, in company with her husband and infant child, and proceeded to Joliet, over appellant's railroad. On arriving at the station in Joliet, the party were met there by appellee's brother, Dennis Van Garvin, and one William Smith, who had in waiting a light spring wagon, for the purpose of conveying the visitors to Van Garvin's home, about two miles southeast from Joliet. Appellant's railway at Joliet crosses Fifth avenue nearly at right angles, and at the street crossing it has three tracks, the easterly track being the south-bound main, the one next west the north-bound main, and the westerly track being what is known as a side track. When the party started for Van Garvin's home, there were seated in the light wagon Van Garvin and Smith upon the front seat, the former sitting on the right-hand side, and driving, while the rear seat was occupied by appellee, with her babe in her arms, and her husband sitting beside her, and a small boy sat in the wagon box behind the rear seat. Proceeding in this manner easterly along Fifth avenue, the party came to the right of way of appellant's railroad, and as they reached that point a long freight train, consisting of about forty box cars, was then being drawn over the Fifth avenue crossing in a northerly direction, along the north-bound main track. Van Garvin, who was still driving, brought his horse to a standstill, and waited for this freight train to pull across the street, and about the time the caboose or rear car reached the north sidewalk, seeing nothing to prevent his going forward, and there being no gates closed or flagman at the crossing to give notice or warning of danger, he started his horse towards home, when, just as he reached the easterly or south-bound main track, and was in the act of crossing, a train, consisting of an engine and seven or eight flat cars, bore down upon them at a rapid rate of speed from the north, striking the wagon in which appellee was riding, throwing the occupants of the vehicle a distance of some twenty or twenty-five feet, and inflicting upon the person of appellee serious injuries.

"It is frankly admitted by counsel for appellant that under the ordinances of the city of Joliet it was the duty of appellant to have a flagman at the crossing, and that one is usually on duty there, but that at the particular time of this accident he had left his post on some other business, and was then absent from his place of duty; and counsel concedes that this was negligence on the part of ap-

pellant, but he contends that, notwithstanding this negligence of appellant, appellee cannot recover, because she had committed her safety to Van Garvin, the driver of the vehicle, and that the latter was guilty of negligence in not ascertaining that the east track was safe to cross before attempting to pass over it; that, inasmuch as the view was obstructed to some extent by the freight train upon the north-bound main track, he should have waited until he could know with certainty that it was safe for him to cross. It is argued that because Van Garvin knew there was usually a flagman at the crossing he should have waited until notified by the flagman that it was safe to cross. Counsel says in his argument: 'He [Van Garvin] knew that at this crossing there was stationed a flagman, whose duty it was to notify persons riding in vehicles when it was safe to cross.' But we think this is a misapprehension of the duty of a flagman under the ordinance put in evidence, and is not according to the general understanding of the public, nor the almost universal custom of flagmen on such duty. It is only when there is danger, caused by the approach of trains, that the flagman displays any signal, or gives any notice to the traveling public. When it is safe to cross, the flagman does nothing, as a general rule; but when there is danger he gives notice, or should do so. This being the almost universal custom, we think Van Garvin, knowing that a flagman was usually stationed at this crossing, had a right to rely on the presumption that he was at his post, and would do his duty, and that, in the absence of any warning or signal of danger, he was not chargeable with negligence in proceeding to cross the tracks. Had the flagman been at his post, and given the danger signal, the accident would not have happened. While appellee's party were waiting for this freight train to go by, other teams had gathered there, also waiting to cross, and all seem to have started forward about the same time, the crossing appearing to be clear, and none of them apprehending danger. They no doubt relied upon the presumption that the flagman was at his post, and would do his duty, warning them of danger if it existed. This presumption they had the right to indulge and to act upon. 'The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track; and the public have a right to rely upon a reasonable performance of that duty.' Railroad Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855. Fifth avenue was a largely traveled thoroughfare, and it was the duty of appellant to keep a flagman in constant attendance there. In his absence, to run a train over the crossing at a dangerous rate of speed was great negligence, and rendered appellant clearly liable for injury resulting therefrom to any one in the exercise of ordinary care for his or her own safety. Whether appellee was in the exercise of such care at the

time of the accident was a question of fact for the jury, and we cannot say their finding on that point was wrong. On the contrary, we think it was fully justified by the evidence, and we cannot reverse the judgment upon that ground.

"It is claimed that the damages are excessive, but we cannot say that the jury were not warranted in finding the amount they have awarded. From the evidence the jury had a right to believe that appellee has sustained an injury to the spinal cord, from which she is in danger of permanent paralysis; and, if so, certainly the damages are not excessive. We do not need the testimony of expert physicians to tell us that injuries of the character received by appellee frequently do result in paralysis. The extent of the injury may not be at once apparent, but the result may be a total wreck of the entire system. The jury heard the testimony of the witnesses and the opinions of the medical experts who had examined appellee, and they saw and had the opportunity of observing her for themselves, and we are not disposed to substitute our judgment for theirs, under all the circumstances of the case.

"No complaint whatever is made of the instructions, and, finding no error in the record, the judgment will be affirmed."

We adopt the foregoing opinion as that of this court, and the judgment of the appellate court is affirmed. Judgment affirmed.

(176 Ill. 238)

CHICAGO & A. R. CO. v. GLENNY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

SUBROGATION—RIGHT OF INSURER—APPEAL AND ERROR—VARIANCE—TRIAL—INSTRUCTION—PROOF OF INCORPORATION—RAILROADS—DAMAGE BY FIRE—STATUTORY REGULATION—BURDEN OF PROOF—OPINION EVIDENCE—VALUES.

1. An insurer who has paid the loss for which another, because of his negligence, was primarily liable, stands in the position of a surety, and becomes subrogated to the right of the insured as against such other to the extent of the amount paid.

2. A variance between the allegations and proof cannot be considered on appeal, unless it was pointed out and urged at the trial.

3. An instruction in an action for negligence authorizing a recovery on either of two counts of the declaration was not erroneous, where both counts alleged acts of negligence, proof of which, in either case, authorized a recovery.

4. Where the summons was served upon a defendant as a corporation, and there was no plea of noli tuel corporation, it is estopped to deny that it is a corporation in an action for damages caused by its negligence.

5. In an action against a railroad company for damages caused by fire escaping from its locomotive, an instruction based on 3 Starr & C. Ann. St. par. 123, p. 3294, providing that in actions for damages caused by fire communicated by any locomotive engine, while passing along any railroad, the fact that such fire was so communicated shall be taken as prima facie evidence of negligence, etc., an instruction is not erroneous in not limiting the prima facie case to fire occasioned by an engine "while upon or passing along any railroad in this state," where the fact that the engine which set the

fire did pass along the defendant's railroad was undisputed.

6. An instruction based on 3 Starr & C. Ann. St. par. 123, p. 3294, is not objectionable, as permitting a recovery without proof of the particular acts of alleged negligence, since plaintiff, having stated a cause of action in his declaration, has a right to invoke the statute as relieving him of the burden of proof, after showing that the fire was communicated from defendant's locomotive.

7. A witness may give his opinion, based on his own observation, as to the value of farm machinery which had been burned so as to be worthless.

8. In an action for the loss of buildings by fire caused by defendant's negligence, error in permitting a witness to base his opinion of the value of the buildings on the description thereof by another witness, instead of on a hypothetical statement of what had been proved, is not ground for reversal, where the value of the buildings was shown by other testimony, and defendant did not controvert the values shown by plaintiff.

Appeal from appellate court, Second district.

Action by John Glenn and another against the Chicago & Alton Railroad Company. The judgment of the circuit court for plaintiffs was affirmed by the appellate court (70 Ill. App. 510), and defendant appeals. Affirmed.

This was an action on the case by appellees against appellant for damages occasioned by fire caused by a passing locomotive on defendant's railroad, destroying certain buildings and personal property belonging to the plaintiffs. There was a trial by jury resulting in a verdict for plaintiffs for \$7,849.18, on which, after overruling defendant's motion for a new trial, the court entered judgment. The appellate court having affirmed that judgment, this appeal is prosecuted.

George S. House, for appellant. R. W. Barger, for appellees.

WILKIN, J. (after stating the facts). The argument of counsel for appellant here is chiefly devoted to a criticism of the opinion of the appellate court. We concur in the views of that court, and regard the objections urged against the reasoning of the opinion without force.

It appears that the property destroyed was partly covered by insurance, and the insurance company had paid the loss before this action was brought. It is said this suit is in fact brought by that company, the intimation being that, inasmuch as plaintiffs had received compensation for their loss from the insurance company, they cannot maintain this action against the defendant. The insurer stood in the position of a surety, and having paid the loss for which the defendant, by its negligence, was primarily liable, became subrogated to the rights of the plaintiffs to the extent it had paid. If authority is needed in support of this proposition, it will readily be found in our own decisions. *Insurance Co. v. Frost*, 37 Ill. 333; *Chadsey v. Lewis*, 1 Gilman, 153; *Express Co. v.*

Haggard, 37 Ill. 465. Other cases might be cited to the same effect, but we regard the law so well settled that it cannot be seriously questioned.

We are urged to review the evidence for the purpose of determining whether it supports the allegations of the declaration. Waiving the question whether the record preserves a ruling of the trial court on that proposition so as to make it one of law, reviewable in this court, we deem it only necessary to say that we think the testimony fairly tended to support the material averments of the declaration. The real point attempted to be urged is that there was a variance between the allegations and proof. It need scarcely be said that to entitle the defendant to have that question passed upon, even in the appellate court, it must have been pointed out and urged at the time of the trial (*Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801; *City of East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1077); and this court will not presume that a variance was the ground of a motion to instruct a jury to find for the defendant (*Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680).

Complaint is made of the first and third instructions given to the jury on behalf of plaintiffs. The objection urged against them is that they treat the first and second counts of the declaration as though they averred the same or similar acts of negligence, whereas the first alleges that the negligence consisted in permitting the right of way to be covered with dry grass and other combustible materials, and the second that the negligence consisted in defective appliances and the improper handling of the locomotive. The instructions authorize a recovery under either count of the declaration, in case both charges of negligence are sustained by the evidence. This certainly did not prejudice the defendant. The law authorizes a recovery upon proof of either one of the charges. If both were proved, it was immaterial on which of the counts the jury found. Proof of both would sustain either. But for the reference in the instructions to both the first and second counts, no fault whatever could be found with them.

The tenth of plaintiffs' instructions is also criticised. It is based on paragraph 123 of the railroad law. 3 Starr & C. Ann. St. p. 3294. The statute reads, "that in all actions against any person or incorporated company," etc. It is insisted that, the defendant not being a person, there must have been proof in the record that it was an "incorporated company," else the statute is inapplicable, and that it was error to give this tenth instruction without that qualification. The summons appears to have been served upon the defendant as a corporation. There was no plea of noli tuel corporation, and the defendant was estopped to deny that it was a corporation. Such was the condition of

the record when the court was called upon to decide the applicability of this instruction to the case.

It is further insisted the same instruction is faulty in not limiting the "prima facie case" to fire occasioned by an engine "while upon or passing along any railroad in this state." That the engine which set the fire did pass along the defendant's railroad is undisputed. The court, in instructing the jury, was justifiable in assuming that fact.

The further point is made against the instruction that it permits a recovery without proof of the particular acts of alleged negligence. The statute upon which the action was based is a rule of evidence. Having made such allegations in their declaration as stated a cause of action, the plaintiffs had the right to invoke the statute as relieving them of the burden of proof after showing the fire was communicated from the defendant's locomotive, and rest their case without proof of the particular facts constituting the negligence. None of the objections to the tenth instruction are well taken.

Expert testimony was admitted, over the objection of the defendant, as to the value of the property destroyed. A witness named Dow stated what he observed of the ruins after the fire, and from that observation gave his opinion as to the value of certain farm machinery which had been so burned as to be worthless. It is insisted this testimony was incompetent. We do not think so. It may have been of but little weight, but that was for the jury. Another witness testified as to the depreciation in the value of buildings, generally, by age, and was then permitted to give his opinion as to the value of those destroyed, based upon the description of them given by the witness Glenny, who was acquainted with them, the witness giving the opinion never himself having seen them. The form in which the question was put to the witness as an expert was not strictly proper. The opinions of witnesses as to values may be based upon a hypothetical statement of what has been already proven in the case,—as to the quality, conditions, and situation of the property,—as well as upon their own actual observation. *Moore v. Railway Co.*, 78 Wis. 120, 47 N. W. 273. Instead of asking the witness his opinion based upon the testimony already in, the question should have been framed hypothetically, so as to embrace such facts as the evidence was supposed to show. "Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts or the witness is personally acquainted with them." *Bradner*, Ev. p. 537. It has been permitted in some courts to pursue the course taken in this case, but as we said in *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999 (on page 300, 158 Ill., and page 1002, 41 N. E.), "the better and proper practice, however, is to put a question to the witness reciting the supposed facts hypothet-

ically upon which the opinion of the expert is wanted." The error in this case was one of form, rather than of substance. The value of the buildings was shown by other testimony, and no evidence was introduced by the defense to controvert the values shown by the plaintiffs. We find no reversible error in the record, and the judgment of the appellate court will be affirmed. Judgment affirmed.

(175 Ill. 421)

SHERIDAN v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1898.)

SPECIAL TAXES—JUDGMENT—ERROR—REVIEW.

1. Where parties appealing from confirmation of a judgment against their property for delinquent special taxes agreed in open court to entry of an order setting aside a former confirmation, and to a submission of the controversy to the court, whereupon the assessment was reduced, and judgment of confirmation entered, they cannot assign as error that their property was not bound because of defects in procedure, whereby the assessment was made void.

2. The rule which prevents the courts from interfering with judgments after term does not apply to orders afterwards entered by agreement of parties.

Error to Cook county court; Frank Scales, Judge.

Proceeding by the city of Chicago against James W. Sheridan to enter a judgment for delinquent special taxes. From a judgment for applicant, Sheridan brings error. Affirmed.

George W. Wilbur, for plaintiff in error. Charles S. Thornton, Corp. Counsel, John A. May, and Stuart G. Shepard, for defendant in error.

PHILLIPS, J. On April 11, 1892, the city council of the city of Chicago passed an ordinance providing that a connected system of sewers be constructed in eight streets in the ordinance named, and commissioners were appointed to estimate the cost of the improvement, who estimated the cost to be \$38,511.78. The ordinance for the improvement detailed the character and size of the sewers, and the grade lines thereof, and provided further: "One hundred and twelve manholes to be built upon said sewer at such points as may be directed, to be cylindrical in shape, and have an internal diameter of three feet, and resting on a foundation of three courses of sewer brick; the walls of said manholes to be eight inches thick, built of two courses of sewer brick laid edgewise, in perpendicular courses. Ninety-eight catch-basins shall be constructed, and connected and trapped with said sewer with nine-inch vitrified tile pipe, located at such points on the curb lines of said street as may be directed. Said catch-basins shall be seven feet two inches deep, to be four feet inside diameter on the bottom to a height of five feet two inches, and thence to narrow to three feet inside diameter at the

top. * * * All brickwork to be laid in the best American hydraulic cement. Said work to be done under the superintendence of the department of public works." Section 3 provides that assessments shall be divided into and collected by installments, in accordance with the act of the general assembly of the state of Illinois, and that the amount of the first installment shall be 20 per cent. of the total assessment. On June 18, 1892, the city of Chicago presented to the county court its petition for the appointment of commissioners to make the assessment of the cost of this connected system of sewers, as provided for by the ordinance. The order appointing the commissioners to spread the assessment, by a clerical error directed and ordered the sewer on four of the streets to be constructed from West Twentieth street to West Thirty-First street, instead of from West Twenty-Sixth street to West Thirty-First street. The commissioners, however, as stated in the brief of plaintiff in error, "In the proceedings and assessment roll did not provide for an improvement commencing at West Twentieth street, but they followed the original petition and the ordinance which was made a part thereof."

It is objected that the affidavit as to mailing notices is insufficient. The affidavit commences as follows: "This affiant, Henry Esdohr, being first duly sworn, upon oath says that the affiant and Humphrey Moynihan and John O'Brien were heretofore appointed," etc. The affidavit is signed, however, by John O'Brien, another of the commissioners, and not the one who was sworn, as appears by the affidavit. The jurat is dated August 3, 1892, and shows the return day to be August 8, 1892. This being a direct proceeding, the notice is to be construed as a part of the process, and should be sufficient on its face to show that the statutory requirements were complied with. A process which does not show the time when it was served cannot be made the basis of a default at the return term.

The fourth point made by plaintiff in error is that the order of default and confirmation is insufficient and void. The insufficiency is alleged to be in that no property is described in the judgment order. A reading of the order of August 10, 1892, will fail to disclose any uncertainty about the description of the property included therein. Judgment was entered against all of the property included in the assessment roll, except against certain specific property, which was fully described in the order objected to. Subsequently all objections filed by objectors were overruled, and a judgment of confirmation entered, and the clerk was ordered to certify the same. Thereafter the default as to certain property owners was set aside, and the hearing was continued from time to time until January, 1896, when, as to certain property, the court reduced the assessment, and entered judgment of confirmation as to the residue. The

plaintiff in error brings this record, and assigns error to the action of the court in entertaining jurisdiction and entering judgment.

From the facts appearing in this record we do not deem it necessary to discuss the foregoing points raised by plaintiff in error. It appears that on January 18, 1897, plaintiff in error, with others, entered his motion to set aside the order of confirmation entered by the county court, and, as abstracted, the following judgment and order were entered: "On January 18, 1897, an order was entered on behalf of certain parties stating that said parties, by their attorney, severally consent and agree in open court that the judgment of confirmation heretofore entered herein against their property may be vacated and set aside and stand for naught; that a trial by jury may be waived, and that said cause may be submitted to the court for trial without the intervention of a jury; and it is ordered that judgment of confirmation heretofore entered against the several lots, pieces, or parcels of land hereinafter described be, and the same is hereby, vacated and set aside. And the court, being fully advised in the premises, finds that the contract for the improvement mentioned has been let, and that there is a difference between the contract price or cost of constructing said improvement and the assessment levied therefor of not less than 44.6 per cent.; and the court further finds that the first installment was in collection this year; that said first installment has either been paid, or judgment and order of sale entered against the lands upon which it remains unpaid, and this order shall not affect said first installment. It is therefore ordered that the said assessment be, and the same is hereby, reduced 44.6 per cent. as to the unpaid installments upon the lands described below, to wit [here follows description of property with amounts of assessment]; and that judgment of confirmation be, and is hereby, entered against each and all the lots, blocks, tracts, and parcels of land described above for the amount set opposite the same as reduced." The plaintiff in error, by this motion, appeared in court, and, so far as shown by the record, consented and agreed that the judgment of confirmation should be set aside, and waived a jury, and submitted to the court for trial the question of the confirmation of the assessment without in any manner, before or at the time presenting any objection to the proceedings or to entering judgment. The plaintiff in error cannot complain of any defect which might exist in these orders, which were entered pursuant to his request, and with his express consent, for there is no principle of law more familiar than that a party shall not be permitted to assign for error that which he has requested the court to do. *Clemson v. Bank*, 1 Scam. 45; *Packet Co. v. Binniger*, 70 Ill. 571; *Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Washington v. Railway Co.*, 136 Ill. 49, 26 N. E. 653. "The appellant must be consistent, and,

if he asks the court below to make a specific ruling, or to proceed in a certain manner, he cannot complain in an appellate court that the ruling or action is erroneous. He has invited the error, must accept its results, and the appellate court will not reverse a judgment at his instance on account of it." 2 Enc. Pl. & Prac. 519 et seq., and cases cited. The rule which prevents the court from interfering with its judgments rendered at terms which have passed can have no application to orders or judgments entered by the express consent and agreement of all parties interested. The plaintiff in error cannot thus voluntarily enter his appearance, and request the court to act, without presenting any objection to the court, and without excepting to any action of the court, and then assign error, and have an appellate tribunal review such action. The judgment of the county court of Cook county is affirmed. Judgment affirmed.

(175 Ill. 221)

WALLER v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1898.)

LARCENY—INDICTMENT—EVIDENCE—SUFFICIENCY—ADMISSIBILITY.

1. An indictment charging accused with the larceny of a cape states with sufficient certainty the larceny of a shoulder wrap.

2. Under Cr. Code, c. 38, § 486, providing that user shall be prima facie evidence of the existence of a corporation, proof of the exercise of corporate powers is sufficient to support an allegation that a corporation was incorporated under the laws of the state.

3. A conversation between accused and one person, and a later conversation between accused and a third person who came into the room during the first conversation, are all one conversation, which may be proved if accused participated at any time.

Error to criminal court, Cook county; Arthur H. Chetlain, Judge.

Minnie Waller was convicted of larceny, and brings error. Affirmed.

Joseph B. David, for plaintiff in error. Edward C. Akin, Atty. Gen., Charles S. Deneen, State's Atty., and Haynie R. Pearson, Asst. State's Atty., for the People.

BOGGS, J. This is a writ of error brought to review the judgment of the criminal court of Cook county convicting the plaintiff in error of the crime of grand larceny, and adjudging she should be confined in the penitentiary. The description given in the indictment of the property alleged to have been stolen is "one cape, of the value," etc., the "personal goods," etc. A motion to quash the indictment on the ground the property alleged to have been stolen was not sufficiently described was overruled, and this ruling of the court is assigned as for error. The argument in support of the assignment is that the word "cape" is the name of more than one object, and nothing contained in the indictment indicates which of said objects the word was

intended to signify. In the general, popular, and usual acceptation, the word "cape" means either a garment or part of a garment used for covering the shoulders of the wearer, or a neck or narrow strip of land extending some distance into a body of water. The rule is, "The indictment must state with reasonable certainty what was stolen." 2 Bish. Cr. Proc. § 699. A natural formation of the earth—as a cape of land—cannot be the subject of larceny; hence it would be wholly unreasonable to say it was uncertain in which sense, in ordinary acceptation, the word "cape" was used. The word "cape" is sometimes employed as descriptive of a kind of wine made at the Cape of Good Hope, but in such instance it is not used as a noun. It is therefore clear it was not in that sense that it was used in the indictment. It is urged that the word "cape" means the coping of a wall, and also ears of corn broken off in threshing; but we find from the standard dictionaries and cyclopedias that no such meanings are given the word except in certain restricted localities, in the northern part of England. We are to accept the word in its plain, ordinary, and popular meaning in our country and among our people. We think the description of the property is set forth in the indictment with reasonable certainty.

The indictment charged that the cape was of the "personal goods and chattels of 'The Fair,' a corporation organized and incorporated under the laws of the state of Illinois." Proof of the actual exercise and enjoyment of corporate powers and functions was proven; but counsel for plaintiff in error contends that, as the indictment charged the corporation had been organized and incorporated under the laws of the state of Illinois, it became necessary for the prosecution to prove that the corporation had been organized and incorporated as alleged. It is provided in the Criminal Code (chapter 38, § 486) that, in all criminal prosecutions involving proof of the legal existence of a corporation, user shall be prima facie evidence of such existence. The legal existence of a corporation presupposes its organization and incorporation. Proof of user, therefore, sufficiently supported the allegation of the indictment, there being no countervailing proof. The complaint that the proof did not establish that the corporate name of the alleged corporation was "The Fair" is wholly groundless. The evidence was ample upon this point.

While the witness introduced to establish the value of the cape was permitted to give his opinion as to its value without being restricted to the value thereof on the market, further testimony given by him on his cross-examination developed that his estimate was, in fact, based upon the salable or market price and value of the garment.

It appeared from the evidence the plaintiff in error, while in the store of the corporation, was charged by one of the employes of The Fair with the theft of a cape which was

then in her possession, and which was seized by such employé, and taken to the room or office of the superintendent of the corporation. The superintendent was allowed to testify to a conversation which occurred in the office, in which the plaintiff in error participated, in the course of which she (the plaintiff in error) denied that she was guilty, and said she had the cape when she came into the store, and that at that time Officer Evans came into the office, and the witness (the superintendent) asked him if he knew or recognized the plaintiff in error, and that the officer replied: "Yes; it is the notorious shoplifter, Emma Weir." It appeared from the testimony of Evans that he came into the office while the conversation between the plaintiff in error, the employé, and the superintendent was in progress, and that he said to plaintiff in error, "Hello, Emma! stealing again?" and she replied, "I don't know," and that then it was that he said to the superintendent, "That is Emma Weir, the notorious shoplifter;" and the plaintiff in error did not say anything more. It was entirely competent to give in evidence a conversation so far as the plaintiff in error took part therein. The position of her counsel that the testimony complained of related to two distinct conversations, and that she did not participate in one of them, is not tenable. But, if it should be regarded that separate conversations occurred in the office, we find it clearly appeared from the evidence that the plaintiff in error participated in both. Moreover, the guilt of the plaintiff in error was established by overwhelming and practically undisputed testimony. The judgment is right, and is affirmed. Judgment affirmed.

(175 Ill. 293)

CHICAGO & A. R. CO. v. WINTERS.

(Supreme Court of Illinois. Oct. 24, 1898.)

CARRIERS—RAILROADS—CREDIBILITY OF WITNESSES—INSTRUCTIONS—STOCKMEN—FREIGHTS—PASSENGERS—INVITATION TO ALIGHT—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE—SPECIAL INTERROGATORIES.

1. Expert witnesses for defendant railroad company testified that the speed at which a train was running was not equal to the rate prohibited by ordinance, which was contradicted by plaintiff's witnesses, who were his fellow passengers, and also engaged in the same business. A general instruction stated, *inter alia*, that the jury, in determining the credibility of each witness, might take into consideration "his relationship to the parties in this suit." *Held*, that the instruction is not objectionable on the ground that it singles out and covertly attacks defendant's witnesses, who were its employes, since it applies as well to the possible relationship between plaintiff and his witnesses.

2. The relation of carrier and passenger still exists when a passenger is obliged to alight from a car to go to another car, to be carried by the carrier to his destination.

3. A stockman traveling with the consent of the railroad company on a freight train, in charge of stock carried by the company for him, is a passenger.

4. Where a train has reached a point where the passenger may lawfully leave it, and no direction is given him to alight on the side of the train where there is no danger, but he is permitted to alight on the side where there is danger, it is for the jury whether reasonable care for the safety of the passenger has been used by the railroad company.

5. A passenger who obeys the instructions of a conductor of a railroad train, on whose assurance he has a right to rely, cannot be charged with contributory negligence, where injured in attempting to follow out the instructions.

6. Plaintiff and other stockmen, who were riding in the caboose of a freight, were asked by the conductor if they did not desire to lunch at a place where the train had stopped, which question was a part of his duties. They answered in the affirmative, and were told to get out, and walk a block and a half, up to where the lunch counter was. The conductor and brakeman saw the stockmen alight on the east side of the train. The conductor knew a fast express was due on the east track, which was unknown to the stockmen, but did not warn them in any way of the danger. Plaintiff was caught in the four-foot space between the moving freight and the fast express, and was knocked down by the current of air or by the motion of the train, and fell under the express. *Held*, that a finding by the jury of negligence on the part of the railroad company was proper.

7. It was proper to refuse an instruction that "information," by those in charge of a freight, to a passenger of mature age, and accustomed to travel, that he might, or might more conveniently, alight from the car at a place other than the usual place of alighting from such train, does not require such passenger to take the risk of leaving the car at such place, and is not negligence on the part of the railroad company, since erroneous in assuming that the statement made to plaintiff and the other stockmen by the conductor was in the nature of information, instead of leaving it to the jury to determine whether such statement constituted an "invitation" to plaintiff to do what the conductor suggested.

8. It is not error to refuse to submit special interrogatories, which relate merely to evidentiary facts, on which the rights of the parties do not ultimately depend.

Appeal from appellate court, Third district.

Action by Ferdinand Winters, Jr., against the Chicago & Alton Railroad Company. From a judgment of the appellate court (65 Ill. App. 435) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, brought by the appellee against the appellant company, to recover damages for a personal injury. The declaration consisted originally of six counts, but the first, second, fourth, and fifth counts were stricken out or withdrawn, and the third and sixth counts only were left standing. The defendant pleaded the general issue. The case was tried before the court and a jury, and resulted in verdict and judgment in behalf of the appellee (the plaintiff below). This judgment has been affirmed by the appellate court, and the present appeal is from such judgment of affirmance.

The third count of the declaration alleges that the appellee was lawfully, and by invitation of the appellant (the defendant below), on the grounds of appellant within the corporate limits of the city of Bloomington, at a point between Mason and Washington streets;

that an ordinance of said city prohibited the appellant from running its passenger trains at a greater rate of speed than ten miles per hour, and its freight trains at a greater rate of speed than six miles per hour, in said city, between said streets; that appellant's servants ran a certain passenger train on said railroad between said streets, in said city, on the night of December 12, 1893, at a greater rate of speed than was permitted by the ordinances of the city; and that the appellee, while on the grounds of appellant by its invitation, and while using due care for his own safety, was knocked down and injured, etc. The sixth count of the declaration alleges that the appellee was a passenger on appellant's railroad car, to be carried from Nilwood to Chicago; that it was the duty of appellant to safely convey and keep appellee from all unnecessary danger, and not to expose him to needless peril, while so being a passenger; that, while appellee was so a passenger at Bloomington, and on the grounds of appellant's railroad, appellant, by its agents, invited him to alight from said train of cars at a time and place of needless peril, appellant knowing, and appellee at the time not knowing, of the perils of the time and place; that appellee then and there alighted from said train on appellant's ground at the invitation and suggestion of appellant; and that upon so alighting at such place, and while in the exercise of due care to guard against injury, appellee then and there was thrown and caused to fall down by the motion of a certain rapidly moving train of the appellant, or by the swift currents of air set in motion by said train, and was thereby injured.

The facts developed by the testimony are substantially as follows: On December 12, 1893, appellee, who was a farmer, shipped from Nilwood, in Macoupin county, a car load of sheep over appellant's road to Chicago, and took passage on the same train, riding in the caboose, to accompany his sheep to Chicago. When appellee boarded this train, there were in the caboose two other parties accompanying their stock to Chicago, who had boarded the train at points further south than Nilwood. On the way from Nilwood to Bloomington, other cars of live stock were added to the train, and six other shippers of stock likewise took passage in the same caboose. When the train, which was a freight train, arrived at Bloomington, there were nine shippers of stock in the caboose, including the appellee. Appellee had made but two similar trips to Chicago. The train arrived at Bloomington after night, and stopped at the hour of 9:40 p. m. on the west track of the appellant, about a block and a half south of the switch yard of the appellant at Bloomington. There was another track upon the appellant's right of way, east of the track upon which the freight train stopped; and the space between the two tracks was about eight feet. The evidence shows that it was the custom of the railroad company, when a

freight train of this character arrived at Bloomington, to make up a new train to go on from Bloomington to Chicago. Upon the new train thus made up, another conductor than the one arriving on the train at Bloomington took charge from Bloomington to Chicago, and another caboose than the one arriving at Bloomington was attached to the train newly made up to go to Chicago. It was thus necessary for the appellee and the other stockmen with him to alight from the train on which they arrived in Bloomington, and go into the other caboose attached to the newly made up train. It was sometimes difficult for the stockmen to find the caboose attached to the new train, in order to enter it, after the train was made up in the switch yard. Some of the witnesses say that it was oftentimes necessary for them to hunt for the caboose attached to the new train, in order to find it.

When the freight train thus reached a point on the west track at 9:40 o'clock at night, a block and a half south from the switch yards, the conductor and brakeman of the freight train were in the caboose with the stockmen, and asked them if any of them desired to get lunch. Several responded in the affirmative. The conductor then told them to get off at that point, and walk north a block and a half, to where the lunch counter was. He stated to them that the freight train would probably remain at that point for some time, and that, if they waited until the train reached the switch yards, it might move on before they would have time to get lunch. The freight train stopped on the west track, at the point indicated, to await a signal to pull up into the switch yard. The stockmen, including the appellee, then alighted from the caboose of the freight train in which they had been riding, and walked north, on the east side of the freight train, towards the switch yard. Just after they so began to walk northward, the freight train began to move north, going at first slowly, and then more rapidly. While the appellee and the other stockmen were thus walking north, a fast passenger train, coming from the north and going south, passed down on the east track, so that the stockmen were thus caught between the two trains. The passenger train which thus passed to the south, on the east track, was due at Bloomington about 9:45 p. m., and seems to have been about on time on this evening. The testimony shows that the space between the two moving trains, the freight train moving north, and the passenger train moving south, was only about four feet. The night was cold, and the ground was frozen. Appellee was walking in the rear of the other stockmen, and in some way, by the motion of the trains, or by the current of air created by their motion, he was knocked down, and one of his legs was so crushed by the passenger train that it had to be amputated.

Rinaker & Rinaker, for appellant. Anderson & Bell, for appellee.

MAGRUDER, J. (after stating the facts). Counsel on both sides have filed in this court the briefs prepared by them for the appellate court. The briefs are largely taken up with discussions of facts. Two prominent questions of fact are discussed by counsel for appellant in their brief. One of these questions of fact is whether or not the passenger train which came down the east track was running at a rate of speed prohibited by the ordinances of the city of Bloomington. The other question of fact is whether or not the appellee was requested or invited by the conductor or brakeman, or both of them, to alight from the freight train, and walk along upon the right of way of the appellant towards the switch yard, in the manner set forth in the statement preceding this opinion.

1. Section 87 of chapter 114 of the Revised Statutes provides that "whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine, or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive engine or car; and the same shall be presumed to have been done by the negligence of said corporation, or their agents." 2 Starr & C. Ann. St. p. 1941. The evidence was conflicting as to the rate of speed at which the passenger train was running, the witnesses of the appellant placing it at 10 miles an hour, and the witnesses for the appellee placing it all the way from 15 to 25 and 30 miles per hour. It was for the jury to determine whether the testimony of the appellee's witnesses, or that of the appellant's witnesses, was to be believed. The lower courts have found against the appellant upon this question as to the rate of speed, and we are concluded by their judgments. The jury found that the passenger train was traveling faster than it was authorized to do under the ordinances of the city, and, this being so, the defendant was prima facie guilty of negligence.

Counsel for appellant claim that the witnesses for the railroad company upon the question of the speed of the train were expert witnesses, and better capable of judging as to such rate of speed than the witnesses introduced by the appellee; and it is said that the appellant would not have been found guilty under the third count of the declaration if the jury had not been misled by the first instruction given for the appellee. The first instruction thus complained of told the jury that they were the judges of the degree of credit which should be given to the testimony of the several witnesses in this case; that the jury, in determining how far each witness was entitled to credit, may take into consideration the apparent intelligence of such witness, his means of knowledge, his manner of testifying, as shown by the evidence; his relationship to the parties in this suit, if any be shown; any feeling of in-

terest or partiality which may be shown by the evidence, for or against either of the parties; the extent to which such witness may be corroborated or disputed by other credible evidence in the case, and all the facts and circumstances in evidence,—and that the jury should give to the testimony of each witness such weight as, in their opinion, it was entitled to receive. The first instruction, as to the various tests laid down by it, is fully sustained by the authorities, as may be seen by reference to Sack. Instruct. Juries (2d Ed.) pp. 31, 32, and the cases there cited. Counsel for appellant say that the instruction is misleading, and that it singles out the witnesses for the appellant, and covertly makes an attack upon them. We do not think that the instruction is justly liable to such a charge. It refers no more to the witnesses of the appellant than to those of the appellee. It is said that, by mentioning the relationship of the witnesses to the parties, reference is made to the relation of employer and employé which existed between the appellant and its witnesses. The instruction no more contemplates such relationship than the relationship which may have existed between appellee and the other stockmen upon the caboose, as being all passengers upon the train, and all engaged in the business of looking after their stock, and accompanying it to the place of shipment. As the instruction authorized the jury to take into consideration the means of knowledge possessed by the witnesses, they were authorized thereby to give to the testimony of appellant's witnesses, upon the subject of the speed of the train, such weight as it deserved, if such witnesses, by reason of being experts in such matters, had means of knowledge superior to the means possessed by the appellee's witnesses. In most of the cases referred to by counsel as sustaining their objection that the first instruction singles out the witnesses for the appellant, the names of particular witnesses were mentioned, and the instructions were condemned on that account. *Clevenger v. Curry*, 81 Ill. 432; *Insurance Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353; *Pennsylvania Co. v. Versten*, 140 Ill. 637, 30 N. E. 540. The instruction here complained of contains no such defect as that condemned in these cases.

2. It is contended by appellant's counsel that the appellee had no right to recover under the sixth count of the declaration. The main question discussed, in relation to the evidence and instructions applicable to the sixth count, is the question whether or not the appellee was invited to alight from the caboose, and walk along upon the grounds of the appellant. The conductor, it is true, swears that he told the appellee and the other stockmen who were in the caboose that they had better remain in the caboose until the freight train arrived at the switch yards; but the appellee and seven or eight other stockmen, who were in the caboose with him, and who heard what the conductor and brakeman said, all swear, in substance, that they were told by the conductor

to get out, and walk up a block and a half to the place where the lunch counter was. When the freight train stopped, at 9:40 o'clock in the evening, neither appellee, nor any other of the stockmen, asked any question of or any information from the conductor in regard to lunch, or in regard to the length of time the train would stop, or in regard to any other matter. The conductor himself first introduced the subject of lunch, by asking the appellee and the other stockmen, who had been on the freight train, most of them, since 1 o'clock, whether they desired to get lunch. The conductor says himself that it was a part of his business to ask them whether they wanted lunch, and that he had received from his superior officers directions to do this. There was a bulletin directing him to inquire of shippers on the train for such of them as wanted to get lunch. When some of them stated that they desired to get lunch, he told them that they had better get off at that point, and walk northward. The conductor and the brakeman were in the caboose with the appellee and the other stockmen, and saw them alight. They say the appellee and the others got off, and started to walk on the east side of the freight train. The conductor knew that the fast passenger train from the north was due at Bloomington at 9:45 o'clock p. m. The appellee was not aware that such a passenger train was coming at that time. The conductor did not warn the appellee that it was dangerous to walk up on the east side of the freight train, nor did he warn him that at that time a passenger train would approach or was due on the east track. He did not state to the appellee that it would have been safer to have walked up on the west side of the freight train. There is evidence tending to show that there was no graded street upon the west side of the west track, upon which the freight train stood, and that on the way to the switch yard there was an embankment and a cut, which it would be difficult to pass for one walking on the west side, especially on a dark winter night. Counsel are mistaken in saying that the relation of carrier and passenger did not exist between appellant and the appellee when the appellee alighted from the freight train. He was obliged to alight from the caboose in which he was, in order to get into another caboose, which was to be attached to a new train, to be made up a block and a half north of the point where the freight train had stopped. Independently of any question of obtaining lunch, it was necessary to alight from the one caboose in order to take the other caboose.

We have held that a person who is traveling, with the consent of the railroad company, upon a freight train, in charge of stock or goods carried by the company for him, is a passenger. *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809; *Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238. This relation between the passenger and the railroad company does

not cease upon the arrival of a train at the place of the passenger's destination, but the company is still bound to furnish him an opportunity to safely alight from the train. He continues to be a passenger while he is rightfully leaving the train. If the train has reached a point where the passenger may lawfully leave it, and no direction is given him to alight on the side of the train where there is no danger, but he is permitted to alight upon the side where there is danger, it is a question for the jury whether reasonable care for the safety of the passenger has been used by the railroad company. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713. Moreover, "the direction, invitation, or assurance of safety given by a servant of the company may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have. * * * One who obeys the instructions or directions of another, upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action for injuries received in attempting to follow out the instructions." *Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197; *Railroad Co. v. Rayburn*, 52 Ill. App. 277; *Railroad Co. v. Wilson*, 63 Ill. 167; *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204; *Railroad Co. v. Lane*, 83 Ill. 448; *Buckley v. Railroad Co.*, 161 Mass. 26, 36 N. E. 583. We are unable to say that the jury erred in finding that the appellant was guilty of negligence, in view of what was said to the appellee and the other stockmen by the conductor, and in view of what the appellee and the other stockmen did in consequence of such statement made to them by the conductor. It was said in *Railroad Co. v. Wilson*, supra, that railroad companies "have no right to invite the traveling public to occupy positions of peril." In all the cases above referred to, where a passenger dismounted from a train at a place of danger, or went from a safe place on a train to enter a part of the train which was dangerous, and was injured in so doing, and where it was held that such passenger was not entitled to a right of recovery of damages for such injury against the railroad company, it appears that such movement of the passenger, in alighting from the train or in changing his position on the train, was not done by any direction or invitation of the conductor of the train or other servant of the company.

Counsel rely upon the case of *Railroad Co. v. Hazzard*, 26 Ill. 373, as sustaining their contention that there can be no right of recovery in this case. It must be remembered that the Hazzard Case was decided on appeal directly from the circuit court to this court, and when this court was in the habit of passing upon questions of fact, and reversing judgments where the verdict of the jury in the court below was against the weight of the evidence. In addition to this, an examination of the Hazzard Case will show that the facts there are different from the facts of the

case at bar. It appeared there that Hazzard alighted from a freight train before it reached the regular stopping place; but he did so of his own motion, and not because of any invitation or suggestion to do so, coming from any servant or employé of the railroad company. On the contrary, he asked the conductor if he could get off at the point where he contemplated alighting, and the conductor merely answered that business men did get off at that point. In other words, the passenger in the Hazzard Case asked information of the conductor, and, when he received the information, exercised his own judgment in acting upon it. In the case at bar, however, appellee asked no information from the conductor of the freight train, but the conductor, of his own motion, first suggested to the appellee and the other stockmen that they had better alight at the point where they did alight. He was not answering a question addressed to him for information, but was himself making a suggestion, and extending an invitation, when no question had been addressed to him upon the subject about which he spoke. Hence we are of the opinion that the trial court committed no error in refusing to give the second of appellant's refused instructions. By the terms of that instruction the jury were told "that information by those in charge of a railroad freight train to a passenger of mature age, and accustomed to railroad travel, that he might, or might more conveniently, for some purpose of his own, alight from a car on which he was then traveling, at a place known by such person to be not the usual place of alighting from such train, does not require such passenger to take the risk of leaving the car at such place, and is not negligence on the part of the company operating such train," etc. The instruction is erroneous in assuming that the statement made to the appellee and the other stockmen by the conductor was in the nature of information, instead of leaving it to the jury to determine whether or not such statement constituted an invitation to the appellee to do what the conductor suggested. Of this instruction the appellate court correctly says in its opinion: "The second was faulty in that it was unduly argumentative, in that it assumed to say that certain facts would not in law amount to proof of a negligent invitation to the plaintiff to alight." All that is material in the appellant's second instruction was given by the court in the sixth instruction asked by and given for the appellant. This sixth instruction told the jury "that it is incumbent upon the plaintiff, to sustain the sixth count of his declaration, to prove by a preponderance of the evidence in this case that the injury of which he complains in his declaration in this case was caused by reason of the fact that the defendant, by its servants, failed and

neglected to keep the plaintiff free from unnecessary danger, and not to expose him to needless perils; and that the defendant, by its servants, invited him to get off the train upon which the plaintiff was riding just before he alighted from said train on the grounds of defendant, at a time and place of needless peril; and that the plaintiff, at the time he was injured, was himself then and there in the exercise of due care for his own personal safety; and that he was then and there injured in consequence of and as the necessary result of the negligence of the defendant's servants, and not as the result of the omission of the plaintiff to exercise that care for his personal safety that a reasonable man, under the circumstances that surrounded the plaintiff at the time he was injured, would and should have exercised, to avoid being injured by the train of the defendant."

3. The appellant, upon the trial below, asked the court to submit to the jury certain special interrogatories. The court refused to submit to the jury some of these interrogatories, and modified others of them, which, upon being modified, the appellant withdrew. It is urged that this action of the court was erroneous. By these interrogatories the jury were called upon to make special findings as to mere evidentiary facts. For instance, by one of the questions the jury were asked whether the plaintiff alighted, at the time he did, for the purpose of having more time to get lunch before his train should be made up; by another, the jury were asked to find whether or not the plaintiff was struck by any part of the engine of the passenger train; and, by another, the jury were asked to find whether or not the bell of the passenger train was rung continuously between Chestnut and Washington streets, in Bloomington. The material questions of fact authorized to be submitted to the jury under the statute upon that subject are not such as relate to mere evidentiary facts, but they are restricted to those elementary facts upon which the rights of the parties ultimately depend. As the special findings here called for merely related to evidentiary facts, there was no error in refusing to submit them to the jury. *Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

Some other points of minor importance are made by counsel for appellant, but, after considering them, we do not deem it necessary to discuss them. What has already been said disposes of the principal objections made to the judgments of the lower courts. Accordingly, the judgment of the appellate court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

BOGGS, J., having heard this case in the appellate court, took no part in its decision here.

(175 Ill. 261)

MIGHELL v. STONE.

(Supreme Court of Illinois. Oct. 24, 1898.)

APPEAL — REVIEW OF FACTS — SEDUCTION — EVIDENCE — REFUSAL TO MARRY — DECLARATION — DAMAGES — DISGRACE — TRIAL — APPLICATION OF EVIDENCE.

1. The affirmance by the appellate court of the judgment of the circuit court is conclusive upon the supreme court as to the facts in an action for seduction.

2. In an action by a father for the seduction of his daughter, the latter testified that defendant had accomplished her ruin on a promise of marriage, and defendant denied the statement. *Held*, that evidence on defendant's cross-examination as to his refusal to marry the daughter was not improperly admitted, when not made a basis for a claim of damages by the father.

3. Where evidence is competent for any purpose, it must be admitted; and, if its application should be restricted, it may be done by an instruction.

4. An instruction in an action by a father for the seduction of a daughter, including as an element of damages moneys paid out or incurred for physician's services and medicines, "if any are shown by the evidence," is not reversible error, even in the absence of proof of moneys so paid out or incurred; since the instruction, being on a mere incidental matter, would not mislead the jury.

5. A declaration in an action for the seduction of plaintiff's daughter, alleging that defendant "debauched and carnally knew" her, sufficiently charges seduction.

6. In an action by a father for the seduction of his daughter, the disgrace brought on plaintiff and his family is a material element of damage.

Appeal from appellate court, Second district.

Action by John Stone against Charles Mighell. The judgment of the circuit court for plaintiff was affirmed by the appellate court (74 Ill. App. 129), and defendant appeals. **Affirmed.**

Haley & O'Donnell, for appellant. S. C. Stough, for appellee.

PHILLIPS, J. The appellee recovered a judgment against appellant for the seduction of his daughter, whereby she became pregnant, and was delivered of a child. This judgment was affirmed by the appellate court, and the errors assigned here are that it erred in affirming the judgment and in its rulings upon the law, and that its finding is contrary to the evidence.

The affirmance of the judgment of the circuit court is conclusive upon this court as to the facts.

It is claimed that evidence was improperly admitted relating to defendant's refusal to marry the daughter. The daughter had testified that after going with the appellant for about six months, and after many expressions of devotion, the defendant had accomplished her ruin on the promise of marriage. He denied this statement, and, in connection with the cross-examination on such denial, certain questions were asked and answered, which are made the basis of this objection. While such examination

may have been extended beyond the proper limits, yet the record shows it was but incidental to the subject-matter of the cross-examination. The context shows it was not for the purpose of making his refusal to marry a basis for a claim of damages on the part of the father. It is said in *Mains v. Cosner*, 62 Ill. 465: "The admission of testimony that the defendant had promised marriage was in conformity with nearly all the authorities. The evidence was admissible, because tending to show that the defendant sought the society of plaintiff's daughter under the pretense of honorable motives, and that the illicit intercourse was therefore the result of seduction on his part, in the strict sense of the term." Where evidence is competent for any purpose, it must be admitted; and, if its application should be restricted, that may be done by an instruction. There was no substantial error committed in regard to the admission of such evidence.

The first instruction given for the plaintiff related to actual damages, and included therein, as an element, "money necessarily paid out or incurred by him for physician's services and medicines, if any are shown by the evidence," etc. There was no proof of money so paid out, or of a promise to pay for the same, and therein the instruction is defective. But the instruction, considered in its entirety, on the point, especially that part stating "if any are shown by the evidence," would not, on a mere incidental matter, mislead the jury or work harm to the defendant.

Complaint is made of the modification of the third and fourth instructions given on behalf of defendant. That modification related to the mental and physical capacity of the daughter, and of her power to resist the solicitations and promises of the defendant. There was much proof that the daughter had been an invalid for many years, and for a long time confined to her bed, and, because of such physical condition, had received but a limited education, and had gone but little in society or with young men. The evidence in this case justified the court in modifying the instructions as offered, by the insertion of the language complained of.

It is also urged the declaration does not charge seduction, and therefore the reference to the declaration in connection with that subject is claimed to constitute error. The declaration charges that the defendant "debauched and carnally knew" the daughter, which, according to the approved forms, is the language used in charging seduction. Besides, the first instruction, as modified, given for the defendant, recognized that the declaration did charge seduction. It begins: "You are instructed that the declaration in this case charges that the defendant seduced the plaintiff's daughter, and that whether or not the defendant did seduce her is a material issue in this case," etc.

There is no instruction given on behalf of

appellee that informs the jury he is "entitled" to exemplary damages, as is claimed by appellant's counsel. The part of one referred to (none of them being numbered) limits the damages to the disgrace, etc., brought on the plaintiff and his family. It is held that such disgrace is a material element of damages. *Yundt v. Hartrunft*, 41 Ill. 9; *White v. Murland*, 71 Ill. 250. There was no substantial error committed, and the judgment is affirmed. Judgment affirmed.

(175 Ill. 445)

CITY OF CHICAGO v. COLLINS et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUNICIPAL CORPORATIONS—USE OF STREETS—WHEEL TAX—INJUNCTION—MULTIPLICITY—DOUBLE TAXATION—UNIFORMITY.

1. Equity has, for the purpose of preventing multiplicity, jurisdiction in the first instance of a bill to enjoin enforcement of a city ordinance on an averment that it is void, where it affects several hundred thousand taxpayers, and is filed by some hundreds of complainants on behalf of themselves and others interested.

2. General Incorporation Act, art. 5, § 1, cls. 4, 7, 8, 10, 11, 12, 92, 75, 78, 66, 96, conferring general power on the common council to fix amount of licenses, to open, improve, light, and cleanse the streets, to plant trees thereon, to prevent annoyances, to make health regulations, and to enforce police ordinances, and to pass ordinances necessary to effectuate such powers, and clause 9, expressly conferring power "to regulate the use" of streets, do not impliedly authorize the imposition of a license to use streets by the owners of private conveyances, because the use of streets is a right, and not a privilege or an occupation.

3. An ordinance imposing on bicycles and other wheeled vehicles a graduated tax to be created into a "wheel-tax fund" for the improvement of streets, when such vehicles are already subject to ad valorem tax, part of which is appropriated to the same purpose, and such vehicles are of varying values, is void, as obnoxious to the inhibition against double taxation, and also as being unequal and not uniform.

Appeal from circuit court, Cook county; *Murray F. Tuley*, Judge.

Bill by *Lorin C. Collins, Jr.*, and others against the city of Chicago. There was a decree for complainants, and defendant appeals. Affirmed.

The appellees, 373 in number, residents and taxpayers of the city of Chicago, suing in behalf of themselves and all others similarly situated, filed a bill to enjoin the city from enforcing an ordinance providing that all vehicles used upon the streets of the city, including those for private use, for pleasure, etc., should pay an annual license fee, and that any person using any vehicle without first having obtained a license therefor, or failing to have said vehicle properly tagged, so that it would appear the license had been paid, should, on conviction, be fined a sum of not less than \$10 nor more than \$50 for each offense. The ordinance requires wagons, carriages, coaches, buggies, bicycles, and all other wheeled vehicles propelled by horse power or by the rider shall be so licensed. The ordinance also provides that all money re-

ceived under or collected from the operation and enforcement of the ordinance should constitute a separate and distinct fund, to be known as the "Wheel-Tax Fund." The sole object and purpose for which said wheel-tax fund might be disbursed should be for repairing and keeping in good condition the streets of the city, and should, upon the recommendation of the council, be distributed in the 34 wards of the city of Chicago. At the time of the filing of the bill this ordinance was in full force and effect. It will be seen from an examination of such ordinance that it imposes a license fee or tax on all vehicles used on the streets of Chicago,—even those in private use, and not for let or hire. All of the appellees are owners of bicycles, and many of them of other wheeled vehicles propelled by horses. 300,000 bicycles and carriages in private use only are affected by the ordinance. The appellees use their bicycles, not for the purpose of traffic, nor for carrying merchandise or passengers for hire, upon the streets of Chicago, but solely for their private use, and as a means of locomotion from place to place, not letting or hiring either said bicycles or wheeled vehicles to any person or persons whomsoever; and 300,000 other vehicles in the city of Chicago, all of which are subjected to the license tax imposed by the ordinance, are similarly used. All the personal property of the appellees owned by them on May 1, 1897, subject to taxation, has been listed and assessed for taxation; and, inasmuch as the law is uniform, it is reasonable to conclude that all other personal property, including the 300,000 other vehicles affected by the ordinance, has been similarly listed and assessed. The fiscal year of the city of Chicago commenced on January 1, 1897, and long prior to the enactment of the ordinance in question the city of Chicago had passed the annual appropriation bill provided for by section 2 of article 7 of the general act relative to cities and villages, providing that within the first quarter of the fiscal year such appropriation bill shall be passed, by which the corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object; and no further appropriation shall be made at any time within such fiscal year without the sanction of the majority of the legal voters of the municipality. The bicycles owned by the appellees range in value from \$5 to \$1,500, and the value of the other wheeled vehicles from \$25 to \$5,000, and it is not denied by the answer that every day the appellees use one or more of their vehicles; and that, inasmuch as they are confined, during the working hours of the day, very closely to their places of business, it is needful for their health and mental and bodily vigor that

they take exercise in the streets, boulevards, and parks of the city; that many thousands of people in the city of Chicago are similarly situated; and that, unless they submit to the exaction of the illegal ordinance, they will be debarred of the privilege of so using the streets, and will be greatly injured in their physical health and enjoyment. It is contended that the ordinance is void, because the city has no power to require a license for private vehicles used on the streets of the city, nor to impose a tax by way of license; that a tax so imposed on vehicles, on account of their different values, would not be uniform; that great injury would result because of injury to health and because of interference with the right of complainants to use the streets, and consequent injury to business by the prevention of free locomotion from place to place, and by the citizens being harassed by arrests, etc. The bill prayed for an injunction perpetually enjoining the enforcement of the ordinance. The answer averred the right to enact and enforce the ordinance, and asserted complainants had a remedy at law if any existed. The cause was heard on a stipulation as to facts which embraced the facts as averred in complainants' bill. The stipulation showed the streets at night are full of passing vehicles; that the bicycle is almost noiseless, and chances of accident to persons using the streets have greatly increased because of its use; that the city has been obliged to enact rules regulating the use of the streets because of the changed conditions; that prior to the passage of this ordinance the city was obliged to impose rules requiring bicycles to carry lights after dark, limiting their speed, regulating the meeting and passing of other vehicles and persons, and otherwise regulating the use of the streets; that many vehicles, especially those used for pleasure, are now fitted with rubber tires, which causes them to move with but slight noise, so that persons using the streets have little warning of their approach.

Charles S. Thornton, Corp. Counsel, Granville W. Browning, First Asst. Corp. Counsel, and Cora B. Hirtzel, Asst. Corp. Counsel, for appellant. Collins & Fletcher, for appellees.

PHILLIPS, J. (after stating the facts). Two questions are presented by this record: Has a court of equity jurisdiction to enjoin the enforcement of an ordinance of a city? And has the city, under the express or implied powers conferred on it by the legislature, authority to adopt this ordinance? The enforcement of a void city ordinance may be enjoined in order to prevent a multiplicity of suits, at the instance of any person whose interests are impaired by it. A court of equity, however, cannot determine whether the ordinance has been violated, but merely whether it is void. Where such court is resorted to on the ground of prevention of a

multiplicity of suits, there must be a right affecting many persons. *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Chicago, B. & Q. R. Co. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 85. *Pomeroy*, in his work on Equity Jurisprudence (section 245), in treating of the jurisdiction of courts of equity on that ground, divides them into four classes, and in the third and fourth classes states the principle: "Third. Where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class. Fourth. Where the same party, A., has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, instead thereof he might procure the whole to be determined in one suit, brought by himself against all the adverse claimants as co-defendants." It is familiar that on this ground taxpayers of a town, city, or county, or other taxing district, may file a bill to restrain or set aside an illegal general tax, whether personal or made a lien upon their respective property. *Allwood v. Cowen*, 111 Ill. 481; *Kimball v. Trust Co.*, 89 Ill. 611; *Searing v. Heavysides*, 106 Ill. 85.

The claim that the failure of complainants to pay this tax, and resort to legal actions to recover the amount, precludes equitable interference, cannot be sustained. Many cases undoubtedly exist where equity will interfere to protect an invasion of property rights where the remedy at law is not entirely adequate; and where peculiar difficulties intervene the jurisdiction will be upheld. In the present case 373 complainants have filed their bill for relief. Their grievance is precisely the same, and arises from the same cause. The various parties aggrieved, although not jointly interested, are allowed to sue together for the express purpose of avoiding a multiplicity of suits, and to have the controversy settled in one hearing. The municipality is charged with a public trust, and where it is about to commit an act clearly illegal, the necessary effect of which will be to impose heavy burdens upon the property of citizens and taxpayers, it becomes amenable to the jurisdiction of equity for a breach of trust, and such court may interfere by injunction for the prevention of such act. Where the controversy is between two parties only, or where but few persons are involved, then, unless complainant's rights

have been established at law, a court of equity will not interfere. *Poyer v. Village of Des Plaines*, supra; *Chicago, B. & Q. R. Co. v. City of Ottawa*, supra; *Yates v. Village of Batavia*, 79 Ill. 500. No inflexible rule can be laid down for the determination of the question as to whether jurisdiction exists in a court of equity. In general, an adequate legal remedy will suffice to make such courts hesitate in acting. But inadequacy in granting relief for the determination of a right may arise from causes other than mere forms of remedy, and it will not do to sacrifice justice on the mere ground of the form of the remedy, where convincing facts show that adequate relief can best be had in the forum of a court of equity. In this case 373 complainants present facts showing that between 200,000 and 300,000 citizens and taxpayers are affected by the provisions of the ordinance, and, if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax, and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstance, if the license exacted is illegal, it would amount to oppression and injustice to a large part of the population of the city of Chicago, and this bill presents a case for the jurisdiction of a court of equity.

The contention of appellant is that the ordinance was lawfully passed under the powers delegated to the city by the general incorporation act, under which it was organized. That act, by section 1 of article 5, provides the common council shall have the following, among other, powers: Clause 4: "To fix the amount, terms and manner of issuing and revoking licenses." Clause 7: "To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, public grounds, and vacate the same." Clause 8: "To plant trees upon the same." Clause 9: "To regulate the use of the same." Clause 10: "To prevent and remove encroachments or obstructions upon the same." Clause 11: "To provide for the lighting of the same." Clause 12: "To provide for the cleansing of the same." Clause 92: "To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or persons." Clause 75: "To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." Clause 78: "To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." Clause 66: "To reg-

ulate the police of the city, and pass and enforce all necessary police ordinances." Clause 96: "To pass all ordinances, rules and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense." The principal contention of appellant is that under clause 9 of section 1 of the act, which grants power to the common council to regulate the use of the streets, the implied power is conferred to require a license to use the streets, as it has been frequently held by this court that, the power to regulate being expressly granted, the power to license as a means of regulation was clearly conferred. *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221; *Kinsley v. Same*, 124 Ill. 359, 18 N. E. 260; *Banta v. Same*, 172 Ill. 204, 50 N. E. 233. The streets and alleys of a city are held in trust by the municipality for the use of the public, for purposes of travel thereon, and as a means of access to and egress from buildings abutting thereon or lots adjacent thereto. The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. The municipality, which is a mere trustee of the public, and holds the streets and alleys in trust for that public, cannot deny the right of the public to use the streets and alleys. It cannot assume an exclusive ownership, and deny the rights of the beneficiaries under their trust, and arrogate to itself a power greater than that of a mere trustee, and prevent the use of the streets and alleys by individual members of the public. The right of the public to use the streets is the right to use them for purposes of travel in the recognized methods in which the public highways of the state are used. Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion, or even an extraordinary method, if it is not, of itself, calculated to prevent a reasonably safe use of the street by others. If a right exists in a city council to impose a license fee, by way of tax, on every person using wheeled vehicles thereon, it may in like manner impose such license fee for such use of the streets in every other manner of locomotion or travel, and reach the man on horseback, or the pedestrian walking along the same. The right conferred on the city council by the legislature to regulate the use of the streets and alleys of the city did not contemplate a power in a trustee of a beneficiary to deprive that beneficiary of a right. The power to provide by ordinance for planting trees in streets; to prevent encroachments upon or remove obstructions from the same; to provide for

lighting and cleansing them; to prevent and regulate the rolling of hoops, playing of ball, or flying of kites therein; or to prohibit any other amusement having a tendency to annoy persons,—is conferred for the purpose of keeping the streets in a condition for public use and travel. Any usual method of travel along the streets and alleys of a city cannot be declared to be a nuisance. The city council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and exclude certain character of loads and regulate the width of tires on vehicles used on a certain character of pavements, and provide that the rate of speed shall be much less on certain streets than on others, and otherwise regulate the use of the streets, having in view solely the welfare and safety of the public. The city may also regulate certain occupations, such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and for the same reason a license may be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; but such license is an occupation license, and not one for the use of the streets. The license in the latter-named case is designed to operate upon those who hold themselves out as common carriers, and a license may be exacted from such as a proper exercise of police power; but no reason exists why it should be applied to the owners of private vehicles, used for their individual use exclusively, in their own business, or for their own pleasure, as a means of locomotion. *Farwell v. City of Chicago*, 71 Ill. 269; *Joyce v. City of East St. Louis*, 77 Ill. 156; *City of Collinsville v. Cole*, 78 Ill. 114; *City of St. Louis v. Grone*, 46 Mo. 575; *Livingston v. City of Paducah*, 80 Ky. 657; *City of Covington v. Woods* (Ky.) 33 S. W. 84.

Anything which cannot be enjoyed without legal authority would be a mere privilege, which is generally evidenced by a license. *Cate v. State*, 3 Sneed, 120. The use of the public streets of a city is not a privilege, but a right. *Tiedeman on Limitations of Police Power* (section 281) says, in distinguishing between a license and a tax: "It is therefore conclusive that the general requirements of a license for the pursuit of any business that is dangerous to the public can only be justified as an exercise of the power of taxation or the requirement of a compensation for the enjoyment of a privilege or franchise." In *Cooley, Tax'n*, p. 596, it is said: "A license is a privilege granted by the state, usually on payment of a valuable consideration, though it is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever." A license,

therefore, implying a privilege, cannot possibly exist with reference to something which is a right, free and open to all, as is the right of the citizen to ride and drive over the streets of the city without charge and without toll, provided he does so in a reasonable manner. That such a right exists in Chicago is recognized in *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, where it was said, relative to the streets of a city (page 63, 148 Ill., and page 143, 35 N. E.): "The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds. The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it." Section 6 of the ordinance provides: "All moneys received from or collected from the operation and enforcement of this ordinance shall make a separate and distinct fund, apart from all other moneys held or collected by the city government of the city of Chicago, and shall be known as the 'Wheel Tax Fund.' The sole use and purpose for which said wheel tax fund may be disbursed or expended shall be for the repair and keeping in good condition of such streets as are under the direction of the city government proper, and shall be expended only as the commissioner of public works shall authorize, in the improvement of such public streets as he may have directed to be placed in proper condition." It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly. It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that courts can interfere, and arrest the course of litigation, by declaring such enactments void. It appears from the allegations of the bill and the stipulation of facts that the complainants are taxpayers, and were assessed for and paid an ad valorem tax equal to that assessed upon other personal property in the city. This ordinance, on its face, indicates that its purpose, in part, is to raise a special fund for the improvement of streets, and provides for the manner of its distribution, and this amounts to a double tax. The exaction imposed is a tax on specific articles of personal property, which are required by law to be, and which the bill alleges have been, assessed for general taxation at their value, and upon which taxes have been paid. To tax them again by declaring by ordinance they shall not be used until another tax is paid, levied, as in this ordinance, without regard to values, is not only double taxation, but is a violation of the principle of equality

and uniformity, which is indispensable to all legal taxation. It imposes a heavier burden upon one class of taxpayers than is imposed upon others, and is violative of the principle of equality and uniformity which must underlie all valid taxation. A statute which makes any kind of property the subject of taxation, and, discriminating, imposes upon it a double burden for a single object, makes even approximate equality and uniformity impossible, because it is an arbitrary and radical departure from both. The authority to impose a tax or to exact a license must clearly appear, and must be strictly construed. If there is a doubt as to the right, it must be resolved adversely to it. In this case there is no express power given the city council to impose this license fee, and no implied power arises which gives the right. It has no power to levy a tax in this manner. In any view of the case, the city had no power to adopt this ordinance, and the injunction was properly made perpetual. The decree of the circuit court of Cook county must be affirmed. Decree affirmed.

(175 ILL 567)

**ST. LOUIS & S. W. RY. CO. v. ELGIN
CONDENSED MILK CO.**

(Supreme Court of Illinois. Oct. 24, 1898.)

**CARRIERS—SPECIAL AGREEMENTS—EVIDENCE—
COMPETENCY OF EXPERTS—REMARKS OF
JUDGE—HARMLESS ERROR.**

1. Where a railroad company agreed, in consideration of a consignor's routing freight by its line, to furnish through refrigerator cars for transportation of perishable products, the agreement is not superseded by a bill of lading given by a connecting carrier at the original point of shipment, whereby liability was lessened, the contracts being independent of each other.

2. Witnesses employed for from 8 to 25 years in manufacturing, handling, and shipping condensed milk are competent as experts to testify as to the effects of heat and cold on milk, or the effects of transferring condensed milk from refrigerator to box cars.

3. Where it was in issue whether a connecting terminal carrier was agent of defendant carrier under a contract sued on, a remark of the trial judge, in admitting testimony of such connecting carrier's employé as a witness, that he would "hold as a matter of law that Mr. B. was agent of defendant," is not prejudicial error, the jury having been immediately admonished that they should disregard the remark, that it was expressed to attorneys, and that the jury would be instructed in writing as to the law at the proper time.

Appeal from appellate court, Fourth district.

Action by the Elgin Condensed Milk Company against the St. Louis & Southwestern Railway Company. A judgment for plaintiff was affirmed by the appellate court (74 Ill. App. 619), and defendant appealed. Affirmed.

Appellee manufactures condensed milk at Elgin, Ill., and sells part of its product at Galveston, Tex. From Elgin to Galveston there is railroad connection via the Chicago & Northwestern Railroad from Elgin to Dixon, Ill.; Illinois Central Railroad from Dixon to Cairo; St. Louis & Southwestern Railway

(appellant's line, known as the "Cotton Belt") from Cairo, via Bird's Point, Mo., and Texarkana, Tex., to Tyler, Tex.; and International & Great Northern Railroad from Tyler to Galveston. There are three shipments of milk claimed to be damaged. There are six counts in the declaration,—two counts, respectively, for each shipment. The right of action in each count is based upon an alleged parol agreement, which agreement is set out in the first, third, and fifth counts, in substance as follows: That defendant was a common carrier, and operated a railroad line in Cairo, in connection with a railway from Bird's Point, Mo., through part of Texas, and keeps an office at Cairo; that by its authorized agent, in consideration of plaintiff's shipping its milk from Elgin over the Chicago & Northwestern Railway to Dixon, thence over the Illinois Central to Cairo, so that it might be transported to its destination by defendant, it agreed to furnish plaintiff refrigerator cars at Elgin, and that the milk, when loaded therein by plaintiff and received by defendant at Cairo, should not be removed therefrom, but should be transported in said cars by defendant over its lines and other lines to place of destination. Counts 2, 4, and 6 state the agreement, in substance, as follows: Defendant agreed that in consideration that plaintiff would cause same to be delivered to defendant at Cairo, defendant would furnish plaintiff, at Elgin, refrigerator cars in which to load the milk, and to be delivered in such cars to defendant at Cairo, and would receive the milk in such cars, and carry the same to destination, and not remove the milk from such cars, or suffer the same to be done, until the same had reached destination. The declaration charges: That in pursuance of said agreement defendant furnished three Illinois Central refrigerator cars, in which plaintiff made certain shipments of milk from Elgin to Galveston, viz. shipment June 6, 1893, 400 cases milk, value \$1,305, Illinois Central refrigerator car 16,210, delivered to defendant at Cairo June 11, 1893; shipment May 6, 1893, 380 cases milk, value \$1,300, Illinois Central refrigerator car 16,346, delivered to defendant at Cairo May 11, 1893; shipment June 27, 1893, 410 cases milk, Illinois Central refrigerator car 16,481, delivered to defendant at Cairo June 29, 1893. That defendant received said cars under the contract at Cairo, but that, instead of sending them through to destination without transshipment, and in violation of its contract, defendant transferred the milk from refrigerator cars into box cars, and then sent it to Galveston, whereby the same was damaged, etc. Defendant pleaded nonsuit. Judgment was rendered for \$2,253.90 damages and costs of suit. On appeal to the appellate court for the Fourth district, that judgment was affirmed, and this appeal is prosecuted from that judgment.

Green & Gilbert, for appellant. William N. Butler and Angus Leek, for appellee.

PHILLIPS, J. (after stating the facts). By the adjudication of the trial and appellate courts the questions of fact have been conclusively determined. By the judgments of those courts it is settled that the contract was made as alleged in some of the counts of plaintiff's declaration; that it was made by an authorized agent; that the milk was shipped from Elgin, Ill., in good condition, in refrigerator cars, under said contract, and was delivered to appellant at Cairo, Ill., in those cars, and was by appellant transferred to box cars, and in them carried to Galveston, Tex., and was damaged by being so transferred from refrigerator to box cars and carried therein from Cairo to Galveston; that the cases of milk returned to the depot of the International & Great Northern Railroad Company at Galveston were damaged, and were disposed of at the best price obtainable at the nearest market; that the damage sustained was to the extent as found by the jury, and that the verdict was not excessive. The appellant contends that the verbal agreement was superseded by the subsequent written contract. The written contract relied upon as superseding the verbal agreement was that expressed in the bills of lading issued by the Chicago & Northwestern Railroad Company, and which sought to limit its liability. This suit is not brought on the contract embraced in the bills of lading, but on a separate and distinct contract entered into between appellant and appellee, which was in no manner affected by the bills of lading. The antecedent contract on which this suit was brought was entirely independent and distinct from that in the bills of lading, and was not superseded thereby.

Objection is made to the admission of expert evidence, because the witnesses sought to be examined did not possess sufficient knowledge in reference to the effect of heat and cold on milk, or the effect of transferring condensed milk from refrigerator cars to box cars, and carrying it a long distance in the latter. The witnesses thus examined had from 8 to 25 years' experience in manufacturing, handling, dealing in, and shipping condensed milk, and from their answers and experience it appears they were competent as experts. The hypothetical question put to witnesses, and allowing their testimony, were not error.

The agent of the terminal road at Galveston was called as a witness. It had been shown that 662 cans of milk of the different shipments made to appellee's consignee were by the latter returned to the depot of that terminal road. Appellant had sought to show that the agent of that road was not in any manner its agent, and the following question was asked the witness by appellant's counsel: "I will ask you if you or your railroad company had any knowledge from Mr. Ujffly as to when these 662 cans of milk were brought back to the depot, except the general knowledge that he desired them shipped when a sufficient quantity accumulated." To this question appel-

lee's counsel objected, and the objection was sustained. In ruling on the objection the judge stated, in its discussion, "I hold as a proposition of law Mr. Becker was the agent of defendant," to which remark and ruling of the court defendant objected and excepted. Thereupon the court said to the jury: "Gentlemen, my remark as to the law was addressed to the attorneys, and not to you, and you will disregard it. At the proper time I will instruct you in writing as to what the law is." A common carrier may enter into a contract to carry to a place beyond the terminus of its route, and thereby become liable as a carrier for the whole distance. All connecting carriers, under such a contract, become the agents of such contracting carrier, for whose negligence or default it is responsible. The contracting carrier cannot evade, by contract, the consequences of the negligence of such connecting carriers, any more than the results of its own. *Railroad Co. v. Frankenberg*, 54 Ill. 88; *Chicago & N. W. R. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Hutch. Carr.* 117. Under the evidence that was before the jury at the time of this ruling, the court could well hold the terminal road and its agent were the agents of the contracting road; but, as the question was one of fact, it was for the jury, and in ruling on the admissibility of evidence it should be in such a manner as that the judge should express no opinion on the evidence. Every unguarded expression in stating reasons for rulings cannot be treated as error requiring a reversal. It is not unusual, in ruling on the admissibility of evidence, to refer to antecedent evidence, and the principle deduced therefrom, and, unless inadvertent remarks of the court operate to the injury of appellant, it will not be sufficient cause to reverse. *Insurance Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804. In this case the jury were promptly instructed that the remark as to the law was addressed to the attorneys, and should be disregarded by them, as they would be instructed in writing as to the law.

Objection is made to the giving of instructions for the plaintiff, and in refusing and modifying instructions asked by the defendant. Two instructions were given for the plaintiff, and 31 asked by the defendant, 20 of which were given as asked, 3 modified and given, and 8 refused. Those given for the plaintiff correctly stated the law. Those given for the defendant stated the law favorably in every phase of the question presented by the defense. There was no error in refusing or modifying instructions. This case is one to be determined from the facts, and their determination by the circuit and appellate courts precludes our consideration of them. From a careful consideration of the record we find no reversible error, and the judgment of the appellate court for the Fourth district is affirmed. Judgment affirmed.

(151 Ind. 471)

WILSON v. CURTIS et al.

(Supreme Court of Indiana. Nov. 23, 1898.)

EXECUTORS—POWER OF TESTATOR TO DELEGATE NOMINATION.

Burns' Rev. St. 1894, § 2375 (Horner's Rev. St. 1897, § 2222), providing that, on probate of a will, the circuit clerk shall issue letters testamentary to the person named as executor; section 2376 (2223), providing that every person named as executor who shall qualify and give bond shall be named in the letters, and, if not thus named, shall be deemed superseded; and section 2379 (2226), providing that, if there be no person named in the will as executor, letters of administration with the will annexed shall be granted to any competent residuary legatee,—admit of a testator's delegating by will the power to legatees to name the executor.

Appeal from circuit court, Howard county; Walter W. Mount, Judge.

In the matter of the estate of Nancy Wilson, John W. Wilson applied for letters of administration c. t. a., and objected to the appointment of Abner R. Barker as executor. From an order overruling the objections and appointing Barker, Wilson appeals. Affirmed.

J. C. Blackledge and O. O. Shirley, for appellant. Bell & Purdum, for appellees.

MONKS, J. Nancy Wilson died testate in Howard county, Ind., in 1897. Her will, which was duly admitted to probate in said county, provided that her executors should buy a "tombstone," and if necessary for the payment of the same, and her debts and funeral expenses, that he sell, at private sale or otherwise, or in such manner, upon such terms of credit as he may think proper, all or any part of her real estate, and to execute and deliver a deed therefor in fee simple. After the payment of the debts, her real estate was devised to her children, and it was provided that the children, or a majority of them, should appoint the executor. All of the children referred to in the will, except appellant, met and signed a writing by which appellee Abner R. Barker was appointed executor of said will. Said appointment was filed in the court below, and Abner R. Barker made his written application to be appointed such executor. Appellant, the oldest son of the testatrix, filed an application to be appointed administrator with the will annexed of said estate, and at the same time objected to the appointment of appellee Barker as executor, on the ground that he was not named as executor in the will. The court overruled the objection to the appointment of said Barker, and he gave bond, and was by the court duly appointed executor of said will, to all of which appellant objected and excepted.

It has been decided that a testator may in his will delegate the authority to name an executor to some third person or persons, and the appointment made by them will be the

same as if made in the will. Williams, Ex'rs, pp. 195, 202; Woerner, Adm'n, § 239; Schouler, Ex'rs, § 41; Crosw. Ex'rs & Adm'rs, p. 52; 1 Thornt. Adm'n, 13, and cases cited; 1 Am. & Eng. Enc. Law, 180, and notes; Hartnett v. Wandell, 60 N. Y. 346; State v. Rogers, 1 Houst. 569; Mulford v. Mulford, 42 N. J. Eq. 68, 76, 6 Atl. 609; Bishop v. Bishop, 56 Conn. 208, 14 Atl. 808; Kinney v. Kephlinger, 172 Ill. 449, 50 N. E. 131. In Bishop v. Bishop, supra, the court said: "The executor is the creation solely of the testator, and it is within the power of the latter not only to appoint personally, but he may project his power of appointment into the future, and exercise it after death through an agent selected by him; and the agent may be pointed out by name, or by his office, or other method of certain identification." It is insisted by appellant that, whatever the rule may be elsewhere, under our statutes no person can be appointed executor unless he is named in the will. Section 2375, Burns' Rev. St. 1894 (section 2222, Horner's Rev. St. 1897), provides that, "whenever any will shall be duly admitted to probate, the clerk of the circuit court in which the same shall have been probated shall issue letters testamentary thereon, to the persons named as executors who are competent by law to serve as such, and who shall appear and qualify," etc. Section 2376, Burns' Rev. St. 1894 (section 2223, Horner's Rev. St. 1897), provides that "every person named in the will as executor, who shall qualify and give bond shall be named in such letters; and every person not thus named shall be deemed superseded." Section 2379, Burns' Rev. St. 1894 (section 2226, Horner's Rev. St. 1897), provides that "if there be no person named in the will as executor, or if those named therein have failed to qualify, have renounced or have been removed, letters of administration with the will annexed shall be granted by the proper clerk or court to any competent residuary legatee named in such will," etc. These sections were enacted in 1881, and are substantially the same as statutes on the same subject in force in New York in 1885, when the case of Hartnett v. Wandell, supra, was decided. In that case it was held that the delegation of power to appoint an executor was valid at common law, and that it was valid in that state under laws substantially the same as those in force here. It was also held in Baker v. Baker, 18 App. Div. 189, 45 N. Y. Supp. 870, citing 1 Williams, Ex'rs, 189, Ex parte McDonnell, 2 Bradf. Sur. 32, and In re Blacian, 4 Redf. Sur. 151, that a direction in a will that the public administrator shall "sell out all real estate" is an appointment of the person holding that position as executor of the will, and letters testamentary were issued accordingly. We think that the trial court properly held that Abner R. Barker was, under the facts of the case, named as executor in the will of said testator, within the meaning of the statute

above cited, and that no error was committed, therefore, in appointing him executor. Judgment affirmed.

(151 Ind. 474)

STATE v. CHICAGO, I. & L. RY. CO.

(Supreme Court of Indiana. Nov. 23, 1898.)

RAILROADS—HIGHWAY CROSSINGS—INCORPORATED TOWNS—COUNTY COMMISSIONERS—FLAGMEN.

Rev. St. 1894, § 5174, requiring railroads having more than two tracks across any public highway or road on the order of the county commissioners to place a flagman there, does not apply to crossings in incorporated towns, as Rev. St. 1894, § 4404 (Horner's Rev. St. 1897, § 3367), gives the trustees of such towns "exclusive power over the streets" within the corporate limits, and hence an order of the commissioners requiring a flagman at a crossing in such town is invalid.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by the state against the Chicago, Indianapolis & Louisville Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Poynter, for the State. E. C. Field, W. S. Kinnan, and Asa Elliott, for appellee.

HACKNEY, C. J. This was an action by the appellant against the appellee to recover the penalty provided by the act of 1891 (section 5175, Rev. St. 1894) for the failure to maintain a flagman at the crossing of High street, in the town of Salem, and the main track and a switch track of the appellee. The requirement that such flagman should be so maintained was by an order of the board of commissioners of Washington county claimed to have been adopted in pursuance of section 1 of said act (Rev. St. 1894, § 5174). The section referred to provides "that all railroads owned or operated in the state having more than two tracks across any public highway or road and used for switching purposes exclusively, or regularly, or if only one track, and used for switching purposes, said railroad corporation shall, upon the order of the county commissioners in which said railroad is located place a flagman at said crossing and maintain the same at their expense, from six o'clock a. m. to eight o'clock p. m. of each and every day, or so long as said commissioners deem it necessary." The appellee's demurrer was sustained to the appellant's complaint, and that ruling is the only assigned error. Constitutional objections are urged to the statute referred to, and, upon the appellant's construction of the statute, would require us to pass upon them. We are of the opinion, however, that it was not intended by the act in question to confer upon county boards any power or authority over the streets of incorporated towns, and that the order of the board, therefore, was invalid. "Public highways or roads" are the words of the statute describing the thoroughfare over which this power of the board is

given. If this expression were employed in a general and unlimited sense, it would include streets, since streets are a class of highways. But in construing the act we are to ascertain whether the legislature intended to include streets in the class over which the power was given. Primarily all power over all thoroughfares is with the legislature. For many years, if not from the beginning, this power has been so delegated by the legislature as to give control over urban ways to the cities and towns, and over suburban ways to the county boards and township officers. In keeping this control subdivided, an orderly system has prevailed with reference to the establishment, improvement, repair, and vacation of ways, and the sources from which the necessary funds are derived, and the officers executing these various functions and expending such funds. As to towns it has been and now is provided that "the board of trustees of incorporated towns in this state shall have exclusive power over the streets," etc., "within the corporate limits of such town." Rev. St. 1894, § 4404 (Horner's Rev. St. 1897, § 3367). An intention to modify this "exclusive power over the streets," and to disturb this prevailing orderly system, should be manifest before the courts could construe the act in question as giving county boards control over the streets of an incorporated town. This "exclusive power" is utterly inconsistent with the exercise of any power by the county board. *Sparling v. Dwenger*, 60 Ind. 80. *Tucker v. Conrad*, 103 Ind. 354, 2 N. E. 803. The act in question, interpreted with reference to the class of highways over which the board has exercised power, namely, those ways the control of which is not given specially to cities or towns, would maintain the consistency of the existing laws, and not introduce conflict in their practical enforcement. We do not doubt that the legislature has power to recall any fraction of its authority over streets delegated to towns, and to confer it upon county boards, but we are as free from doubt in holding that it was not intended by this act to do so. The ruling of the circuit court was correct, and the judgment is affirmed.

(152 Ind. 39)

ROWND et al. v. STATE et al.¹

(Supreme Court of Indiana. Nov. 18, 1898.)

MARSHALING ASSETS—PLEADING—APPEAL.

1. Where one creditor has a judgment lien on several properties of the judgment debtor, and others have liens, some on all the properties and others on a part only, a bill to marshal assets will lie.

2. A demurrer to two paragraphs of a pleading because neither states a cause of action or defense is joint, and hence must fail, unless both paragraphs are demurrable.

3. Where there was competent evidence, direct or circumstantial, or both, sustaining a finding by the trial court of fraud in a conveyance, the supreme court will not disturb it on the weight of the evidence.

¹Rehearing denied, 53 N. E. 306.

Appeal from circuit court, Clark county; George H. D. Gibson, Judge.

Bill by the state of Indiana against Robert M. Rownd and others. There was a decree for plaintiff, and some of defendants appeal. Affirmed.

Rankin & Rector, T. E. Powell, and C. L. & H. E. Jewett, for appellants. W. A. Ketcham, for appellees.

MONKS, J. This action was brought by the appellee the state of Indiana against appellants. Appellants Rownd and Gray alone assign errors. Those not waived are as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) The court erred in overruling the demurrer of the appellants Robert M. Rownd and David S. Gray to the second paragraph of the answer of the appellee the state of Indiana to the cross complaint of said appellants Rownd and Gray. (3) The court erred in overruling the demurrer of the appellants Robert M. Rownd and David S. Gray to the third paragraph of the answer of the appellee the state of Indiana to the cross complaint of the appellants Rownd and Gray. (4) The court erred in overruling the joint and several motions of Rownd and Gray for a new trial.

It is first insisted that the complaint stated no cause of action against Rownd and Gray. The state of Indiana recovered a judgment in the court below against one Patton, who owned manufacturing plants in Clark and Delaware counties, in this state, and caused executions to be issued on said judgment to said counties, and levied upon said plants. Said property appeared to be incumbered by liens held by different persons, and the state commenced this action for the appointment of a receiver; to set aside certain chattel mortgages upon a part of said property levied upon (one of which was held by the appellants Rownd and Gray), on the grounds that they were executed to hinder, delay, and defraud the creditors of said Patton; and to sell said incumbered property, and marshal the assets of said Patton, and distribute the same to the persons holding liens thereon according to their priority. The only objection urged against the complaint by Rownd and Gray is that the allegations of fraud are not sufficient to avoid the mortgage executed to them by said Patton, and that, therefore, the complaint did not state facts sufficient to constitute a cause of action against them. The complaint was sufficient as to said appellants, even if all the allegations of fraudulent intent and purpose, in the execution and acceptance of said mortgage, had been omitted therefrom. It is well established that courts of equity have jurisdiction to marshal the assets and securities of a debtor. The general principle is that, if one party has a lien on, or an interest in, two or more funds, as security for a debt, and another party has a

lien on, or interest in, one only of those funds, for another debt, and others have liens, some on all of said funds, and some only on a part thereof, as in this case, a bill to marshal the assets will lie. 1 Story, Eq. Jur. c. 13; 1 Pom. Eq. Jur. §§ 112, 180, 410, 1414; Ostrander v. Weber, 114 N. Y. 301, 21 N. E. 112; Relly v. Mayer, 12 N. J. Eq. 55; Van Mater v. Ely, Id. 271.

It is next insisted that the court erred in overruling the demurrer of Rownd and Gray to the second and third paragraphs of the answer of the state of Indiana to the cross complaint of said Rownd and Gray. Rownd and Gray each filed a separate cross complaint, upon notes executed by said Patton to them, and the chattel mortgage executed to secure said notes, on certain property upon which the execution, issued on the judgment in favor of the state, had been levied. It was alleged that said chattel mortgage was a first lien on the property described therein, and each asked for an order that the proceeds of such property be first applied by the receiver to the payment of the claims of said appellants. The state of Indiana filed an answer in four paragraphs to said cross complaints of Rownd and Gray. Appellants Rownd and Gray filed a demurrer to the second and third paragraphs of said answer in the following form: "The defendants Robert M. Rownd and David S. Gray demur to the second and third paragraphs of the answer to the cross complaint of said defendants Rownd and Gray, and for cause of demurrer say neither of said paragraphs of answer states facts sufficient to constitute a good defense to either of said cross complaints." This demurrer was joint, and not several. *Cooper v. Hayes*, 96 Ind. 390, and cases cited; *Stone v. State*, 75 Ind. 235, 236; *Silvers v. Railroad Co.*, 43 Ind. 435; *Stanford v. Davis*, 54 Ind. 45. It follows that, if either said second or third paragraph of said answer was good, the demurrer was properly overruled. The second paragraph of answer was a plea of payment, and said appellants do not claim that said paragraph was not good, but assail the third paragraph of answer only. As said second paragraph of answer was sufficient, the court did not err in overruling the demurrer, even if the third paragraph was not good. *City of Plymouth v. Milner*, 117 Ind. 324, 325, 20 N. E. 235; *Durham v. Hiatt*, 127 Ind. 514-519, 26 N. E. 401.

It is contended by appellants Rownd and Gray that the finding of the court was not sustained by the evidence. It is insisted in their brief that the controlling question is whether the evidence shows that "Rownd and Gray participated with Patton in any fraud by which the state of Indiana suffered, or by which they intended that the state of Indiana should suffer." It is true, as insisted by said appellants, that, in this state, an insolvent debtor may, in good faith, prefer one bona fide creditor to the exclusion

of others; and a mortgage or other security given in good faith to secure a bona fide indebtedness, and accepted in good faith for that purpose, cannot be set aside by the other creditors on the ground that the giving and accepting of such security may result in defeating their claims. *Levering v. Bimel*, 146 Ind. 545, 45 N. E. 775; *Straight v. Roberts*, 126 Ind. 383, 26 N. E. 73; *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. 296. But if Patton executed the chattel mortgage in controversy to appellants Rownd and Gray, with the fraudulent intent to cheat, hinder, delay, or defraud his creditors, and they were injured thereby, and said appellants participated in such fraud, it is clear that such mortgage may, in an action brought by one or more of the creditors, be set aside. It is not necessary, however, to establish the charge of fraud by direct and positive proof. As a general rule, men do not perpetrate fraud openly, but the attempt is made to carry out the fraudulent purpose in such a way as to conceal the real intent and purpose, and give it the appearance of fairness and honesty, and thus baffle detection. Fraud is therefore usually established by circumstantial evidence. Conduct which, standing alone, would seem innocent and harmless, when considered in connection with other facts and circumstances may furnish sufficient grounds to sustain an inference of fraud. It is "usually shown by the outlook, the circumstances, and environments of the transaction, and the situation and relations of the parties, and must be tested by our knowledge of human nature, and the motives and purposes which move men in the ordinary transactions of life." *Wait, Fraud. Conv.* (3d Ed.) pp. 15, 16. As was said in *Bump on Fraudulent Conveyances* (4th Ed. p. 592): "The frequency of frauds upon creditors, the difficulty of detection, the powerful motives which tempt an insolvent man to commit it, and the plausible casuistry with which it is sometimes reconciled to the consciences even of persons who have been without reproach, are considerations which prevent its classification among the grossly improbable violations of moral duty, and often permit it to be presumed from facts which may seem slight. How much evidence is required to raise a presumption of actual fraud cannot be determined according to any inflexible rule." Whether said Patton executed the chattel mortgage to said appellants with the fraudulent intent charged, and whether said appellants participated therein, were questions of fact to be determined by the trial court. *Kelly v. Lenihan*, 56 Ind. 448, 450, 451; *Rhodes v. Green*, 36 Ind. 715. This court said in *Rhodes v. Green*, supra: "Since fraud is a question of fact, and not of law, it is the peculiar province of the jury to decide upon the facts, and the credibility of the witnesses, and the weight and effect of their evidence. Fraud may be found from the circumstances as well as from posi-

tive evidence." What was said in regard to the province of the jury in said case applies with equal force to the court in this case as the trier of the facts. If there was competent evidence, either direct or circumstantial, or both, which sustains the finding, this court cannot disturb the same on the weight of the evidence. After a careful examination of the evidence, we cannot say that the finding of the court was not sustained thereby. As there was competent evidence which satisfied the trial court, we cannot disturb the finding. Judgment affirmed.

(152 Ind. 139)

UNION NAT. SAVINGS & LOAN ASS'N v. HELBERG et al.¹

(Supreme Court of Indiana. Nov. 22, 1898.)

MECHANIC'S LIENS—LIMITATIONS—MORTGAGES.

Horner's Rev. St. 1897, § 5298 (*Burns' Rev. St.* 1894, § 7259), making a mechanic's lien void if not enforced within a year after it is recorded, precludes a mechanic's lienor, foreclosing his lien without making the holder of a mortgage junior to his lien a party, from asserting any rights, other than that of an owner of the land having a right to redeem, as against the mortgagee bringing suit to foreclose more than a year after the filing of the lien.

Appeal from superior court, Lake county; J. E. Cass, Judge.

Action by the Union National Savings & Loan Association against George H. Helberg and one Mosler. From a judgment for Mosler, plaintiff appeals. Reversed.

Olds & Griffin, for appellant. Peter Crumacker, for appellees.

HACKNEY, C. J. The appellant sued to foreclose a mortgage executed by the appellee Helberg. The appellee Mosler, by cross complaint, sought to enforce a mechanic's lien as senior to the mortgage. The essential facts were that Helberg owned a lot in the city of Hammond, and in December, 1892, contracted with Mosler for the erection of a dwelling house. The dwelling house was under construction when, in March, 1893, the appellant, with knowledge of said contract and the work upon said house, made a loan of \$1,300 to Helberg, which loan was secured by a mortgage of said lot. On the 30th day of September, 1893, within the statutory time, Mosler gave the proper notice of a mechanic's lien. On the 8th day of September, 1894, Mosler sued to foreclose said lien, not making the appellant a party, and in February, 1895, purchased said property under a decree of foreclosure. The lower court held the lien of Mosler senior to that of the appellant, and that holding presents the question for decision by this court.

It is not questioned that, in point of time, the mechanic's lien was, by relation back to the time when the work began, senior to the mortgage; but it is insisted that by the failure to bring suit to foreclose such lien, as against the appellant, within one year from

¹ Rehearing denied.

the giving of such notice, the lien was waived as to the appellant. The statute, giving the remedy for the foreclosure of mechanics' liens, provides that "any person having such lien may enforce the same by filing his complaint in the circuit or superior court of the county where the labor was performed or the materials, machinery, articles, things, or service furnished or rendered at any time within one year from the time when said notice has been received for record by the recorder of the county, * * * and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void. * * *" *Horner's Rev. St. 1897, § 5298* (*Burns' Rev. St. 1894, § 7259*). It will thus be seen that the remedy is limited to one year, and, if the complaint is not filed during that period, the lien is void. We have seen, also, that the remedy, as against Helberg, the owner of the property, was enforced within the year. Does the statute require that the remedy shall be enforced also against existing junior lienholders, within the year, to save the validity of the senior lien? The requirement of the statute is general, and contains no exception applicable to this case. Its object was to prevent the ex parte incumbrance from beclouding titles, and embarrassing dealings with reference to the property, for a longer period than one year. This object cannot be said to concern the property owner alone, for the junior incumbrancer is interested in having the lien determined while the extent of labor or materials may be more easily ascertained, and while values, as to the lien, may not become obscure, and, as to the property, may not become impaired. A foreclosure, as against a junior lienor alone, could hardly be said to satisfy the statutory requirement if objection were made by the property owner. If, upon such foreclosure, the year having expired, the owner could assert the invalidity of the lien, it would seem that the rule should also be upheld that a foreclosure against the owner alone would not preclude the junior lienor to assert the invalidity of the lien as against his lien. Even as between mortgagees, where the senior is foreclosed without bringing in the junior, the foreclosure is a nullity as to the junior. *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791, and authorities there cited; *Catterlin v. Armstrong*, 101 Ind. 258. The same rule has been generally applied to mechanics' liens. See 15 Am. & Eng. Enc. Law, p. 165, note 4. If the analogy is fair, and we think it is, we may say that the foreclosure by Mosier was, as to the appellant, as no foreclosure, and did not preclude or estop the appellant to deny the validity of the lien, under the provisions of the statute. In Alabama it was held, in an action to foreclose a lien, commenced against the husband within the statutory period, the wife being brought in by amendment after the period, that the statute was a bar in her favor. *Seibs v. Engelhardt*, 78 Ala. 508. In *Dunphy v. Rid-*

dle, 86 Ill. 22, *Crowl v. Nagle*, Id. 437, and *McGraw v. Bayard*, 96 Ill. 146, it was held that a suit within the statutory period against the property owner, and to which a junior incumbrancer was made a party after the statutory period, could not be maintained against the junior incumbrancer. In *Dunphy v. Riddle*, supra, it was held that the limitation, "unless suit be instituted to enforce such lien within six months," required that the suit should be instituted against the owner, creditor, or incumbrancer to be available. In this state it has been held that the limitation applies in favor of a purchaser pending the lien. *Holland v. Jones*, 9 Ind. 495; *Marvin v. Taylor*, 27 Ind. 73; *Schneider v. Kolthoff*, 59 Ind. 568. These holdings support the conclusion that the statute is available in favor of all who are interested, and against whom proceedings have not been instituted within the limited period. While we hold that the failure to make the appellant a party to his foreclosure lost to Mosier the seniority of his lien, we do not hold that his foreclosure was entirely fruitless. It had the effect to place Mosier in the shoes of Helberg, and to carry to him the equity of redemption. *Holmes v. Bybee*, 34 Ind. 262; *Catterlin v. Armstrong*, 101 Ind. 258; *Browning v. Smith*, 139 Ind. 280, 37 N. E. 540. The judgment is reversed, with instructions to sustain the demurrer to the cross complaint, and to grant a new trial.

(151 Ind. 442)

LONG v. CITY OF PORTLAND.

(Supreme Court of Indiana. Nov. 15, 1898.)
ORDINANCE—CONSTRUCTION—"KEEPING" CHICKENS.

A dealer who on Saturday takes in a large number of chickens, and retains them in the building, on the ground of a railroad company, occupied by him, and near which ran a side track, and ships them, on Monday, in the meantime feeding them, does not violate an ordinance declaring it a nuisance for one "to keep" within the city, for the purpose of feeding for the market, more than 50 chickens.

Appeal from circuit court, Jay county; J. W. Headington, Judge.

Joseph A. Long was convicted of violating an ordinance, and he appeals. Reversed.

John M. Smith and John F. La Follette, for appellant. D. T. Taylor and S. A. D. Whipple, for appellee.

HACKNEY, C. J. The appellant was charged by the city, and found guilty, of the violation of section numbered 2 of an ordinance of said city, as follows:

"Sec. 2. That it shall be unlawful for any person or persons to keep in any lot or enclosure within the corporate limits of said city of Portland, Indiana, for the purpose of slaughtering or feeding for marketing or slaughtering, any cattle, hogs, sheep, or other animals in any number; or any geese, chickens, ducks, turkeys or other fowls exceeding

fifty (50) in number; that the feeding of cattle, hogs, sheep or other animals, geese, chickens, ducks, turkeys or other fowls as above provided, be and the same is hereby declared a nuisance."

The violation charged was in "unlawfully feeding within the corporate limits of said city * * * five hundred chickens, the same being then and there kept and fed within an inclosure in said city, for the purpose of marketing."

The ordinance is awkwardly worded, but, as relating to the act charged against the appellant, it provided that "to keep," for the purpose of feeding for the market, any number of chickens exceeding 50 shall constitute a nuisance. So interpreted, and being of a penal character, it should be given a reasonably strict construction, which, if possible, will not bring it in conflict with the constitution. "To keep," it is expressly conceded by the appellee's learned counsel, does not mean the mere transient or temporary custody within the limits of the city, as while awaiting a car for shipment, or while in a car awaiting a train which shall carry them to a distant market. He says: "It will not do, we think, to construe section 2 of said ordinance as meaning that * * * the appellant might not temporarily keep his fowls inclosed until he could load them on a car. * * * The purpose of the ordinance was, as we understand its meaning, to prevent persons from keeping for the purpose of shipment or slaughtering at some future time." Various definitions of the word "keep" are quoted to disclose a meaning of continuance or of considerable duration. The idea of maintaining or continuing to possess or control for a considerable period is agreeable to the purpose of preventing a nuisance. It would certainly not be within the spirit of the ordinance to condemn the attendant of a car load of fowls in transit who, while his train was switching within the city, should feed them. So if the fowls were temporarily in a freight depot awaiting shipment, and so if the buyer gathers them upon a side track for loading and shipping within a reasonable time, but does not detain them for fattening. Otherwise shipments would be limited to 50 or less, or shippers would be required to arrange for shipping facilities without the city limits. We agree with the appellee, therefore, that the purpose of the ordinance was to prevent the gathering and continued feeding of fowls in preparation for the market or for slaughtering as may become offensive to the senses. While the validity of the ordinance is attacked, the attack must depend upon the interpretation and construction to be given it, and the interest of the appellant in making such attack. The evidence showed that on Saturday the appellant, who was a grocer and poultry dealer, took in 500 chickens, and retained them in the building, situate upon the ground of the Grand Rapids Railway Company, occupied by him, and near to which ran a side track or switch

of said company, and that on the following Monday they were shipped. In other words, he, as a dealer, had the chickens from Saturday until Monday, and during that time fed them where they were detained. This, we think, did not make a case within the purpose and spirit of the ordinance, and the appellant's motion for a new trial should have been sustained. The appellant has, therefore, no interest in questioning the validity of the ordinance. The judgment is reversed, with instructions to sustain the appellant's motion for a new trial.

(152 Ind. 700)

MYERS et al. v. CULLUM.¹

(Supreme Court of Indiana. Nov. 22, 1898.)

LIFE ESTATES—CREATION—DEEDS—CONSTRUCTION.

A deed reciting that a certain person "is to have his support off of said described land during his natural life" conveys to him a life estate.

Appeal from circuit court, Carroll county; T. F. Palmer, Judge.

Action by Robert W. Cullum against John Myers and others. Judgment for plaintiff, and defendants appeal. Affirmed.

L. D. Boyd, for appellants. Smith & Jullen, for appellee.

MONKS, J. Appellee brought this action to recover the possession of 100 acres of real estate in Carroll county, and for damages, and recovered judgment for possession. It appears from the record that William Cullum and Annie Cullum, his wife, the parents of appellee, and the grandparents of the appellant Alvin W. Cullum, executed a deed conveying the 100 acres of real estate in controversy to said Alvin W. Cullum, the son of appellee, with the following provision immediately following the description of the real estate in said deed: "This deed being made to Alvin W. Cullum, son of Robert W. Cullum, the said Robert W. Cullum is to have his support off of said described land during his natural life." The contention in this cause is as to the proper construction of said clause in the deed. If said deed conveyed to appellee a life estate, the judgment of the court below ought to be affirmed; otherwise it is to be reversed. In *Stout v. Dunning*, 72 Ind. 343, the following provision was contained in a deed immediately following the description of the real estate: "A condition in the foregoing conveyance is that the said James B. Stout is to have the privilege of a support off of said lands during his lifetime without incumbrance."—and this court held that said deed conveyed to said Stout a life estate in said lands. The court said: "He could not have his support off the land without the use and occupation of it. The right to such support from the land involves the use and occupation, as without the use and occupation he could not derive his support from it. And it seems to us that a life estate was as effectually conveyed to him as

¹ Rehearing denied.

If the deed had provided that he should have the use and occupation, or the rents and profits, of the land for life." The provision in the deed in this case is substantially the same as that in the case of *Stout v. Dunning*, supra, which case was cited with approval in *Williams v. Owen*, 116 Ind. 70, 72, 18 N. E. 389. The use of the closing words "without incumbrance" in that case added nothing to the remainder of the clause. If said words had not been used, the privilege of *Stout* to support off of said lands would have been the same; that is, not to be incumbered or impeded. The decision in that case did not depend upon said words, but upon the fact, as stated by the court, that "the right to such support from the land involves the use and occupation, as without the use and occupation he could not derive a support from it." This case is ruled by said case of *Stout v. Dunning*, supra, and said deed, therefore, conveyed a life estate in the land in controversy to appellee. The judgment is therefore affirmed.

(151 Ind. 400)

TOUHEY v. TOUHEY.

(Supreme Court of Indiana. Nov. 17, 1898.)
EXECUTION—EFFECT OF FAILURE TO APPRAISE—RESALE.

Property was sold, without appraisal, under an execution requiring one, to the judgment creditor, who took possession. After two years, the sheriff returned the execution unsatisfied, because the sale was invalid, owing to failure to appraise. Another execution issued, appraisal was had, and the property sold to the creditor. *Held*, that the irregularity in selling without appraisal, and holding the writ for two years, did not extinguish the judgment lien, since the sale was void, and the title remained in the debtor, and no disadvantage was occasioned him, and no advantage accrued to the creditor.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Action by Patrick Touhey against Honora Touhey. There was a judgment for defendant, and plaintiff appeals. *Affirmed*.

Miller & Parr, for appellant. Andrew Anderson, for appellee.

HACKNEY, C. J. The question for decision in this case arises upon facts specially found and conclusions of law stated by the trial court, in substance as follows: On October 25, 1894, the appellee obtained a decree of divorce from, and a judgment for \$2,000 alimony against, the appellant; the latter then being the owner of the real estate in question. Five days later an execution issued upon said judgment, and was, according to the terms of the judgment, collectible subject to valuation and appraisal laws. Said writ was levied upon said property, and a sale, without appraisal, was made to the appellee in May, 1895. A certificate of purchase issued to the appellee, and it recited the payment of the amount of the writ, whereas no sum was paid or receipted for by the appellee. In May,

1896, the sheriff executed to the appellee a deed for said property, and she went into possession. In December, 1896, more than two years from the issuance of said writ, the sheriff returned said execution unsatisfied, by reason of the invalidity of said sale, owing to the failure to appraise the property. Thereupon the appellee procured to be issued an execution in the nature of a venditioni exponas for the collection of said judgment, and upon said writ appraisal, notice, and sale were made; the appellee purchasing and receiving a certificate. Upon the appellant's complaint to quiet title, and upon the facts found, the court stated, as conclusions of law: (1) That the appellant is the owner of the legal title; (2) that the deed of the sheriff was void; but that (3) the lien of the judgment had not been extinguished. It is manifest that the appellant can present but one question,—that arising upon the third conclusion of law. It may be stated in this way: Did the irregularity in selling without appraisal, and in holding the writ for two years, extinguish the lien of the judgment, while leaving the title to the property undisturbed in the appellant? From any equitable view, the inquiry would suggest a negative answer. It would be a remarkable state of circumstances under which a sale absolutely void would satisfy the judgment upon which it is made; there being no money paid, no receipt executed, no advantage gained, and no disadvantage occasioned the appellant. The record contains no facts showing advantage to the appellee or disadvantage to the appellant from the irregularity, and the satisfaction, insisted upon without payment of money or surrender of property, is extremely technical, and utterly devoid of equity. The principal argument in behalf of the appellant is that the first sale was void for the want of an appraisal, and the second sale was void because the first sale satisfied the judgment. The apparent rather than real legal support for this argument is in the holding that a levy upon property sufficient to satisfy a judgment is a presumptive satisfaction of the judgment. As between the debtor and the creditor, and involving no interests of a third party, this presumption is only prima facie, "and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt * * * is gone, although the creditor may not have been paid." *U. S. v. Dashiel*, 3 Wall. 688; *Lindley v. Kelley*, 42 Ind. 294; *McCabe v. Goodwine*, 65 Ind. 288; *Dehority v. Paxon*, 115 Ind. 124, 17 N. E. 259. Here the appellant has succeeded in his claim that the writs and attempted sales were void. Of this the appellee does not complain. The only substantial claim of the appellant here, as we have already shown, is that the invalid proceedings under the judgment shall be deemed a satisfaction of the

judgment. In this claim we do not concur. The title of the appellant has not been affected, and the rights of third parties have not been disturbed. The case does not fall within the class where the presumption of satisfaction is conclusive. The judgment is affirmed.

HOWARD, J., absent.

(152 Ind. 392)

WABASH R. CO. v. RAY.¹

(Supreme Court of Indiana. Nov. 15, 1898.)

MASTER AND SERVANT—ASSUMPTION OF RISK—RAILROADS—SPECIAL VERDICT.

1. A party is entitled to judgment on a special verdict for the absence of a fact which his adversary is bound to establish.

2. In determining the judgment to be entered on a special verdict, conclusions and conjectures of the jury cannot be considered.

3. A railroad company blocked the space between switches and guard rails, except at street crossings. There were about 50 of these, all unblocked. A brakeman's foot was caught in an open space while attempting a coupling. The space was in the same condition when the brakeman entered on his employment, and since then he had passed it once a day, except Sundays, for over a month. *Held*, that he had assumed the extra risk incident to the space being left open.

Appeal from circuit court, Whitley county; Joseph W. Adair, Judge.

Action by Pearl Ray, administratrix of the estate of William O. Ray, deceased, against the Wabash Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

A. A. Adams and Stuart Bros. & Hammond, for appellant. Ninde & Ninde, for appellee.

JORDAN, J. The appellant railroad company owned and operated, as one of its branches, a railroad extending from the city of Detroit, Mich., through Columbia City, Ind., to the city of Peru, in the latter state. Appellee is the administratrix of William O. Ray, deceased, who was at and prior to his death in the employ of appellant, as a brakeman on one of its local freight trains. He was accidentally killed while coupling cars at Columbia City, by catching his foot in an unblocked guard rail, and, while in such condition, was run over by the car which he was attempting to couple. To recover for this alleged negligent killing, the appellee successfully prosecuted this action in the lower court, and, upon a special verdict by the jury, obtained a judgment for \$5,000. The alleged errors of which appellant complains, in the main, are based upon the decision of the court in overruling a demurrer to the amended complaint, and in denying its motion for a judgment upon the special verdict of the jury, and in overruling its motion for a new trial.

We may, at least for the present, pass the consideration of the sufficiency of the complaint, for the reason that substantially the same facts and the same theory thereunder are disclosed by the special verdict; and if

we can hold that, under the facts therein found, appellee is entitled to a judgment, such holding will certainly result in sustaining the complaint. Counsel for appellant earnestly insist that their motion for a judgment in favor of appellant, upon the special verdict, ought to have been sustained. Preliminary to the consideration of this insistence, we may properly refer to some familiar and well-settled rules applicable to a special verdict, one of which is that it is the very essence of such a verdict that it state all the material facts within the issues of the case, and no omission of a fact therein can be supplied by intendment. Its failure to find a fact in favor of the party upon whom the burden of establishing it rests is the equivalent of an express finding against him as to such fact. When the party having the onus in a case asks a judgment upon a special verdict, the material facts therein found within the issues must establish his right under the law to a judgment, otherwise he must fall in his demand; but where, as in this case, the moving party is not the one upon whom the burden of the issue rests, his right to be awarded a judgment does not depend alone upon the presence of material facts, but he may be entitled to the judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish. The jury, therefore, being required in their special verdict to find facts, mere conclusions, surmises, and evidence have no legitimate place therein, and are entitled to no consideration by the court. *Cook v. McNaughton*, 128 Ind. 410, 24 N. E. 361, and 28 N. E. 74; *Railroad Co. v. Miller*, 149 Ind. 490, 49 N. E. 445.

It may be said that the verdict in this case is open to the objection that the jury in several instances stated their own conclusions and conjectures. Eliminating these, however, as we must, the material facts embraced therein, and necessary to the solution of the question presented by counsel, may be summed up and stated as follows: Appellee's decedent was, at the time of his death, a skillful railroad brakeman, 30 years old, sound in body and in good health. At the time of the fatal accident, he was in the employ of the appellant as a brakeman, on one of its local freight trains, which ran over its road between the town of Butler and the city of Peru. His said employment as brakeman by appellant began on February 9, 1893, and he continued to serve as such brakeman on the train above mentioned until the time of his death, on March 14, 1893. During that period he ran on said train each day, except Sunday, over the road, as follows: One day he would run from the town of Butler, through Columbia City, to Peru, and the next day he would return with his train over the same route from Peru to Butler. The defendant, for more than two months prior to March 14, 1893, maintained a certain spur switch and side track in Columbia City, which switch

¹ Rehearing denied.

branched off from the main track of the railroad about 50 feet east of the point where said track crossed Main street, in Columbia City. This switch extended westward from its junction with the main track for a distance of 400 feet. The south rail of this switch was about 7 feet and 9 inches north of the north rail of the main track where it crossed Main street, and the main track of the switch crossed this street nearly at a right angle. Main street, in Columbia City, including its sidewalks, is 80 feet wide, and the east line of this street is 50 feet west of the junction of the main track of the railroad. Two months and more prior to the death of the deceased, appellant placed and maintained two guard rails for a distance of 45 feet across said street. The east and west ends of these guard rails were about the same distance from the east and west boundaries of this street. One of these guard rails was placed and maintained 2½ inches from the north rail of the switch, and the other, the same distance from the south rail; and these guard rails were so placed between the rails of the switch that each was bent and flared out from the main rails of the track until the ends thereof were about 14 inches from the main rail of the switch. The opening of the east end of the south guard rail is described in the special verdict as follows: "That the east end of said south guard rail commenced to separate from the south rail of said track about nine feet from the end thereof, and continued to curve away from the south rail of said track till the east end thereof was seventeen inches from said south rail, as aforesaid; that said curve in said guard rail made a wedge-shaped space between south rail of said switch and the bent portion of said guard rail, which, at the point where said guard rail commenced to recede from said south rail, was two and three-eighths inches wide, and which space continued to widen as said guard rail continued to leave the main rail, until it was seventeen inches wide at the end of said guard rail." The wedge-shaped space between these rails was unblocked, and the verdict states that for this reason it was "extrahazardous" for the decedent and other employes of the defendant to couple and uncouple cars moving westward over this open space, for the reason that they were liable, when so engaged, to step into said opening, and thereby to cause one of their feet to become wedged and fastened therein, so that it could not be withdrawn until such employé would be run over and killed by the car which he was coupling. The verdict states: That this space or opening could have been prevented by blocking it as follows: "By a wooden block about sixteen inches long and two inches thick, cut in a wedge shape, so that the point would be two inches wide, and then widen as fast as said rail spread." That such blocking would have prevented a brakeman's foot from passing under the rails, and becoming fastened. It is fur-

ther stated in the verdict that the defendant, long prior to the time it employed the deceased, had properly blocked all of its frogs, switches, and guard rails at said switches, and that the deceased, during the time of his employment, up to his death, "saw and knew" that said switches, frogs, and guard rails were blocked and safe to pass over. It is then stated that the defendant, carelessly and negligently, and without due caution and care for the safety of the deceased in operating its train, and in coupling and uncoupling its cars, over said switch and over said guard rails at the crossing of said Main street, failed and neglected to block said space or opening between said guard rails and said south rail as above described; and that on said 14th day of March, 1893, the deceased was carefully, and in the due performance of his duty, engaged in coupling cars on said spur switch on and over said open space between said guard rail and the south rail of said track, and on and over the crossing of said Main street. As he was so carefully engaged in coupling cars and moving westward between the cars and over said space or opening, he stepped into said opening, whereby his left foot became wedged and fastened between said rails, so that it became then and there impossible for him to withdraw his foot; and, while it was so held, the car that he was coupling ran over him, and then and there killed him, without any fault on his part. The verdict then proceeds as follows: "That, at the time he was so caught and run over and killed, he did not know, and never had known, that said space was not blocked or made safe for him to couple cars over the same; but from the fact that all the frogs, switches, and guard rails at said switches on and along the defendant's said road were properly and safely blocked, the deceased believed, and had reason to believe, said space where his foot caught, and where and by means of which he was killed, was safely and properly blocked at the time he was killed as aforesaid. * * * That the defendant, all the time that the deceased was in its employ, knew that said space was not blocked nor in any manner made and kept reasonably safe for the deceased and its other trainmen to switch and couple and uncouple cars over the same; * * * yet the defendant, for and during all of said time, negligently and carelessly failed and refused to block the same or render it reasonably safe." At the time of the accident, the verdict states "that it was necessary for the decedent to give his entire attention to his duties in coupling cars, and that he did not see where he stepped, and did not know exactly where he was on said track at the time he was caught and killed. It is then further stated as follows: "That there were about forty-five guard rails placed over the highway crossings on said railroad between Butler and Peru during the period that the said deceased was so employed by said defendant, and also about five

street crossings at which such guard rails were placed between the rails of said railroad or its side tracks, and that the purpose of placing said guard rails at such crossings was to hold and contain gravel and other hard substances on a level with the tops of the rails at said crossings, and to avoid planking the same; that none of said guard rails during said period were blocked, nor were said crossings, except in one other instance, a part of any system of switching upon said road."

We have in part stripped the special verdict of conclusions and immaterial matter, and the above facts may be said to be those which are essential to the question involved. The theory upon which the verdict proceeds to impute negligence to the appellant is founded on the omission of the latter to block the open space at the guard rail. This rail, it appears, was 45 feet in length, and located at or near a street crossing in Columbia City. The opening at the east end of the rail, where the accident occurred, began at a point where the guard rail was 2 3/8 inches from the main rail, and continued to increase in width until, at the end of the guard rail, it was 17 inches wide. The duty which it is claimed the appellant ought to have performed was to have placed a wooden block or wedge in the opening, which block, as the jury find, should have been 16 inches long and 2 inches thick. It is seemingly contended by counsel for appellee that the failure to block this opening was negligence per se. It is said by some of the authorities that the operation of a railroad without blocking its frogs and switches is not, as a matter of law, negligence. See *Railway Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401; *Hewitt v. Railway Co.*, 67 Mich. 61, 34 N. W. 659. The test of liability would seem to be in such cases, not whether the railroad company had omitted to block its frogs and switches, as it might have done, but whether the places where its employes were required to work were, on account of such omission, not reasonably safe for the performance of such work when such employes, under the particular circumstances in the case, were exercising ordinary care. But we may pass this feature of the case without further comment, and proceed to consider the one so earnestly pressed and argued by counsel for appellant.

They contend that the facts disclose that the condition of the guard rail was the same at and prior to the employment of the deceased, and so continued during his entire term of service until the time of the accident; that its dangerous condition, if such was the fact, was open and obvious to all, and clearly discernible by the deceased, had he, under the circumstances, exercised the sense of sight with which he must be presumed to have been endowed. Therefore it is insisted that the risk of the alleged hazard on account of the unblocked guard rail, to which, as claimed by appellee, the deceased was subjected, was one of the risks which he as-

sumed, and thereby waived any right of recovery. We recognize the familiar doctrine, so often and so universally asserted, that the master, in the employment of his servants, impliedly obligates himself to exercise ordinary care to furnish them with a reasonably safe place to work, and also with reasonably safe machinery, appliances, and instrumentalities with which to perform their duties. The test or standard in such matters, upon the part of the master, is ordinary care; but, in order to ascertain what would constitute such care in the particular case, the dangers of the service in which the employe is engaged is a factor, and must be considered. What might prove to be the exercise of ordinary care under some circumstances might not be such in others. *Elliott, R. R.* § 1273. The general rule relative to the risks which a servant assumes under his employment to discharge hazardous duties is that he assumes such risks as are ordinarily incident to the discharge of the duties from cause, open and obvious, the dangerous character of which he has had an opportunity to ascertain; but he does not assume the risks of unsafe premises, defective machinery, appliances, or instrumentalities, unless he has had, or may, from the facts or circumstances, be presumed to have had, knowledge or notice thereof. *Griffin v. Railway Co.*, 124 Ind. 326, 24 N. E. 888; *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Swanson v. City of Lafayette*, 134 Ind. 625, 33 N. E. 1033; *Railway Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927; *Elliott, R. R.* §§ 1288, 1289. The doctrine of the assumption of risks upon the part of a servant has been frequently applied by the higher courts in cases where the death or injury complained of was attributable to unblocked frogs, switches, or guard rails of railroad companies. In the following cases, decided by this court, the same question was involved as in the case at bar. *Railway Co. v. McCormick*, 74 Ind. 440; *Ames v. Railway Co.*, 135 Ind. 363, 35 N. E. 117; *Sheets v. Railway Co.*, 139 Ind. 632, 39 N. E. 154. Among those of sister states in which the same question was presented, see *Spencer v. Railroad Co.* (Sup.) 22 N. Y. Supp. 100; *McNeil v. Railroad Co.* (Sup.) 24 N. Y. Supp. 616; *Appel v. Railway Co.*, 111 N. Y. 550, 19 N. E. 93; *McGinnis v. Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Hewitt v. Railway Co.*, supra; *Railroad Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55; *Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895; *Holum v. Railway Co.*, 80 Wis. 299, 50 N. W. 99; *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Railroad Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786.

It is a well-affirmed legal principle that, where a danger or hazard of the business is alike open to the observation of all, the master and the servant, under such circumstances, are on an equality, and the former is not liable to the latter for an injury resulting from such danger incident to the business. *Swanson v. City of Lafayette*, supra; *Stone*

Co. v. Wolf, 138 Ind. 496, 38 N. E. 52. It is also well settled that an employé who has knowledge, or who by the exercise of ordinary diligence or observation can learn of the infirmities, imperfections, or hazards of implements, machinery, or appliances with which he works, or the hazards of the premises, where he performs the duties of his employment, and continues in the service without objections, and without the promise of repairment or change upon the part of the master, will be deemed to have assumed all the risks incident to such defects and hazards, and thereby will be held to have waived his right to recovery for injuries resulting therefrom. While this rule cannot be extended so as to cast upon the employé the duty to search for latent defects in the machinery, appliances, and instruments used by him, or about which he works, or the hidden dangers of places where he is engaged in the line of his duty, yet it does go to the extent of holding that he assumes the consequences resulting from such defects and dangers as are apparent to him, or such as, by the exercise of ordinary diligence, and by giving proper heed to his surroundings, he might have discovered. *Rietman v. Stolte*, 120 Ind. 314, 22 N. E. 304; *O'Neal v. Railway Co.*, 132 Ind. 110, 31 N. E. 669.

The facts in the case at bar, when tested in the light of the well-settled principles to which we have referred, do not, in our opinion, entitle appellee to a recovery. The decedent, as the verdict discloses, was a man of mature years, and well skilled as a railroad brakeman. His employment by appellant began on February 9, 1893, at which time, and prior thereto, the guard rail in controversy was in the same condition, and so continued up to the time of the fatal accident. He had served from the date of his employment continuously as brakeman on one of appellant's local freight trains, until his death, which, as it is stated, occurred on March 14, 1893. Each day, except Sunday, during said period of his employment, the train on which he was braking and switching passed the place where the guard rails in dispute were located. The main track and the side track at that point were but 7½ feet apart. It is apparent, therefore, that appellee's decedent, prior to the accident, passed about 28 times very near to the open space occasioned by the unblocked guard rail. At the time of the accident, he was engaged in the line of his duty, as the jury find, in coupling cars over the opening in question. As to whether, at any time previous to his death, he had or had not engaged in switching and coupling cars at the point in controversy, the verdict does not expressly disclose. The unblocked opening, into which he stepped and caught his foot, was 9 feet in length, 2¾ inches wide at one end, and 17 inches wide at the other. It is certainly manifest from the facts that this unblocked space or opening was so plain and obvious that it could have been seen by

the deceased when so close to it as he was at divers times during the period of his employment, had he given ordinary heed to his surroundings. It would surely seem that he would have been able to have discovered this obvious unblocked space at the time of the accident, when he was engaged in switching and coupling cars immediately about and over the opening, had he exercised ordinary care or heed, as required, in regard to his surroundings. The jury apparently offer an excuse for his failure to exercise such care or heed by concluding, as they do, that it was necessary at that time for him to give his entire attention to his duties, and therefore he "could not and did not see" where he was placing his foot. If not aware of the condition of the place about and over which he was moving his foot while coupling cars, common prudence, at least, ought to have admonished him to ascertain its character before placing his body, as he did, between the moving car and the one to which it was to be coupled.

The argument of counsel for appellee is that as it appears that all of appellant's guard rails at switches were blocked, and that deceased, at the time he was killed, and "always up to the time of his death, saw and knew that said switches, frogs, and guard rails at said switches were properly blocked, and safe to pass over, and couple and uncouple cars and make up trains over the same," therefore he had a right to believe that the guard rails at the crossing of Main street, in Columbia City, where the accident occurred, were in the same condition. This argument is not tenable, and is certainly without force when the facts found by the jury are considered, which reveal that appellant's guard rails, some 50 in number, at other highways and street crossings between Butler and Peru, were not blocked. The fact that the decedent was so circum-spect as to see and know at all times during his employment that appellant's frogs, switches, and guard rails at switches, along the route over which he worked, were properly blocked and safe, makes it appear singular that such caution or heed upon his part did not also enable him to discover that the guard rails at or near the crossing of Main street, in Columbia City, were not blocked. Considering the obvious character of these guard rails, and the size of the opening of the south rail, in which the foot of the deceased was caught, and the many opportunities which he had to ascertain that these rails were not blocked, it becomes apparent, we think, that prior to the accident he must have been aware of their condition, or by the exercise of ordinary diligence or observation he could have had knowledge that the opening in question was not blocked.

It certainly is evident, when all the facts are considered, that the opportunities of the deceased to know or learn the condition of these rails were virtually equal to those of

appellant. In *Railway Co. v. McCormick*, supra, the employé caught his foot in an unblocked frog, and, while in that situation, was run over and killed by a car. It appeared in that case that the switches and frogs of the railroad company were in the same condition during the entire period of the service of the deceased. This court held that, under the circumstances, the condition of the frog, to which the death of the servant was imputed, was a risk incident to the business which he assumed, and it was therefore held that the railroad company was not liable. In the case of *Ames v. Railway Co.*, supra, the employé was killed by catching his foot in an unblocked opening between the abutting rails of a switch, and, while in that condition, was run over and killed by a moving train. It was held by this court that the question presented in that appeal was not one of contributory negligence, but one involving the assumption of the risk as incident to the service. It was there asserted that it was not only incumbent upon the plaintiff in such cases to show freedom from contributory negligence, but that it also devolved upon him to show, by facts, that the injury for which the recovery was sought was not the result of some hazard of the service assumed by those employed therein; and it was held, under the facts in that case, that the railroad company was not liable, for the reason that the deceased servant had assumed the risk incident to the use of the unblocked switch. In the case of *Sheets v. Railway Co.*, supra, the servant was killed by catching his foot in an unblocked "switch angle," and, while in that situation, was run over and killed by a car which he was attempting to couple. It was alleged in the complaint that the deceased did not know, and had no means of knowing, that the angle or frog in question was not blocked; that at no time while in the service of the railroad company did he have the means or opportunity to inspect the angle or frog in question, and thereby discover the defect; that, at the time of the accident, the ground was covered with snow, so that it was impossible to discover the absence of the block. The complaint was held upon demurrer to be insufficient to entitle the plaintiff to a recovery, and, in the course of the opinion, Dailey, J., speaking for the court, said: "The duties of a brakeman include the handling of switches, and the coupling and switching of cars, and, in the performance of these duties, he could readily learn if blocks had been provided to lessen the danger of the service. The danger incident to an unblocked frog or switch is in no sense a latent one. On the contrary, it must be obvious to the most casual inspection. Any man of mature years must know that, if he puts his foot into an acute angle formed by the two converging lines of rail, there will be danger of his foot being caught or held thereby." It was held in that case that the employé assumed the risk

incident to the unblocked frogs and switches of the railroad company in whose service he was engaged as a brakeman at the time of the accident. The holding in that appeal, under the facts, which presented a stronger case in favor of the plaintiff than do those in the case at bar, is virtually decisive that there can be no recovery in this action. The danger of the unblocked rail in this case, in the light of the facts, is certainly shown to have been open and obvious to all, and the deceased had many opportunities to see it; and, under a well-settled doctrine heretofore mentioned, it must be presumed that he saw what he might have seen had he looked, and there can be no escape from the conclusion that, by his continuation in the service, he assumed the risk or hazard which resulted in his lamentable death.

For the reasons stated, the facts set out in the special verdict do not entitle appellee to a judgment against appellant. We have also considered the evidence, and it may be said upon no view thereof can a recovery by the appellee be sustained. The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain appellant's motion for judgment in its favor on the special verdict.

(153 Ind. 134)
CHICAGO & E. I. R. CO. v. STATE ex rel
KETCHAM, Atty. Gen.¹

(Supreme Court of Indiana. Nov. 15, 1898.)

CORPORATIONS—CONSOLIDATION—FILING ARTICLES
—STATUTES—TITLES—PENALTIES—RES JUDICA-
TATA—TAX ON INTERSTATE COMMERCE.

1. So far as concerns the filing of articles, a consolidation of corporations is to be treated as simply a corporation, under Act March 4, 1891, providing for collection by the state of fees from corporations for filing articles of incorporation, articles of increase of stock, and articles of agreement of any consolidation of corporation, and declaring that "said articles of agreement of consolidation shall be treated as the articles of incorporation of the new consolidated corporations"; and Act March 9, 1891, declaring that all corporations hereafter desiring to incorporate shall be required to file articles of incorporation; and Act March 11, 1895, declaring that corporations desiring to incorporate or to enter into any agreement of consolidation, shall be required to file their articles of incorporation, and providing a remedy to compel it.

2. A corporation formed by the uniting of two or more corporations is to be considered a consolidation, as regards the filing of articles of agreement, though it takes the name of one of the constituent corporations.

3. The penalty for failure to file articles of incorporation imposed by Act March 9, 1891, declaring that no corporation "shall be deemed * * * to be legally incorporated till the provisions of this act shall have been complied with," is not increased by Act March 11, 1895, providing a remedy to enforce the penalty and compel such filing, and declaring that "till such time they shall have no right or authority to do business, * * * and any contract made * * * by or with them under any pretended corporate or consolidated name shall be utterly void"; so that as concerns corporations incorporated or consolidated after the passage of the first act and before that of the second,

¹ Rehearing denied.

and which had not filed their articles, the second act is not retroactive, and does not violate the obligation of contracts, or deprive them of property without due process of law, or deprive them of the equal protection of the law, or interfere with vested rights.

4. Under Const. art. 4, § 19, declaring that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title," Act March 11, 1895, amending Act March 9, 1891, by providing a remedy to compel the filing of articles and consolidations of corporations, is not unconstitutional, though its body speaks of "consolidations of corporations," which term is not used in the body of the former act, which declares a penalty for not filing articles, or in the title of either act, the former of which is "An act requiring all persons, companies, corporations and associations desiring to incorporate * * * to file * * * their articles of incorporation," and the latter is "An act to amend" such former act; Act March 4, 1891, which declares fees for filing articles, providing that for the purpose of such filing a consolidated corporation shall be regarded as a simple corporation.

5. Judgment for defendant corporation, in an action to collect fees from it on the theory that it had filed its articles, on the ground that it had not filed them, is not a bar to an action under an act subsequently passed to compel the filing of the articles, and to restrain it from acting as a corporation till the articles are filed and the fee therefor paid.

6. The fee imposed on corporations for filing articles, which they must file before they can be deemed legally incorporated or consolidated, is not a tax on interstate commerce, though they be engaged in such business, but on the right to exist as a corporation.

Appeal from circuit court, Marion county; H. C. Allen, Judge.

Action by the state, on the relation of William A. Ketcham, attorney general, against the Chicago & Eastern Illinois Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. Syford and A. C. Harris, for appellant. Wm. A. Ketcham and Smith & Korbly, for appellee.

HOWARD, J. By an act approved March 4, 1891 (Acts 1891, p. 84; Rev. St. 1894, § 7631), it was provided, among other things, that the secretary of state should collect from certain corporations certain named fees, for the benefit of the state, as follows: First, for filing articles of incorporation; second, for filing a certificate of increase of capital stock; and, third, for filing "the articles of agreement, or a certified copy or duplicate thereof, of any consolidation of corporations having a capital stock." It was there further provided that "said articles of agreement of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles of agreement of consolidation," and that the fees for filing such agreements should be the same in each case as for filing articles of incorporation "of a corporation having the same amount of capital stock as is provided for by the articles of agreement of consolidation for the new consolidated corporation, created by any such articles of agreement of consolidation." By another act, ap-

proved March 9, 1891 (Acts 1891, p. 892; Rev. St. 1894, § 3424), it was provided, in addition, "that all persons, companies, corporations and associations hereafter desiring to incorporate under the laws of the state of Indiana, and who are not now by law required to do so, shall be and are hereby required to file with the secretary of state certified copies or duplicates of their articles of incorporation or association, and no such corporation or association shall be deemed and held to be legally incorporated until the provisions of this act shall have been complied with." On the 7th day of June, 1894, the appellant, which is a consolidated corporation, formed as such on June 6, 1894, and composed of an Illinois and an Indiana railroad company, appeared, by its agent, at the office of the secretary of state, and tendered for filing its articles of agreement of consolidation; the capital stock therein fixed being in the sum of \$25,000,000. On receiving information that the fee for filing the articles was \$25,000, the agent withdrew the papers; and the company thereafter declined to file its articles of agreement, and has hitherto failed to file them. On the theory that the agent of the company had placed the articles of agreement in the hands of the secretary of state for filing, and thereafter, when informed of the amount of the fee, had wrongfully withdrawn them, the state, alleging in effect that the articles had been filed, brought suit for the unpaid fee of \$25,000. This case was decided against the state, it being found and held by the court that the papers were not in fact placed on file. *State v. Chicago & E. I. R. Co.*, 145 Ind. 229, 43 N. E. 226. "The refusal of the agent to pay the legal fee demanded," said the court in that case, "prevented the filing of the document, and left the company in the same condition as though the transaction, or offer to file, had not taken place." Afterwards, by an act approved March 11, 1895 (Acts 1895, p. 255; Horner's Rev. St. 1897, § 3001a), section 1 of the act of March 9, 1891, supra, was amended to read as follows: "That all persons, corporations, companies and associations desiring to incorporate under the laws of the state of Indiana, or desiring to enter into any agreement of consolidation of the interests, rights and powers of two or more existing corporations, and who are not now by law required to do so, shall be, and are, hereby required to file with the secretary of state certified copies or duplicates of their articles of incorporation or association or of consolidation, and no such corporation, or association, or consolidation of corporations shall be deemed and held to be legally incorporated or consolidated until the provisions of this act shall have been complied with, and until such time they shall have no right or authority to do business within the state of Indiana, and any contract made or entered into by or with them under any pretended corporate or consolidated name shall be utterly void. In case any such pretended corporation, association or consolidation of cor-

porations shall do or attempt to do any business within the state of Indiana, without having first filed its articles of incorporation or consolidation, or copies thereof with the secretary of state, and having paid the fee therefor, as now provided by law, the state shall, in addition to other remedies now provided by law, have the right to proceed against such pretended corporation or consolidation of corporations by suit in any court of competent jurisdiction for the recovery of any fee which would be due under the provisions of this act, the same as if their articles of incorporation or consolidation had been filed and any such court shall have the power to compel the filing of such articles. The provisions of this act shall also apply to all corporations, associations, or consolidated companies now doing business in this state, and which have heretofore entered into articles of incorporation, or consolidation, but have failed, or refused, to file the same, or copies thereof, as required by the act of March 9th, 1891, of which this is amendatory, and to pay the fees required by law." On January 21, 1897, the state, on the relation of the attorney general, and by virtue of the authority given by the acts of March 4 and March 9, 1891, *supra*,—invoking also the aid of the additional remedy conferred by the act of 1895, *supra*,—began this action to require the appellant to file its said articles of incorporation and consolidation, and to pay the fee prescribed therefor, and asking in addition that the corporation be restrained from doing business as such until such filing and payment should be made. Judgment was rendered in accordance with the prayer of the complaint, and this appeal followed.

Counsel for appellant first urge the insufficiency of the complaint. Under this head the three acts of March 4, 1891; March 9, 1891, and March 11, 1895, are taken up separately; and it is argued that there could be no right of recovery, as against appellant, under any one of those acts. The argument so made is a specious one, even as shown in appellant's own brief, in which it is said (citing *Doe v. Avalline*, 8 Ind. 6) that "where two or more laws are passed at different times, and all relate to the same subject-matter, although one may be an amendment of the other, or may even repeal the other, they must all be construed together; and the court is not at liberty to presume that the legislature intended to give different meanings to the same words in different statutes which are in *pari materia*." To this may be added that, where the legislature expressly states the meaning which is to be given to a term used in an act, that meaning must be given to such term as so used. In considering the sufficiency of the complaint, we must therefore construe together, and not separately, the three acts *supra* upon which the complaint is based. In the third specification of section 1 of the earliest of these acts (that of March 4, 1891), as we have already seen, the legislature plainly expressed its intention that, for the purposes of

filing and collection of fees therefor, "articles of agreement of consolidation shall be treated as the articles of incorporation of the new consolidated corporations," and that fees for filing such articles of consolidation shall be the same as for filing the articles of a corporation having the same amount of capital stock "as is provided for by the articles of agreement of consolidation for the new consolidated corporation." Acts 1891, p. 84. Words could hardly be clearer to show that in all three of the acts, which must be treated as in *pari materia*, the term "corporation" is to be construed as including also consolidation of corporations, and that a consolidation is but a new corporation formed out of two or more pre-existing corporations. All therefore which is so learnedly said by counsel as to the distinction between corporations and consolidations of corporations is of no effect here. So far as concerns the filing of articles provided for in the acts under consideration, a consolidation of two or more corporations is to be treated as simply a corporation.

In this connection may also be noticed the very inconsistent contention that appellant is not in fact a consolidated corporation, but that the Indiana corporation, the Coal Railway Company, has been merely merged into the Illinois corporation, the appellant railroad company. This is evidently an afterthought, and quite out of harmony with the form and substance of the articles themselves, whose very language shows them to be a plain, ordinary, and unambiguous agreement of consolidation. Averments in appellant's answer are to the same effect, notwithstanding the use of the word merger: "It was deemed proper and lawful, and it was proper and lawful, that the legal title of all the property of said Chicago & Indiana Coal Railway Company should be vested in this defendant by the formal consolidation of said companies, and the merging of the property, rights, and franchises of the said Chicago & Indiana Coal Railway Company into and with the property, rights, and franchises of the defendant, which consolidation and merger were duly authorized by the laws of the states of Indiana and Illinois, wherefore on the 6th day of June, 1894, said companies entered into formal articles of consolidation." That the new corporation should take the name of one of the constituent corporations out of which it was formed is, of course, immaterial. So, also, is the circumstance that the legislature, in the act of 1895, *supra*, proceeded to elaborate the language that had been used in the act of March 9, 1891. We have seen that, so far as concerns the requirements of all the acts referred to, a consolidation is to be regarded as a corporation. That the act of 1895 emphasizes this conclusion goes only to show that such was the original legislative intent. The purpose of the act of 1895 was not to impose any additional obligation upon any corporation or consolidation of corporations, but only to furnish the state with a remedy for the

enforcement of the obligation already imposed by the act of 1891. By the act of March 9, 1891, all corporations, whether simple or consolidated, were "required to file with the secretary of state certified copies or duplicates of their articles of incorporation or association." The full penalty for failure to so file such articles was also imposed in said act of 1891, where it was further declared that "no such corporation or association shall be deemed and held to be legally incorporated until the provisions of this act shall have been complied with." To these penalty words the act of 1895 added the following: "And until such time they shall have no right or authority to do business within the state of Indiana and any contract made or entered into by or with them under any pretended corporate or consolidated name shall be utterly void." It needs no argument to show that these words of the act of 1895 added nothing to the penalty imposed by the act of 1891. The words added served only to elaborate, emphasize, and explain. If the corporation could not be deemed legally incorporated or consolidated until it had complied with the provisions of the act, it is plain that until it had so complied with such provisions it could have no right to do business within the state, and any contract entered into under its pretended corporate name must be void. The means of enforcing the penalty, however, and of compelling the delinquent to comply with the law, was not given in either of the acts of 1891. To give such remedy was the purpose of the act of 1895. It was therefore provided in that act that "in case any such pretended corporation, association or consolidation of corporations shall do or attempt to do any business within the state of Indiana, without having first filed its articles of incorporation or consolidation, or copies thereof, with the secretary of state, and having paid the fee therefor, as now provided by law, the state shall, in addition to other remedies now provided by law, have the right to proceed against such pretended corporation or consolidation of corporations by suit in any court of competent jurisdiction for the recovery of any fee which would be due under the provisions of this act, the same as if their articles of incorporation or consolidation had been filed and any such court shall have the power to compel the filing of such articles." This provision gave ample warrant for the bringing of the action, and, in connection with the evidence, fully authorized the court to render the judgment entered below.

A labored effort is made, on the same theory, to show that the act of 1895 is invalid for the reason that neither the title of this act, nor the title of the act of March 9, 1891, of which it is amendatory, makes any reference to articles of consolidation or to consolidated corporations. We think it must be plain, from what we have said, that, for the purpose of filing articles, as required by the three acts under consideration, a consolidated corporation is regarded simply as a corpora-

tion, and that everything said in any of the acts in regard to a simple corporation applies equally to a consolidation of corporations or a consolidated corporation. The legislature has so defined the words. Besides, counsel are in error in assuming that matters connected with and growing out of the subject-matter of an act must be expressed in the title. If that were so it would make the title as interminable and detailed as the act itself. But it is only the subject that must be expressed in the title. The constitutional provision (article 4, § 19) is that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." The subject of the amended act of March 9, 1891, is the filing of articles of incorporation by "all persons, companies, corporations and associations desiring to incorporate under the laws of the state of Indiana." All this, and more, is expressed in the title. Appellant admits that, had the title of the act of 1891 been simply "An act concerning corporations," it would have been sufficient to make the amendatory act of 1895 valid in this respect. Surely, then, the unnecessarily extended and elaborate title given to the act of 1891 must be sufficient.

It is contended, also, that the act of 1895 is retroactive, and hence unconstitutional and void. This is on the theory that the penalty clause of that act imposes an obligation upon appellant which did not exist under the acts of 1891. We have shown, however, that there is no additional penalty imposed by the act of 1895. That act, while elaborating and explaining provisions of the act of March 9, 1891, was intended merely to give to the state a remedy for the enforcement of the penalty incurred under the two acts of 1891. Appellant's failure to file its articles of consolidation occurred after the acts of 1891 went into force. The act of 1895 did not fix or attempt to fix any penalty for such failure of appellant to obey the law. That penalty had already been incurred, and the act of 1895 merely furnished the means for its enforcement. The act of 1895 consequently does not violate the obligation of contracts, does not deprive appellant of its property without due process of law, does not deprive it of the equal protection of the law, and does not interfere with vested rights.

Counsel for appellant next urge the plea of former adjudication, insisting that the matters here in issue were determined against the state in the former action. *State v. Chicago & E. I. R. Co.*, supra. But in that case the state sued for the fee provided for filing the articles of consolidation, on the theory that the articles had in effect been filed, and then wrongfully withdrawn. The court, however, found that the articles had not been filed, and hence that the fee could not be recovered. Will it be said that, if the company afterwards filed the articles, no fee could be recovered, or that, if the law afterwards afforded a remedy for compelling their filing, the fee could not be recovered? Before the

plea of former adjudication can be invoked, it must appear, not only that the thing demanded in the present action is the same as that demanded in the former action, and that it is between the same parties, or their privies, and was found for one of them against the other in the same quality, or suing in the same right, but it must also appear that the cause of action is the same. *Kitts v. Willson*, 140 Ind. 604, 39 N. E. 813, and authorities there cited. Because it may be determined that one has not a right to recover, it does not follow that he may not afterwards recover, on acquiring new rights or titles. An adjudication, says Judge Van Fleet, "simply determines which party had the right or title at the time the suit was commenced, or, at furthest, at the time of the final judgment; thus not preventing either party from asserting any right or title which he may afterwards acquire." Van Fleet, Former Adj. § 145, and following, and cases there cited. The action in the case at bar is not the same as in the former case. There it was to recover a fee for filing articles of incorporation or consolidation. Here it is to compel the filing of such articles, and to restrain the company from acting as a corporation until the articles are filed, and the fee therefor paid. The issue here tried could not be considered in the former action, for the reason that the state had not then acquired the right to bring the action here instituted. Only matters within the issues are barred. See numerous illustrations in Van Fleet, Former Adj., cited above. It is quite beside the question to say that, because the state might have instituted some other suit at the time the former action was brought, it therefore follows that the action actually brought was an adjudication of the matters at issue in the present action. The question is, rather, whether the relief sought in the present action could have been had in the former, and not whether mandamus or some other remedy might then have been resorted to. In so far as the state was without power to institute the present suit until after authority to do so was given by the act of 1895, the question presented is much like that in case of a suit prematurely brought, which is no bar to a subsequent suit brought in due time. See *Athearn v. Brannan*, 8 Blackf. 440; *Duncan v. Holcomb*, 26 Ind. 378; *Wilson v. Fatout*, 42 Ind. 52; *Roberts v. Norris*, 67 Ind. 386; *Griffin v. Wallace*, 66 Ind. 410; *Kitson v. Hillabold*, 95 Ind. 136; *Miller v. Manice*, 6 Hill, 122.

The contention that the fee imposed by the acts under consideration is a tax on interstate commerce, and therefore void, is of little merit. The fee is not a tax upon the right to carry on the business of interstate commerce, but a tax upon the right to incorporate. The state is not required to authorize the formation of a corporation, or the consolidation of two or more corporations; and, if it does give authority to form such corporations or consolidations, it may impose such conditions as it sees fit. The tax is on the right to exist as a corporation, and not on the business done by

the corporation. In 6 Thomp. Corp. § 8120, the author says: "There appears to be no essential distinction between a tax upon franchises when applied to a domestic and to a foreign corporation. A franchise tax, when applied to a domestic corporation, is a tax upon the right of a corporation to exercise the privilege conferred upon it, and is not a property tax. * * * The manner in which the value of its franchise shall be assessed, and the rate of taxation applied thereto, are matters of legislative discretion, subject to the restriction of the domestic constitution, and no question in respect to such a tax arises under the federal constitution." And in *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, the court said: "A state, in granting a corporate privilege to its own citizens, or—what is equivalent thereto—in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained." Finding no error, the judgment is affirmed.

(152 Ind. 24)

DAVIS v. STATE.¹

(Supreme Court of Indiana. Nov. 18, 1898.)

INDETERMINATE SENTENCE—CONSTITUTIONAL LAW—ASSAULT TO COMMIT MURDER—INSTRUCTIONS.

1. Act March 8, 1897, known as the "Indeterminate Sentence Law," is not unconstitutional, as an ex post facto law, in being applied to a sentence on conviction of a crime committed before its passage, since such a sentence does not add to or increase the punishment beyond that existing when the crime was committed.

2. In a prosecution for assault to commit murder, an instruction that if the prosecuting witness made an attack on defendant, and had no weapon in his hands, nor appearance thereof, defendant was not warranted in using a deadly weapon, was error, since it included every conceivable case of a violent attack, and disregarded differences of age and physical strength.

3. An instruction, though correct as an abstract proposition of law, is error, if it leaves the jury in doubt as to how it should be applied to the evidence.

Appeal from circuit court, Clark county; George H. D. Gibson, Judge.

John F. Davis was convicted of an assault with intent to murder, and he appeals. Reversed.

M. J. Stannard, for appellant. W. A. Ketcham, Merrill Moores, H. C. Montgomery, and Dickey & Aydelotte, for the State.

MCCABE, J. The appellant was tried by a jury in the Clark circuit court on an indictment charging him with an assault perpetrated April 13, 1896, on one Thomas Glynn, with the felonious intent to murder the said Glynn. The jury found appellant "guilty of the crime charged in the indictment, and that he be fined in the sum of \$50, and that his age is 54 years." On this verdict the circuit court rendered judgment that he be confined in the state prison not less than 2 and not

¹ Rehearing denied.

more than 14 years, and for a fine of \$50 and costs, over appellant's motions for a new trial, for a venire de novo, and in arrest of judgment. The assignment of errors calls in question these several rulings, as the sole grounds on which a reversal of the judgment is sought.

Under the motions for a venire de novo and in arrest of judgment, it is contended by appellant that the act approved March 8, 1897 (the only law authorizing such a verdict and judgment), known as the "Indeterminate Sentence Law," is unconstitutional as to this case, because, as applied to this case, it is an *ex post facto* law, the alleged crime having been committed before the passage of the act. The constitutionality of the act in all other respects has recently been upheld by this court in *Vancleave v. State*, 150 Ind. 273, 49 N. E. 1060; *Wilson v. State*, 150 Ind. 697, 49 N. E. 904; *Miller v. State*, 149 Ind. 607, 49 N. E. 894. Section 24 of article 1 of the bill of rights in the constitution provides that "no *ex post facto* law * * * shall be passed." Rev. St. 1894, § 69; Rev. St. 1881, § 69; *Horner's Rev. St. 1897*, § 69. The question is, what is an *ex post facto* law? This court as far back as 1822 defined the meaning of the phrase as follows: "The words '*ex post facto* law' have a definite, technical significance. The plain and obvious meaning of this prohibition is that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of the crime, or to retrench the rules of evidence so as to make conviction more easy." *Strong v. State*, 1 Blackf. 193. To the same effect are *Dinckerlocker v. Marsh*, 75 Ind. 648; *Hicks v. State*, 150 Ind. 293, 50 N. E. 27; *Com. v. Mott*, 21 Pick. 492; *State v. Arlin*, 39 N. H. 179; *Mullen v. People*, 31 Ill. 444. At the time of the decision in *Strong v. State*, supra, the same provision as to *ex post facto* laws existed that exists now. Rev. St. 1843, p. 43; Const. art. 1, § 18. In that case the punishment of the offense was changed by law from whipping not exceeding 100 stripes to confinement in the state prison, after the commission of the offense, and before the conviction. The sentence to a fine and confinement in the penitentiary at hard labor for a year and a day was affirmed, as not being *ex post facto*. If the substitution of confinement in the state prison at hard labor for a period not exceeding 7 years in place of whipping not exceeding 100 stripes, as the statute in that case provided, being enacted after the offense was committed, could not be deemed to add to or increase the punishment by the new law, and hence not *ex post facto*, much more can it be justly held that the indeterminate sentence law does not add to or increase the punishment of appellant's offense beyond that existing at the time of its commission. The punishment by law at the time of the com-

51 N.E.—59

mission of the offense charged in the indictment was and is imprisonment in the state prison not more than 14 years nor less than 2 years, and a fine not exceeding \$2,000. The indeterminate sentence law has not changed this, but only prescribes a different method of fixing the amount of punishment within those limits. And taking that whole law together, and reading it into the judgment of conviction in its reformatory character, it mitigates the severity of the punishment as prescribed in the Criminal Code, as we substantially held in *Miller v. State*, supra; and hence it does not add to or increase the punishment, and is therefore not an *ex post facto* law, as applied to this case. Such is the rule held in *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1; *In re Conlon's Case*, 148 Mass. 168, 19 N. E. 164; *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81. The contention that the act is *ex post facto*, because it repeals the good-time law, cannot be sustained. That law relates only to rules for the government of the prison officials. The indeterminate sentence law simply substituted a new and different method of crediting good time to the convict. The good-time law does not apply to one sentenced under the indeterminate sentence law or the reformatory act.

Under the motion for a new trial, numerous instructions are complained of, one of which (given by the court on its own motion) is as follows: "(12) Even if you believe the prosecuting witness made a rush or attack upon the defendant when he came out of his house, if you believe the prosecuting witness had no weapon in his hands, or appearance thereof, then I instruct you that the defendant was not warranted in using a deadly weapon." And another, given at the request of the prosecuting attorney, was as follows: "(11) An assault or an assault and battery by a person upon another with his hands, arms, or head, or the force or momentum of his body, does not justify the use of a deadly weapon." The defendant was a one-armed man,—his right arm having previously been amputated at the shoulder,—and the evidence tended to show that Glynn and others had engaged in a quarrel with defendant in Jeffersonville, and that Glynn had drawn a beer faucet on defendant, as if to strike him; that defendant immediately left them, and went to his residence, in said city, and was followed by said Glynn along the streets thereof; that defendant went into his house and got a revolver; and that Glynn (being a stout, robust man) stopped at defendant's front door, and, on defendant's coming out of his house, Glynn made a rush at defendant, to attack him, in a state of intoxication and rage and passion, and defendant shot at him. These instructions inform the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person. If that is the law, then, in every conceivable case of a violent attack upon one by another,—no mat-

ter what the circumstances may be, no matter what the disparity between the ages and physical strength of the two may be,—the assaulted party must stand and take his chances of being knocked down and stamped into a jelly, or of being choked to death, before he can lawfully use a weapon in his defense. Though the appearance and circumstances of the assault were such as to induce the reasonable belief to be honestly entertained by the defendant that his life was in danger, or that he was in danger of great bodily harm, from the assault, he could not lawfully use a deadly weapon to repel such assault, unless the assailant had a weapon in his hands, or the appearance thereof, no matter how many he had about his person. That is not the law. *Presser v. State*, 77 Ind. 274-278; *Batten v. State*, 80 Ind. 394; *McDermott v. State*, 89 Ind. 187. But we have a case where an assailant was convicted of manslaughter where he used nothing but his hands, thereby choking his victim to death, and that judgment was affirmed in this court. *Shields v. State*, 149 Ind. 395, 49 N. E. 351. It is insisted by the state, however, that these instructions were correct as abstract propositions of law, and, construed along with other instructions given, they became, as a whole, a correct statement of the law. As was said by this court in *Abbitt v. Railway Co.*, 50 N. E. 729-734: "But even though the instruction in question, as formulated, upon any view could be said to be a correct exposition of the law,—which at least may be asserted to be doubtful,—still it may be said that it is so framed as to present the question to the jury as an abstract proposition, and not in a manner applicable to the particular evidence in this case. To say the least, it certainly would have left the jury in doubt or uncertainty as to how it should be applied to the evidence in this case, and for this reason alone the court was justified in refusing to give it. An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane." In any view of the case, the giving of the instructions quoted was erroneous. Therefore the court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded, with instructions to sustain the defendant's motion for a new trial. The clerk is directed to issue the proper order for the return of the prisoner.

(151 Ind. 445)

MARMON v. WHITE et al.

(Supreme Court of Indiana. Nov. 16, 1898.)

FRAUDULENT CONVEYANCES—RIGHTS OF WIFE—EXECUTION SALE.

1. A conveyance of property to one's wife, pursuant to agreement, made before marriage, to convey it to her in consideration of her marrying him, has a valuable consideration to support it against attacks of his creditors.

2. Property conveyed by a husband to his wife, though with intention, known to her, to defraud his creditors, cannot be reached by them, he being a householder, and the value of his wife's inchoate interest therein, and his exemption of \$600, and liens on the property senior to such creditors, being equal to the value thereof.

3. In determining whether a decree for sale of land conveyed by a debtor, through a trustee, to himself and wife, as tenants by entireties, to defraud his creditors, would benefit them, the court must take judicial notice that the wife would be entitled to a third of it as against any one purchasing it at sheriff's sale to pay a judgment against said debtor.

4. A wife who has expended money on the house of her husband, on his agreement to have it conveyed through a trustee to himself and her, as tenants by entireties, not knowing that such conveyance was to defraud creditors, is entitled, as against them, to a lien for such sum.

5. Burns' Rev. St. 1894, §§ 765-768 (Horner's Rev. St. 1897, §§ 753-756), requiring, in a certain case, the rents and profits of the real estate of the debtor, for a period not exceeding seven years, to be first offered on execution sale, and, if no one bids enough therefor to pay the judgment, requiring the sheriff to offer the fee simple, does not prevent the sale of the fee, though the rents and profits for seven years exceed in value the judgment, if no one bids such amount therefor.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Action by Daniel W. Marmon against Rush White and others. Judgment for defendants. Plaintiff appeals. Affirmed.

W. V. Rooker, for appellant. J. E. Bell, for appellees.

MONKS, J. This action was brought by appellant against appellees to set aside certain conveyances of real estate as fraudulent, and subject the same to the payment of a judgment recovered by appellant against appellees Rush White and William T. White. The court made a special finding of the facts, and stated conclusions of law thereon in favor of appellees, and rendered judgment accordingly. The only error assigned is that the court erred in each conclusion of law.

The facts found are substantially as follows: Appellees Rush White and Ida L. White were married in 1895, at which time Rush White was the owner of a lot in the city of Indianapolis. Prior to the marriage they entered into an oral agreement that, in consideration of the marriage of said Ida L. to him, said Rush White would convey to her said real estate as a marriage settlement. In 1896, Rush White conveyed said real estate to his wife, the only consideration therefor being said agreement above named. At the time of said conveyance said real estate was worth \$2,600, and was subject to a mortgage for \$1,166. Rush White, at the time of making said conveyance, had no other property, except a one-half interest in the stock of groceries, etc., owned by the firm of White & White, his brother, the appellee William T. White, being the other member of the firm; which partnership property, including the claims owing to said firm, was then worth \$1,700, and the in-

debt of the firm was then \$1,800. The firm property was on May 18, 1893, sold for \$1,407.98, and all of the proceeds thereof were placed in the hands of a trustee for certain creditors, whose claims equaled the proceeds received by said trustee. The appellees William T. White and Mamie White were married in 1893. In March, 1894, said William T. White purchased a certain lot in the city of Indianapolis, paying therefor \$1,500 cash, and assuming the payment of a mortgage thereon for \$500. At the time of said purchase appellee Mamie White had, as her separate estate, \$800 in money. Afterwards it was agreed by parol between said husband and wife that said Mamie, out of her own means, should remodel and improve the house on said real estate, in consideration of which said William T. should cause the same to be conveyed through a trustee to himself and said Mamie, his wife, to have and hold the same as tenants by entireties; and under said agreement appellee Mamie White expended of her own estate, in improving the said real estate, and for certain street and sewer assessments, the sum of \$873. On March 8, 1896, said William T. White and Mamie, his wife, conveyed said real estate to a trustee, who conveyed the same to them as husband and wife. The consideration for such conveyance was the payment of the said sum of \$873. The value of the said real estate was at the time of said conveyance, and at the time of the trial, \$2,630, and the rental value thereof per month \$18. At the time of said conveyance to said trustee said William T. White contemplated insolvency, and executed said deed for the purpose—First, of securing the payment made by his wife, under the agreement heretofore mentioned; and, second, to place the title to said real estate in the name of himself and wife, so as to prevent the same being seized by the creditors of the firm of White & White; but appellee had no knowledge that her husband was insolvent or of any fraudulent intent on his part. At the time of said conveyance by Rush White and his wife, and at the time of the conveyance by William T. White and his wife to said trustee, the firm of White & White was indebted to appellant on contract in the sum of \$183.53, for which appellant afterwards recovered a judgment against said appellees Rush White and William T. White. Appellees Rush White and William T. White were at the time of making said conveyances, and now are, householders residing in Marion county, Ind. The court found, as a conclusion of law, that appellant was not entitled to have either tract of said real estate subjected to sale to pay off his judgment.

The finding does not show that the conveyance by Rush White to his wife, Ida L. White, was made with a fraudulent intent or purpose, or that she had any knowledge of such intent or purpose, but it was found that the consideration for said conveyance to her was her agreement to marry him. This was a valuable consideration. *State v. Osborn*, 143 Ind. 671, 677,

678, 42 N. E. 921, and authorities cited; 6 Am. & Eng. Enc. Law (2d Ed.) 724; *Walt, Fraud. Conv.* § 212.

It is evident that the court did not err in the conclusion of law that appellant was not entitled to have the real estate conveyed to appellee Ida L. White sold to pay his judgment. Besides, the conveyance by Rush White to his wife did not harm appellant, for the reason that at the time said conveyance was made said Rush White was a householder, and had no property out of which he could claim the exemption of \$600 except said real estate. His wife, Ida L., was entitled to one-third in value of said real estate as against said appellants, under section 2669, Burns' Rev. St. 1894 (section 2508, Horner's Rev. St. 1897), if the same was sold at execution sale on said judgment. She was also entitled to have said mortgage for \$1,166 paid, if it could be done, without encroaching on her interest in said real estate. *Kelly v. Canary*, 129 Ind. 460, 462, 29 N. E. 11, and cases cited; *Purviance v. Emley*, 126 Ind. 419, 26 N. E. 167.

It is proper, therefore, to charge the amount of said mortgage against said real estate after deducting the value of her interest therein. The value of said real estate, after deducting the value of said Ida L.'s interest therein, which she could take as against a purchaser at execution sale on said judgment, was \$1,733.34. The amount of the mortgage, \$1,166, and the \$600 exemption, equal \$1,766; so that, if said real estate had been sold to pay appellees' claim at the date said deed was made, for its full value, which was \$1,766, subject to the inchoate interest of the wife, the proceeds would not have been sufficient to pay the mortgage and the exemption allowed appellee Rush White. It follows, therefore, that, even if Rush White had conveyed said real estate with the fraudulent intent of cheating and defrauding his creditors, of which intent his wife had knowledge, and the special finding had so stated, appellant would not have been damaged thereby, and would not, therefore, have been entitled to any relief in this action. *Bank v. Bolen*, 121 Ind. 301, 306, 307, 23 N. E. 146, and cases cited; *Moss v. Jenkins*, 146 Ind. 589, 599, 45 N. E. 789.

The rule in such case is that when a debtor is a householder, and conveys or transfers his property to defraud his creditors, of which fraudulent intent his grantee or transferee has notice, his creditors cannot reach such property, if the value of the wife's interest therein, the debtor's exemption of \$600, and all liens on such property, senior to such creditors, equal or exceed the value of the property so conveyed or transferred. *Moss v. Jenkins*, *supra*. A different question is presented concerning the real estate conveyed by the trustee to William T. White and his wife. It cannot be said, as a matter of law, that the inchoate interest of Mamie White in the real estate of her husband conveyed to the trustee, and by him reconveyed to her and her husband, was, at that time, worth \$876, one-

third of \$2,630, the value of said real estate as found by the court when said conveyance was made. If a husband conveys real estate by a deed in which his wife does not join, it is not true, as a matter of law, that the value of her inchoate interest in said real estate is one-third the value of said real estate. In such case she is not entitled to any part of said real estate unless she survives her husband. She may not survive him, in which case the title of the husband's grantee would be as perfect as if she had joined in the deed; or her husband may live many years after the deed is made, and not until his death would she be entitled to one-third of said real estate, under section 2652, Burns' Rev. St. 1894 (section 2491, Horner's Rev. St. 1897). It is clear that the value of such interest in such a case is a question of fact, to determine which many elements beside the value of the land must be considered. The only case in which it can be said that the value of the inchoate interest of the wife in the land of her husband is one-third the value of such land is when such land is sold under execution or decretal order, and the title thereto vested in the purchaser. Burns' Rev. St. 1894, § 2669 (Horner's Rev. St. 1897, § 2508). In determining whether a decree for the sale of the real estate held by William T. White and wife, as tenants by entireties, would be of any ultimate benefit to appellant, it was the duty of the trial court, and is the duty of this court, to take judicial notice of the fact that under the law said Mamie White was, and would be, entitled to one-third of said real estate as against appellant or any other person purchasing the same at sheriff's sale to pay appellant's judgment. The special finding shows that appellee Mamie White had no knowledge of any fraudulent intent on the part of her husband, and that, under the contract that said real estate should be conveyed to her and her husband, she paid street and sewer assessments against said real estate, and for improving said real estate, in all the sum of \$873. The rule is that when the purchaser has not been guilty of any positive fraud, and the circumstances are such as make it highly injurious and inequitable as to the creditors for the conveyance to stand, the same may be set aside, upon such terms as will protect a purchaser whose purchase is only constructively fraudulent. *Smith v. Selz*, 114 Ind. 229, 234, 16 N. E. 524; *Bank v. Smith*, 149 Ind. 443, 49 N. E. 376, and cases cited. Under this rule, for the \$873 paid by appellee Mamie White for improvements on said real estate, and for street and sewer assessments, she was entitled to a lien thereon, junior only to the mortgage for \$500. The value of the real estate, as found by the court, was \$2,630. Mamie White would be entitled to the undivided one-third of said real estate if sold to satisfy appellant's judgment. The value of the real estate to be sold would be \$2,630, less \$876.66, the value

of her one-third, which is \$1,753.34. To determine whether the sale of said real estate on execution to pay said judgment would be of any ultimate benefit to appellant, the following sums must be deducted from the value of said real estate, because they must be paid out of the proceeds of said sale before any part thereof could be applied upon appellant's judgment:

Amount paid by Mamie White for improvements on said real estate and for street and sewer assessments	\$ 873 00
Mortgage on said real estate	500 00
Amount of exemption allowed William T. White, resident householder	600 00
Total	\$1,973 00

The amount to be paid out of the proceeds of the sale of the property, if sold to pay appellant's judgment, is \$219.66 in excess of the value of the interest in said real estate subject to sale. It is evident, therefore, that the appellant was not damaged by the conveyance of said real estate to Mamie White.

Appellant insists, however, that, under the provisions of sections 765-768, Burns' Rev. St. 1894 (sections 753-756, Horner's Rev. St. 1897), the owner of a judgment is required to purchase "the rents and profits" of his debtor's real estate at the amount of his judgment, interest, and cost, provided the same does not exceed two-thirds of the appraised value thereof for a period not exceeding seven years; that is, that such owner of such a judgment is required to purchase the rents and profits of such real estate at execution sale for such period, not exceeding seven years; that two-thirds of the rental value of such real estate for such period would equal the amount of the judgment, interest, and cost; that in this case, as the two-thirds of the rental value for seven years is in excess of appellant's judgment, interest, and cost, if the court ordered said real estate sold to pay said judgment appellant would be required by said sections 765-768 (sections 753-756), supra, to purchase the rents and profits of said real estate on such order for such period; that two-thirds of the rental value for such period would equal the amount of the judgment, principal, interest, and cost, which period he estimates would be 21 months; that, therefore, the greatest interest appellant could acquire in said real estate would be a leasehold interest for 21 months, and the legal title of the husband therein would not become absolute and vested in the purchaser at sheriff's sale, which is required by section 2669 (2508), supra, before the inchoate interest of the wife would be vested in her; and, such being the case, that, in determining whether the conveyance of said real estate damaged appellant, it was not proper to estimate the value of her inchoate interest in said real estate at one-third of the whole value of said real estate. It is only on the theory that his construction of sections 765-768 (sections 753-756), supra, is correct, that appellant insists that, in determining whether appellant was

damaged by said conveyance, it is not proper to count the value of Mamie White's interest in said real estate at one-third the value thereof, and deduct the same from the value of said real estate. Said sections, however, will not bear such construction. If appellant procured an order to sell said real estate to pay his judgment, he would not be required to sell the rents and profits of the same for a period not exceeding seven years. Said sections only require that the rents and profits of the real estate for a period not exceeding seven years be first offered, and, if no one bids enough therefor to pay said judgment and interest and cost, then it is the duty of the sheriff to offer the fee simple. The fact that the rents and profits of the real estate, or two-thirds thereof, for seven years, exceed in value the judgment, interest, and cost, does not prevent the sale of said real estate in fee simple on execution to pay such judgment. The statutes only require such rents and profits to be first offered for sale, and, if no bid is received therefor sufficient to pay the judgment, interest, and cost, the sheriff must sell the fee simple of the real estate to pay such judgment. Finding no error in the record, the judgment is affirmed.

(151 Ind. 454)

HENRIKUS v. STATE ex rel. **ROBISON**.
(Supreme Court of Indiana. Nov. 17, 1898.)

SCHOOL DISTRICT—ESTABLISHMENT.

Burns' Rev. St. 1894, § 6001 (Rev. St. 1881, § 4512; Acts 1877, p. 125), provides that trustees of two or more adjacent townships may, on petition, establish a new school district, and build a new school house therein, at their joint expense; that on the presentation of such petition the trustees shall determine whether such petition be granted, and take such further action as necessary. From their decision appeals are allowed, under section 6028 (section 4537), to the county superintendent, whose decision is final. *Held*, that the proceedings to establish a school must be initiated by petition, and, whether the trustees agree to the petition or refuse it, an appeal lies to the superintendent.

On petition for rehearing. Overruled.

For prior opinion, see 50 N. E. 559.

HOWARD, J. It was held in the principal opinion that the proceedings before the trustees were taken in compliance with the statutes, but that the action of Trustee Miller in purchasing land for the school house, and of the county superintendent in approving such purchase, was wholly unauthorized. The appellant had moved to modify the judgment so that no writ should issue to order the erection of a school house on the land so unlawfully purchased, and we held that the judgment should be so modified. We are unable to understand why appellant himself should now complain of the holding so made. Under the judgment as modified, no further action can be taken for the construction of the building on the land purchased, and that is all appellant asked or could ask. The action,

as taken and pursued, has ended in his favor. It is true that new proceedings may be commenced. The trustees may go ahead, and agree upon a site and structure for the proposed school; or the patrons of the school may file a new petition, in which these matters shall be provided for. It is not true, therefore, that the statutes, as construed by the court, leave the establishment of such a school to the arbitrary discretion of either trustees or superintendent. The proceedings must, in each instance, be initiated by petition of the school patrons. Whether the trustees agree to the petition or refuse to agree to it, there may be an appeal to the superintendent. If the people of the state desire still further limitation on the powers of school officers in this matter, they may, of course, secure it by legislative action, but the courts can do no more than interpret or construe the law as it is written. Petition overruled.

(152 Ind. 89)

STUDABAKER v. STUDABAKER et al.¹
(Supreme Court of Indiana. Nov. 17, 1898.)

PUBLIC DITCH—COLLECTION OF ASSESSMENT—INJUNCTION—DUTIES OF COMMISSIONERS—RIGHTS OF LANDOWNER.

1. A landowner cannot, by a suit to enjoin the collection of an assessment, obtain a review of the assessment of benefits against his land by the construction of a public ditch.

2. If proceedings in regard to the construction of a public ditch are absolutely void, a suit to enjoin the collection of an assessment for its construction is maintainable, but, if not void, plaintiff cannot prevail, no matter how erroneous or irregular the proceedings were.

3. Under Acts 1891, p. 455, § 9 (Burns' Rev. St. 1894, § 5698), providing for reports by the engineer appointed to superintend the construction of a public ditch, it is the duty of the engineer so appointed to see that the work of constructing the ditch is fully completed as provided in the specifications.

4. Notwithstanding the absence of any express provision in Acts 1891, p. 455 (Burns' Rev. St. 1894, § 5690 et seq.), providing for the construction of public ditches, requiring the board of commissioners to determine from the engineer's report when such ditch has been completed according to the plans and specifications, the law implies that the board shall perform that duty, and a landowner has a right to appear before the board and question such completion.

5. The collection of an assessment for the construction of a public ditch will not be enjoined on the ground that the work on the ditch is not completed according to its plans and specifications.

6. Where a portion of the assessment for a public work is valid, the complaint, in an action to enjoin the collection of the invalid portion, must allege a tender of the valid portion, and a keeping of such tender good by a payment of it into court.

Appeal from circuit court, Wells county; **E. C. Vaughn, Judge.**

Suit by **Dillia M. Studabaker** against **George W. Studabaker** and others, as officials of Wells county, for an injunction. From an order sustaining defendants' demurrer to the complaint, plaintiff appeals. Affirmed.

¹ Rehearing denied.

Mock & Sons, for appellant. Dailey, Simmons & Dailey, for appellees.

JORDAN, J. Appellees are the auditor and treasurer of Wells county, and appellant unsuccessfully sought to enjoin them from selling her real estate in satisfaction of a lien existing against it growing out of benefits assessed for the construction of a public ditch. The complaint is in two paragraphs, the facts alleged in each being substantially alike. The lower court held each paragraph of the complaint insufficient on demurrer, and this ruling is the only error assigned in this appeal.

The first paragraph of the complaint, by its averments, substantially discloses that in June, 1892, under an act of the legislature entitled "An act concerning drainage," etc., approved March 7, 1891, a petition for the construction of a ditch was presented to the board of commissioners of Wells county. Such proceedings were had thereon that the board appointed three viewers, who reported favorably on the construction of the proposed ditch, and designated the line or the route over which it should be located, the manner of its construction, and the estimate of its cost, and assessed benefits to the respective tracts of land which would be benefited by the work, including the real estate of appellant,—all of which matters set forth in such report of the viewers appear to have been confirmed and approved by the board, and the ditch was ordered to be established and constructed; and, for the purpose of carrying this order into effect, the board appointed the surveyor of the county as an engineer to superintend the construction of the ditch. Contracts for the construction of the improvement were let accordingly, the contractors executing bonds as required by law. The board of commissioners appear to have issued bonds of the county, and negotiated them, to raise money necessary to pay the cost and expenses incident to the construction of the ditch. After letting the work the board directed that the assessments against the lands be placed upon the ditch-tax duplicate, which order was accordingly carried into effect by the auditor. The complaint avers that the auditor "wrongfully, unlawfully, and without right" placed upon the tax duplicate against plaintiff's real estate the sum of \$1,422.21, and it is alleged that said assessment is unjust and void, for the following reasons: "First, that said ditch was never constructed according to said plans and specifications, as mentioned in said report and as confirmed by said board of commissioners, in the following particulars, to wit: That the excavation of said ditch was made with a dredge, and the banks of said ditch were made perpendicular and uneven, with no slope whatever, and the bottom of said ditch was uneven, in holes, and covered with loose dirt; that the dirt was thrown out in piles, and no slope whatever given same." As a second reason, it is stat-

ed that, notwithstanding the specifications required the ditch to be of certain width from stake No. 248 to stake No. 501, the board of commissioners, without any "legal notice, and contrary to law, and in disregard of plaintiff's rights," after the contracts for the construction of the ditch had been let, and after the assessments had been made, by an order entered of record, changed the specifications so as to diminish the width of the ditch between the aforesaid mentioned stakes. It is further averred that the contractors have been discharged, and that the commissioners do not propose to complete the ditch, and that, owing to the fact that the construction of said work has not been completed according to the original specifications, the work is of no benefit to the lands of the plaintiff; and that said lands have been advertised for sale on February 8, 1897, by the auditor of the county, who is proposing to sell the same to satisfy an installment of said ditch assessment, amounting to \$489.87. The plaintiff, it is alleged, "has paid all the taxes justly due from him"; and the prayer of the plaintiff is that a restraining order be granted, restraining the sale of the land in satisfaction of the installment mentioned, and that the assessments, on final hearing, be adjudged void, and the defendants be perpetually enjoined from enforcing the payment thereof.

The act under which the proceeding was had before the board of commissioners to construct the ditch in controversy was enacted in 1891. See Acts 1891, p. 455 (Burns' Rev. St. 1894, §. 5690 et seq.). The first section of this statute authorizes the board of commissioners to locate and construct any ditch, five miles and more in length, upon the filing of the required petition. Section 2 designates the number of landowners who must petition for the improvement, and provides what facts shall be set forth in the petition, etc. The next section provides for the appointment of three viewers, and prescribes their duties, and the character of the report which they are required to make to the board of commissioners, etc. Section 4 relates to the time to be fixed for hearing the particular matters and things set out in the report of the viewers; also as to the required notice to be given to the several landowners of the time fixed for the hearing of the report. Section 5 provides for the meeting of the board, the time fixed to hear the report, and authorizes the commissioners, if they find it to be fair and just according to benefits, to approve and confirm the same. Sections 6 and 7 relate to taking appeals to the circuit court by any aggrieved party; and section 8 makes provisions for fixing a time to let the contracts for the construction of the work, and further provides that the surveyor or engineer appointed by the commissioners shall be directed by them to superintend the letting of such contracts, and requires the contractors to execute bonds con-

ditioned for the faithful performance of their contracts, and for the completion of the work within the time fixed therein. Section 9, among other things, provides for the surveyor or engineer appointed to superintend the construction, after he has let out the work, to make a report of his doings to the auditor, who is authorized to approve the bonds of the contractors. The board of commissioners, under this section, after the report of the engineer is made, is authorized to either approve or disapprove the contracts let by him; and it is provided that each contractor shall be liable on his bond for all delays after the expiration of the time fixed for the completion of his respective job, and for the payment of all damages which shall accrue by reason of his failure to complete the same within the time required. Section 10 provides that a job, not completed within the prescribed time, shall be resold, without notice, to the lowest responsible bidder, but the same shall not be sold for a sum greater than the estimate, nor shall it be sold a second time to the same party. Sections 11, 12, and 13 provide that when the cost and expense of construction and all compensation and damages are ascertained, the commissioners are to meet and determine at what time and in what number of assessments they will require the same to be paid, and are authorized to order the assessments, as confirmed by them, to be placed upon the tax duplicate against the lands assessed; and, in order to raise money to pay such cost and expenses, the board is empowered to issue and negotiate the bonds of the county, such bonds to be secured and payable out of the money derived from the assessments, and not otherwise. Assessments against the lands benefited, as provided by section 12, are made a first and paramount lien thereon, in the same manner and form as other taxes. Section 14 makes the surveyor or engineer, auditor, board of commissioners, and clerk of the circuit court liable to a fine of \$25 for the neglect of any duty imposed by the act in question; and section 17 declares that the collection of taxes, under the act, shall not be enjoined nor declared void in consequence of any technical error committed by the viewers, engineer, county auditor, or board of commissioners; and section 19 directs that the engineer appointed to superintend the work shall give a bond for the faithful performance of his duties, and authorizes an action thereon by any person aggrieved by his failure to discharge such duties. By section 21, after the construction of the ditch, the landowners through whose lands it is established are required to keep it open and free from obstructions.

It is apparent, we think, that the provisions of the above act are ample for the complete construction of any ditch proposed and authorized to be established or constructed thereunder. The complaint, however, proceeds upon the theory that the installment of the benefits assessed against the land of ap-

pellant, for the payment of which appellees are proposing to sell her real estate, is absolutely void, for the reason that the ditch has not been completed as provided for under the original specifications. The facts and matters alleged in the complaint, and upon which appellant bases her right to an injunction, do not pertain to the original proceedings to establish the ditch. Neither the proceedings under which the work of constructing the ditch was inaugurated, nor the assessments as originally confirmed, nor the final order directing the proposed work to be carried into effect, are challenged, and all of said proceedings or acts of the commissioners, under the facts, must be presumed to have been in all respects regular, and as conforming to the requirements of the law. The complaint does not impute any invalidity to the proceedings establishing the ditch for the reason that the board of commissioners was not invested with jurisdiction over the subject-matter or on account of the absence originally of notice to appellant, whose land is affected by the construction of the improvement. By the provision of section 17 of the act itself, which provision is but a recognition of the general principle, no irregularity upon the part of the board of commissioners, or other designated officials, can be made available to defeat, by injunction, the collection of taxes ordered to be levied for the construction of the work. That a landowner cannot, by a suit for an injunction, obtain a review of the assessment of benefits against his land for the construction of a public ditch, is settled by our decisions. If such proceedings are absolutely void, a suit for an injunction can be maintained; but, if not void, the plaintiff cannot prevail, no matter how erroneous or irregular such proceedings may be shown to have been. *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, and 19 N. E. 184; *Indianapolis & C. G. R. Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867; *Cauldwell v. Curry*, 93 Ind. 363; *Muncy v. Joest*, 74 Ind. 409; *Shrack v. Covault*, 144 Ind. 260, 43 N. E. 229; *Duncan v. Lankford*, 145 Ind. 145, 14 N. E. 12.

There is no doubt but what it is the duty, under the law, of the engineer who is appointed by the board as a superintendent, to see that the work of constructing the ditch is fully completed, as provided by the order of the board and the terms of the contract. *Racer v. State*, 131 Ind. 393, 31 N. E. 81. If a contractor falls or neglects to complete his job according to his contract, the engineer is certainly the proper person, and is invested with the power to have the job resold, as provided by section 10 of the act in question. See *Commissioners v. Krauss*, 53 Ohio St. 628, 42 N. E. 831. While there is no express provision in the statute requiring the board to determine when the ditch has been completed as ordered and designated in the contract of the contractors, still the law fairly implies and intends that the board shall perform this duty. It is an elementary rule that the grant of a principal power

carries with it all necessary, subsidiary, or implied powers. Hence the board of commissioners, under the express authority conferred upon it by the statute to order the construction of such public improvement, is invested with such incidental or implied powers as are necessary to fully carry out the completion of the work. The discharge of such duties is as incumbent upon the board as are those expressly imposed.

In practice, it may be asserted that the law contemplates that the matter of the petition for the proposed ditch, or other improvement, shall remain upon the docket of the board of commissioners until the final completion of the work. The law, undoubtedly, further contemplates that, when the work is completed according to contract, the engineer, who acts as a superintendent, is to make a final report to the board for its approval, and one of the essential matters to be determined by the board in approving such report is whether or not the work has been completed according to contract. Any landowner whose land is affected by the improvement would certainly be entitled to appear before the board, and controvert the question of the completion of the ditch. *Smith v. State*, 117 Ind. 167, 19 N. E. 744; *Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670.

This view of the case is incompatible with the contention of counsel for appellant that the law is invalid for the reason that the landowner is afforded no opportunity to be heard in respect to the final completion of the ditch. The mere fact that the ditch, in this case, has not been completed according to the plans and specifications, cannot be accepted as a sufficient ground for enjoining the collection of the assessment. *Muncey v. Joest*, supra. In the appeals of *Indianapolis & C. G. R. Co. v. State*, supra, and *Racer v. State*, supra, it was held that the landowner could not successfully interpose, as a defense to the action to collect the ditch assessment, the fact that the work had not been done and completed as required by the order of the court. His remedy, it was said in the latter case, was to apply to the court, whose agent the drainage commissioner is, to compel him and the contractor also to perform their duties. If the ditch in dispute has not been completed according to the terms of the contract, which terms, we must presume, conform to the original specifications and order of the board of commissioners, and the appellant has been damaged by the failure to complete it, under the law she has a remedy, and ample provisions are made by the statute for enforcing the completion of the work. But it is evident that, under the facts, appellant cannot invoke the writ of injunction to defeat the collection of the entire benefits assessed against her land.

If any portion of the taxes in question is invalid, the part thereof which is valid ought to have been paid, or a tender of the money in payment thereof ought to have been made, before an action to enjoin the collection of

the residue could be maintained, and such tender, if refused, must be kept good, by paying the money into court. These facts, in such cases, must be alleged in the complaint, or it will not be sufficient to repel a demurrer. *Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322, and cases there cited. Even though it could be held that a part of the tax in dispute is illegal, the complaint is fatally defective in not disclosing that the plaintiff has complied with the rule in respect to payment or tender. The averment that she has paid all the taxes due is not sufficient. Such an averment is but a conclusion upon the part of the pleader, and therefore must be disregarded. Neither of the paragraphs of the complaint is sufficient, and the demurrer was properly sustained, and the judgment is therefore affirmed.

(151 Ind. 463)

**DEMING-COLBORN LUMBER CO. et al. v.
UNION NAT. SAVINGS &
LOAN ASS'N.**

(Supreme Court of Indiana. Nov. 22, 1898.)

MECHANICS' LIENS—FORECLOSURE—RIGHTS OF JUNIOR MORTGAGEES—FAILURE TO JOIN JUNIOR MORTGAGEES IN FORECLOSURE SUIT.

1. The foreclosure of a senior mechanic's lien is not invalid merely because a junior mortgagee was not made a party, since in such case the latter's rights are in no way affected.

2. Rev. St. 1881, § 5298 (Rev. St. 1894, § 7260), provides that a sale under a mechanic's lien foreclosure shall be without prejudice to the rights of prior incumbrancers not parties to the action. *Held*, that since the rights of a junior incumbrancer are not greater than those of a senior incumbrancer, whose rights, the statute provides, shall not be prejudiced, a junior mortgagee's only rights after the foreclosure of the senior mechanic's lien are simply the right to redeem from such senior lien, or to foreclose his mortgage and procure a decree for a resale of the property, subject to the decree in favor of the senior lien.

3. Rev. St. 1894, § 7259 (Horner's Rev. St. 1897, § 5298), allows one year from the time when notice is filed in the recorder's office, during which suit may be brought for the enforcement of a mechanic's lien, and provides that, if the lien is not enforced within such time, the same shall be void. *Held*, that where the lien is foreclosed within the year as against the owner of the property, but a junior mortgagee is not made a party to the foreclosure, the lien itself and the judgment based thereon are void, as against such mortgagee, after the expiration of the year.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by the Union National Savings & Loan Association against the Deming-Colborn Lumber Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ibach & Ibach, for appellants. Olds & Griffin, for appellee.

HOWARD, J. The appellee brought this action against the appellants for the foreclosure of a mortgage dated March 31, 1893, and made a lien upon certain real estate in the city of Hammond, described in the com-

plaint. Among the allegations of the complaint are the following: "The said plaintiff further avers that the defendant the Deming-Colborn Lumber Company claims to have furnished lumber and materials for the erection of a dwelling house or other building upon said premises in the year 1893, and to have filed a notice of its intention to hold a mechanic's lien upon said real estate in the recorder's office of Lake county, Indiana, on the 22d day of June, 1893, and claims to have foreclosed its mechanic's lien by suit in the Lake circuit court, and obtained a decree for the sale of said real estate; and by virtue thereof said real estate was duly advertised and sold under such decree, and said Deming-Colborn Lumber Company purchased the same at such sale. But the plaintiff avers that said lien was not filed according to law, and the same does not describe the above-described property, or any other property, and as to it the said pretended mechanic's lien is of no force or validity whatever; that it was filed and recorded more than one year previous to this date, and that the plaintiff was not a party to said foreclosure proceedings in favor of the said the Deming-Colborn Lumber Company, and no attempt has been made to enforce said pretended lien against this plaintiff; and that as to this plaintiff the said pretended lien stands as if it had never been foreclosed, and the time permitted for the foreclosure of the same has expired, and said lien is barred against this plaintiff." The appellant lumber company filed its motion to make the complaint more specific, in this: "That whereas it seeks to have its mortgage declared a prior lien to the judgment of the defendant lumber company, and whereas the said defendant lumber company's judgment is obtained by the foreclosure of its mechanic's lien, that it set up in the complaint the time and dates upon which said defendant lumber company furnished said materials," etc. This motion was overruled, as was also the lumber company's demurrer to the complaint. The lumber company then filed its answer, being a general denial, which was afterwards withdrawn, and also a special paragraph. In the special paragraph of answer it is admitted that the company obtained a decree of foreclosure of its mechanic's lien on February 9, 1894, together with an order of sale of the property described in the complaint. It is further averred "that the said lumber company began to furnish materials to be used in the erection and construction of a certain frame building, and which materials were used in the erection and construction of said building upon the land as described in its notice of lien, on the 17th day of February, 1893, which lien was foreclosed on the same land as described in plaintiff's mortgage, which mortgage was not recorded until March, 1893; that the said lumber company continued to so furnish such materials under contract * * * continuously up until the 24th day of June, 1893, and

within sixty days after the furnishing of the said last materials, and on the 26th day of July, 1893, it filed its notice of its intention to hold a lien against the said described real estate, the same as set forth in plaintiff's complaint herein, and within one year thereafter brought its suit to foreclose said lien, and obtained a judgment foreclosing its said lien, and an order of sale to sell the said described realty to satisfy the said judgment." To this answer a demurrer was sustained, and, the lumber company refusing to plead further, judgment of foreclosure was entered in favor of appellee.

There can be no doubt that the facts pleaded in the answer show that the appellant's lien, which related back to the date of furnishing the first material, February 17, 1893, was prior to the lien of appellee's mortgage, which latter was not recorded until April 4, 1893. As said in *Fleming v. Bumgarner*, 29 Ind. 424, "The lien of the mechanic or material man relates to the time when the work commenced, or the materials began to be furnished, as to subsequent conveyances as well as to other liens." Indeed, we do not understand that the learned counsel for appellee deny the priority of appellant's lien. They simply contend that they may foreclose their mortgage and sell the property without regard to appellant's lien, or the foreclosure and sale thereunder; and this for the reason that appellee was not made a party to the proceedings for the foreclosure of appellant's mechanic's lien. The right to a mechanic's lien, and the procedure for its enforcement, are purely statutory. As said in *Goodbub v. Hornung's Estate*, 127 Ind. 181, 26 N. E. 770, "In so far as a right to a mechanic's lien in a given case is concerned, we must look only to the statute in force when the material is furnished or the labor is done," and "such rights are to be established and enforced by the law existing at the bringing of the suit." Even if the land were already mortgaged at the time the mechanic's lien attached, that would not affect such lien, so far as the then interest of the owner might be concerned. As provided in section 7256, Rev. St. 1894 (section 5294, Rev. St. 1881; section 5294, *Horne's Rev. St. 1897*), "The lien, so far as concerns the buildings erected by said lienholder, is not impaired by foreclosure of mortgage; but the same may be sold to satisfy the lien, and removed within ninety days after the sale by the purchaser." See *Cariger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266. Moreover, even if the mortgage in suit were prior in time to appellant's lien (which it was not), we might yet say (following *Farmers' Loan & Trust Co. v. Railway Co.*, 127 Ind. 250, 26 N. E. 784, in its citation from *Brooks v. Railway Co.*, 101 U. S. 443), that the appellee knew that the structure here in question was yet to be built, and that, while such building would add to the value of appellee's security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage. One cannot

shut his eyes to the condition and character of property upon which he is about to take a mortgage. So it was held in *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632, citing *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 843, that, when a person acquires a mortgage lien upon property, he acquires it "with knowledge of the uses and purposes to which the property is to be applied, and with notice that under the statute the mortgaged property is liable to be subjected to after-acquired liens for labor and material."

So far as to mortgages made prior to the attaching of a mechanic's lien. The mortgage here considered was, however, given after the attaching of the mechanic's lien, and is therefore a junior incumbrance. But it is not absolutely necessary to the validity of a foreclosure proceeding that either senior or junior incumbrancers should be made parties. At most, it is to be said that the rights of those not made parties are not affected. If such rights are not thereby diminished, neither are they increased, and we are to look to the law in each case to see what such rights are. If we should treat appellant's mechanic's lien and appellee's junior mortgage lien as having to each other simply the relation of two mortgages, as appellee would seem to argue they ought to be treated, then, as we have seen, the rights of appellee, as holder of the junior lien, were, at most, not affected by appellant's foreclosure. Its lien remains, as before, junior to that of the senior lienholder. "As a general rule," said Judge Worden in *Hasselman v. McKernan*, 50 Ind. 441, "where a junior mortgagee is not made a party to an action to foreclose a senior mortgage the foreclosure does not affect him, and as to him all things remain as if there had been no foreclosure." A like statement of the law is found in *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791,—that, where a junior mortgagee is not made a party to the foreclosure of a senior mortgage, "the foreclosure is, as to him, a mere nullity. He is only required to pay the mortgage debt, with interest"; citing many like decisions of this court. But it is nowhere held that the foreclosure of a senior mortgage is in itself invalid for the reason simply that a junior lienholder was not made a party. Neither has it been held that the junior mortgagee can thereafter, in disregard of the senior lien, proceed to foreclose his mortgage and sell the land as if he alone had a lien upon it. Following the analogy of these cases, appellee's right as a junior lienholder—it not having been made a party to appellant's foreclosure suit, and not, therefore, being bound by it—would be precisely the same as it was before such foreclosure suit was begun. The statute as to the foreclosure of mechanics' liens certainly does not give any greater rights to a junior incumbrancer. It is only prior incumbrancers that are there protected when not made parties. In section 7260, Rev. St. 1894 (section 5208, Rev. St. 1881; section 5208, Horner's Rev. St. 1897),

It is provided that, on sale in mechanic's lien foreclosures, "such sale is to be without prejudice to the rights of any prior incumbrancer, owner, or other persons not parties to the action." It is questionable whether this section does not treat a mechanic's lien as a pending suit from the date of the doing of the first work or the furnishing of the first material, until the entry of the judgment of foreclosure, and whether all persons acquiring liens after the doing of such first labor or the furnishing of such first material must not do so at their own hazard, as in other cases *pendente lite*. But, without deciding this question, it is at least certain that the rights of such junior incumbrancer (he not being named as such in the statute) are not greater than those of a prior incumbrancer, whose rights, the statute provides, shall not be prejudiced; that is, the junior incumbrancer's rights cannot in any case be greater after than they were before the foreclosure of the mechanic's lien, namely, the right to redeem from the senior lien, or to foreclose subject to such senior lien. The several interests in the land before the suit were: First, that of the owner; second, that of the senior lienholder; and, third, that of the junior lienholder. On the foreclosure of appellant's senior lien, and the purchase of the land, appellant acquired the owner's interest, together with its own, subject to the right of appellee, the junior lienholder, either to redeem from such decree and sale, or to foreclose its own mortgage, and procure a decree for the resale of the land.

But counsel for appellee contend that, however true it may be that the lien of the lumber company was prior to that of the mortgagee at the time of the foreclosure of the former, yet such priority could last only during the life of the mechanic's lien. This, we think, must be admitted. The statute (section 7259, Rev. St. 1894; section 5297, Rev. St. 1881; section 5297, Horner's Rev. St. 1897) gives one year from the time when notice is filed in the recorder's office, or, if a credit is given, one year from the expiration of such credit, during which time suit may be brought for the enforcement of a mechanic's lien; and it is there expressly provided that, "if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void." If the lien in this case had not been foreclosed within the year given by the statute, it is clear that it would have been void as to all persons concerned, including the mortgagee. But, while the lien was duly foreclosed as against the owner of the property, yet, as we have seen, the appellee, as mortgagee, not having been made a party to the action, its rights were in no manner affected thereby; that is, appellee's mortgage stands just the same as it would have stood if the mechanic's lien had not been foreclosed within the time prescribed by the statute. In other words, the year given by statute having expired without a foreclosure of the

lien, as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot after the expiration of the year, when the statute declares it shall be void. By its foreclosure the lienholder, not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and, as such owner could not question the right of the mortgagee to foreclose against the property, neither can the lienholder now do so,—the year given him by statute to foreclose his lien having expired. It would, of course, be different if the time for the foreclosure of a mechanic's lien were not limited by the statute. See *Catterlin v. Armstrong*, 79 Ind. 514, 101 Ind. 258, and *Association v. Helberg* (at this term) 51 N. E. 916. Judgment affirmed.

(21 Ind. App. 178)

**BOARD OF COM'RS OF HUNTINGTON
COUNTY v. BUCHANAN.**

(Appellate Court of Indiana. Nov. 18, 1898.)

**CLERKS OF COURTS—RIGHT TO FEES—ILLEGAL
CLAIM AGAINST COUNTY—RIGHT OF
COUNTY TO RECOVER.**

1. Under Rev. St. 1881, § 5854, requiring all allowances made by the court at each term to be certified to the auditor in one certificate, and Rev. St. 1894, § 6544, construing a fee specified as compensation for any service to be in full therefor, and section 6543, prohibiting a county officer from receiving any fee except as is specified in the acts relating thereto, a clerk cannot receive fees for certifying jurors' and bailiffs' bills from time to time during the term; and this though he complies with Rev. St. 1894, § 8106 (Rev. St. 1881, § 6029), requiring an officer in doubt as to the charge to make for a service to bring it before the circuit judge, who shall decide the question, since section 8106 forbids any judge to make an allowance to any officer except as provided by law.

2. The fact that an illegal claim for fees by a county officer was allowed and paid by the county commissioners is no defense to an action by them to recover the fees, since the commissioners cannot bind the county by allowing an unlawful claim.

Appeal from circuit court, Huntington county; J. T. Cox, Special Judge.

Action by the board of commissioners of Huntington county against Samuel Buchanan. There was a judgment for defendant, and plaintiff appeals. Reversed.

Whitelock & Cook, for appellant. Kenner & Lesh, for appellee.

ROBINSON, J. This cause was transferred to this court by the supreme court. Appellant brought this action against appellee to recover the sum of \$722, alleged to have been illegally drawn from the county treasury as fees by appellee as clerk of the Huntington circuit court. The bill of particulars filed with the complaint shows, among other things, certain sums of money received during the years 1883, 1884, 1885, 1886, and 1887, by appellee from the county, arising out of

fees taxed by him in issuing certificates to jurymen, court bailiffs, and other officers. A demurrer was overruled to the complaint, and appellee answered in three paragraphs, the first of which was the general denial. A demurrer to the second paragraph was sustained. Overruling the demurrer to the third paragraph of answer is the first error assigned. The action was commenced to recover back certain alleged fees, on the ground that they had been charged in violation of the fee and salary law of 1879, and the act supplemental thereto approved February 28, 1883. It is argued that no question is presented on the ruling on the demurrer to the third paragraph of answer, for the reason that the demurrer is joint, and is not addressed to the amended answer. The filing of the demurrer immediately follows the amended answer, and it is evident that the demurrer was addressed to the amended answer, and was so considered by the trial court. Nor is the objection that the demurrer is not addressed to each paragraph well taken. It is addressed "to the second and to the third paragraph, * * * on the ground that neither paragraph," etc. However, the record discloses that the demurrer was sustained to the second paragraph of answer, and, as we construe the third paragraph of answer, the demurrer should have been sustained to it, also. In the third paragraph of answer, appellee admits having received the sums of money sought to be recovered; but he avers that at the beginning of his term of office "certain jurymen, who had rendered service as jurors in this court, presented to defendant, as clerk, statements drawn by the sheriff, showing the time of service and miles traveled by each, and they then and there demanded defendant's certificate as clerk to authorize the auditor to draw warrants for their payment, whereupon, such demand having been made before the close of the then current term, and defendant being in doubt both of his duty and the proper charge to make for service in issuing such certificates, he brought the question before Hon. H. B. Sayler, then judge of this court, and was about to submit said question in writing, when said judge, in open court, directed defendant to certify as clerk from time to time, as presented, such bills for service by jurors and bailiffs of this court, so that such persons might promptly receive payment for their service in his court, and at the same time instructed defendant to tax a fee of fifty cents for each of such certificates, and file his claim therefor before the board of commissioners; that, in accordance with such order, defendant made certificates, for which he charged the sums claimed in the complaint, and filed his claim before the board of commissioners, which was allowed and paid accordingly." It is further averred that appellee relied upon said opinion in making such charges, and but for the opinion would have certified allowances and for

services at the end of each term, and that when he charged and presented his claim for such service he understood he was acting under the order of the court, so that such persons might receive payment for their service without delay. It appears from this paragraph of answer that the fees in question were charged by appellee, as circuit court clerk, for certificates made by him from time to time, during the term of the circuit court, to parties entitled to fees as jurors. To entitle appellee, as such clerk, to receive fees from the county treasury for official duties, it is necessary that he should show a statute providing such compensation, and fixing the amount thereof, and also a statute authorizing the board of county commissioners to pay such compensation out of the county treasury. *Noble v. Board*, 101 Ind. 127; *Wood v. Board*, 125 Ind. 270, 25 N. E. 188; *Board v. Johnson*, 127 Ind. 238, 28 N. E. 821; *State v. Roach*, 123 Ind. 167, 24 N. E. 106. The act in force at the time the fees in question were charged and collected provided that "all allowances made by the court at each term shall be certified to the auditor in one certificate; and for such certificate, and seal thereto, the clerk shall receive one dollar, to be paid out of the county treasury upon the order of the judge of the proper court." Rev. St. 1881, § 5854. And by the act of 1883 it was provided that whenever a fee or sum of money was specified as compensation for any service, duty, or thing, the same should be construed in full therefor. Rev. St. 1894, § 6544. It is also provided by the act of 1883 that "no county or township officer of this state under the color of his office shall charge, tax up or receive or permit to be taxed up or received in relation to any service in or about his office any fee or sum of money except as is plainly specified in the acts to which this is supplemental, without resort to implication." Rev. St. 1894, § 6543. It may be true, as argued by counsel, that appellee performed extra duties, but that gave him no right to charge an unauthorized fee. It has long been declared that a public officer takes and holds his office cum onere; that he undertakes to perform the duties of the office for the compensation stipulated, whether those duties be increased or diminished; and that compensation for any kind of service must be by virtue of statutory warrant. *Board v. Barnes*, 123 Ind. 403, 24 N. E. 137, and cases there cited. The fact that jurors would be compelled to wait until the close of the term of court to receive their pay affords no excuse for charging any extra fees. If the legislature has provided an inconvenient method for doing a certain thing, the inconvenience must be borne until the same power provides a different method. It is true, it was provided by the act of 1879 (Rev. St. 1881, § 6029; Rev. St. 1894, § 8105) that any officer, being in doubt of the proper charge to be made for any service rendered, shall in no case charge any constructive fee, but he shall

bring the question before the circuit judge of his county, in writing; and said judge shall decide the same, which decision shall be entered of record, and which order shall authorize such charge to be made as found by the court. Even if a compliance with the provisions of this section authorized the collection of the fees in question, appellee cannot claim its protection in this case, for the reason that the third paragraph of answer shows that he did not comply with its provisions. But the above provisions do not authorize the circuit judge to allow any fee not provided for by some statute. Another section of the statute expressly prohibits such an allowance. Section 40 of the act of 1879 provided that "no judge of any court in this state, shall make any allowance to any officer or person named in this act except as in this act provided." Rev. St. 1881, § 6030 (Rev. St. 1894, § 8106). It is true, the circuit court is given power to make allowances in certain cases, and direct their payment out of the county treasury; and, where the amount to be allowed is not fixed by statute, the court may fix the amount. But such an allowance can be made only to a person who, under the law, is entitled to some allowance. Thus, it has been held that "when a person, under the law, is entitled to some allowance, the sum settled and allowed by the court will be prima facie evidence as to the correctness of the amount allowed; but where the person in whose favor such allowance is made is not, under the law, entitled to either fees, charges, or expenses, then such allowance will be void." *Board v. Summerfield*, 36 Ind. 543; *Trant v. State*, 140 Ind. 414, 39 N. E. 513; *Board v. Pollard*, 17 Ind. App. 470, 46 N. E. 1012. See, also, *In re Stroh*, 149 Ind. 164, 48 N. E. 792.

The fact that the claim for the fees in question was filed before the board of county commissioners, and was allowed and paid accordingly, constitutes no defense to this action. The supreme court has held that the board of commissioners cannot bind the county by allowing an unlawful claim, and that the payment of such a claim in defiance of a statute is not a payment by the county, within the rule that a payment under a mistake of law cannot be recovered. *Board v. Heaston*, 144 Ind. 583, 41 N. E. 457, and 43 N. E. 651.

In the case of *Miller v. Boone Co.*, 5 Ind. App. 225, 31 N. E. 1123, cited by appellee's counsel, the question was not whether there was any statute allowing a fee to the sheriff for attending and preserving order at the session of the circuit court, but whether the fee fixed by the statute for such service should be paid out of the county treasury. In the case of *Noble v. Board*, 101 Ind. 127, appellant, as clerk of the circuit court, filed with the auditor of the county a claim made up of various items; among which was, "44 certificates to auditor for jurymen, 50,—\$22.00." A part of the claim was allowed by

the board of commissioners, but upon appeal the circuit court refused to allow any part of the claim. In affirming the judgment the court said: "We have been unable to find any statutes which fix any compensation for the clerk for performing any of the services above specified, or which authorize the county boards to pay for such services out of the public treasury; and, as neither the appellant nor his counsel have pointed out any law for either, we have some confidence that none exists." See *Lee v. Board*, 124 Ind. 214, 24 N. E. 986; *Board v. Fullen*, 118 Ind. 158, 20 N. E. 771; *Stropes v. Board*, 84 Ind. 560; *Stiffler v. Board*, 1 Ind. App. 368, 27 N. E. 641. The doctrine announced in the above case of *Noble v. Board* is controlling in the case at bar. Not only was there no statute authorizing the collection by the clerk of the fees in question, but, as we construe the statute, the legislature has declared positively against the charging and collecting of such fees. The demurrer to the third paragraph of answer should have been sustained. Judgment reversed, with instructions to sustain the demurrer to the third paragraph of amended answer.

(21 Ind. App. 492)

CROUCH et al. v. CHAMNESS et al.¹

(Appellate Court of Indiana. Nov. 18, 1898.)

COMPLAINT—OBJECTION ON APPEAL—FRAUD—EVIDENCE.

1. A complaint sufficient to bar another action for the same cause will be held sufficient where questioned for the first time on appeal.

2. Testimony of plaintiffs that they traded for a horse that they understood to be "H." an American bred coach stallion; that, at the time of the purchase, defendants gave them a warranted pedigree of him as such; and that they took him home, and advertised him as such horse, and with the pedigree as warranted,—shows that they relied and acted on defendant's representations as to his being such horse, with such pedigree.

Appeal from circuit court, Clinton county; J. V. Kent, Judge.

Action by George W. Chamness and others against Jephtha Crouch and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

Guenther & Clark and John T. McHugh, for appellants. Puett & McFaddin and H. O. Sheridan, for appellees.

COMSTOCK, J. The complaint in this cause is in two paragraphs. The first alleges that appellees are a firm doing business under the name of Chamness Bros., and that appellants are a firm trading as J. Crouch & Son; that on the 11th day of May, 1894, defendants sold and delivered to plaintiffs a stallion named "Hermann," to be used by them in their breeding stables for breeding purposes, for the sum of \$530 then paid by plaintiffs, and as a part of the terms and consideration of said contract of sale, and for the purpose of inducing them to purchase said horse, de-

fendants then warranted to plaintiffs that said horse was an American bred coach stallion, foaled in 1887, being No. 118; that they furnished the pedigree of said horse to plaintiffs, setting out the pedigree furnished; that, believing said representation to be true, and relying upon said warranty, plaintiffs were induced to and did purchase said horse; that said horse was not at the time of said sale an American bred coach stallion, nor was he a coach horse at all; that his pedigree is as follows (setting out his true pedigree), and that the defendants knew that he was not as represented and warranted by them; and that he had no value, and was not a breeder, and was worth \$1,000 less to plaintiffs than he would have been worth had said warranty and pedigree as furnished by defendants been true. The second paragraph of complaint alleged that on the 11th day of May, 1894, plaintiffs were a firm engaged in running and operating a breeding farm in Bloomingdale, Parke county, Ind.; that they kept for hire, for breeding purposes, stallions of a high grade, and (registered) pedigreed horses, and, over a large territory, many patrons of their stables brought their mares to be bred to their stallions so kept at their stables, relying on the pedigrees of the horses they had in their stables being true and as represented; that at said time they had no registered coach horse in their stables, and, in response to the demands of their patrons, sought the purchase of an American bred coach horse, duly registered in the American Coach and Stud Book; that defendants, doing business as J. Crouch & Son, represented to plaintiffs that they had an American bred coach horse, whose registered number was 118, named "Hermann," and of the following pedigree (setting out the pedigree); that, relying upon said representations, and believing said horse to be as represented, they purchased him; that said horse was not at the time of said sale an American bred coach horse, and that his real name was "Enterprise, Jr.," having draught blood in him; that defendants knew this, but falsely and fraudulently manufactured the pedigree given by them to plaintiffs to induce them to make said purchase; that plaintiffs brought said horse to their stables, and advertised him, and many of their patrons bred their mares to him, and, when they discovered he was not as represented, they refused to pay for said breeding service, and plaintiffs lost large sums of money, to their damage in the sum of \$2,500. Appellants answered in two paragraphs,—the first, the general denial; the second, the special plea. As no question is raised upon the second paragraph of answer, it is not necessary to set it out. Appellees replied by general denial. The cause was submitted to a jury, and a verdict returned in favor of appellees for \$830. Appellants' motions for a new trial and in arrest of judgment were overruled, and an exception taken.

The specifications of error assigned challenge, respectively, the sufficiency of the com-

¹ Rehearing denied.

plaint, the first paragraph of the complaint, and the second paragraph of the complaint, to state a cause of action against appellants; the fourth specification is that the court erred in overruling appellants' motion for a new trial; fifth, that the court erred in overruling the motion in arrest of judgment. The sufficiency of the complaint and each paragraph thereof is challenged for the first time in this appeal, no demurrer having been filed in the court below. The objection urged by counsel for appellants to the complaint is that neither paragraphs shows an attempt to deceive appellees. The second paragraph alleges that "defendants falsely and fraudulently manufactured the pedigree given by them to the plaintiffs to induce them to make said purchase." These averments show an attempt to deceive, and, with others in the same paragraph, that the attempt was attended with success. Each paragraph is sufficient to bar another action for the same cause, and, being questioned here for the first time, must be held to be good. *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Harris v. State*, 123 Ind. 272, 24 N. E. 241; *Bozarth v. McGillicuddy*, 19 Ind. App. 35, 47 N. E. 397, and 48 N. E. 1042.

In support of the fourth specification of error (overruling the motion for a new trial), appellants claim that there is no evidence to show that appellees relied upon the representation made by appellants at the time of the exchange and trade of the horse "Hermann." George Chamness, appellee, testified that he traded for a horse that he understood to be "Hermann," an American bred coach stallion; that, at the time of the purchase, appellants gave him a warranted pedigree (this being the same pedigree made an exhibit in each paragraph); that he took him home, and advertised him in season as the horse "Hermann," and with the pedigree as warranted. This evidence shows that appellees relied and acted upon the representations made by appellants.

The fifth specification of error is not discussed. It is therefore, under the rule, waived. We find no error. Judgment affirmed.

(21 Ind. App. 138)

MYERS et al. v. GREEN.

(Appellate Court of Indiana. Nov. 15, 1898.)

ACCORD AND SATISFACTION—SPECIAL VERDICT—VENIRE DE NOVO.

1. Acceptance of a check of less than the amount of a liquidated debt, though the check state that it is in full, does not, in the absence of any other consideration, operate to discharge the balance of the debt.

2. A special verdict finding a breach of warranty under which goods were sold, which does not find the difference between the goods delivered and those agreed to be delivered, is insufficient, since it cannot be determined therefrom that the buyer suffered any damages.

3. A venire de novo will not be awarded, at the instance of one having the burden, because of a failure to find material facts, since that is construed as a finding against him.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Robert S. Green, as receiver of the Gove & Hooper Company, against William Myers, Jr., and another. From a judgment for plaintiff entered on a special verdict, defendants appeal. Affirmed.

Randall & Doughman, for appellants. Breen & Morris, for appellee.

HENLEY, C. J. This action was upon an account for goods sold by appellee to appellants. The goods so sold consisted of a certain number of hats. Appellants answered in five paragraphs, and also filed a cross complaint of one paragraph. The first paragraph of answer was a general denial; the second, a plea in payment; the third, accord and satisfaction; the fourth and fifth, failure of consideration. The cross complaint is founded upon an alleged breach of warranty. The lower court sustained a demurrer to the third and fourth paragraphs of answer, and overruled a demurrer to the fifth paragraph of answer and to the cross complaint. The cause was tried by a jury. At the request of appellee, the court ordered the jury to return a special verdict. The special verdict is in the form required by the act of 1895. Both parties to the action moved for judgment upon the special verdict. Appellee's motion was sustained; that of appellants overruled. The action of the lower court in sustaining appellee's demurrer to the third paragraph of answer, and in overruling appellants' motion for judgment upon the special verdict, are the questions discussed by appellants' counsel. The third paragraph of answer, to which the lower court sustained a demurrer, was, omitting the formal parts, as follows: "Come now the defendants, and for their amended third paragraph of answer allege and say that on the 4th day of April, 1896, the defendants delivered to plaintiffs, and plaintiffs received in full satisfaction and discharge of their cause of action in their complaint alleged, the following check, which is in words and figures as follows: 'Ft. Wayne, Ind., April 4, 1896. First National Bank of Fort Wayne: Pay to Robert S. Green, receiver Gove & Hooper Co., or order, eighty-four ⁶⁰/₁₀₀ dollars, in full for invoice Jany. 22, '96. Wm. Myers & Bro.' Wherefore the defendants demand judgment." The question arising upon this paragraph of answer is, did the delivery to, and the acceptance by, appellee of this check, as set out in the answer, satisfy appellants' claim? In other words, does it amount to an accord and satisfaction? The amount due from appellants was an ascertained sum,—a liquidated amount,—and it was held, in a recent case decided by this court, that where a debtor sent to his creditor a check for a part of a liquidated sum due the creditor, reciting in the check that it was in full of all demands, the acceptance of the check by the creditor did not discharge the entire debt. *Hodges v. Truax* (Ind. App.) 49

N. E. 1079. The exact question is decided in the case of *Curran v. Rummell*, 118 Mass. 482. In that case the plaintiffs received from one Bond, acting for the defendant, the following letter: "Gentlemen: In the matter of the Rummell estate, we are getting it into such shape that we can see the end now. It will pay a dividend of 19 cents on the dollar. As I suppose you would like to close it, I inclose my check for \$11.89 in settlement of your account." Inclosed in the letter was a bank check for \$11.89, dated July 3, 1873, payable to the plaintiffs' order. The plaintiffs used the check in the ordinary course of business. The question presented to the court for decision was expressed in the agreed statement of facts as follows: "If receiving and retaining this check, under the circumstances stated, is such a settlement of the right of action that they cannot recover the residue of the debt, then judgment is to be entered for the defendant; otherwise for the plaintiffs upon their declaration." The court in deciding the case says: "The facts agreed do not bar the plaintiffs' right to recover on both counts in their declaration, because an agreement to accept, in satisfaction of an ascertained debt, a sum less than the full amount due, is not sufficient, unless it be founded on some additional consideration, such as the payment of money or transfer of property, or some new responsibility incurred by a third party, or when the agreement constitutes part of a composition deed among creditors, binding upon all. *Perkins v. Lockwood*, 100 Mass. 249. The case falls to show any such new consideration offered to the plaintiffs, and accepted by them as the consideration of an agreement to accept less than the amount of their debt. The letter inclosing the check 'in settlement' implies that the money was realized out of Rummell's estate only. * * * They [plaintiffs] were not bound to treat it [the check] other than as a part payment by the debtor, to be applied in reduction of the debt only." See, also, *Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030. It is not necessary for us to discuss whether or not this rule is founded in good reason. It is the rule at common law, and has been followed, with one or two exceptions, by all the courts of this country. We think the lower court properly sustained the demurrer to the third paragraph of answer. The special verdict is insufficient to support a judgment in favor of appellants, because the court cannot determine from the special verdict that the appellants suffered any damage. If there was a warranty in the sale of the hats, and a breach of it, the measure of damages would be the difference between the articles sold and those delivered at the time and place of delivery. This the special verdict fails to show. *Bushman v. Taylor*, 2 Ind. App. 12, 28 N. E. 97; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348. The motion for a *venire de novo* was properly overruled. The failure to find material facts will be construed as a finding against the party upon whom rested the burden

of proving such facts, and is no cause for a *venire de novo*. We find no error in the record. Judgment affirmed.

(21 Ind. App. 142)

STATE v. TINCHER.

(Appellate Court of Indiana. Nov. 15, 1898.)

INTOXICATION IN PUBLIC PLACE.

A private residence, at which an ice-cream supper and a dance are given, attended by a number of people, with or without invitation, is not a public place, within *Horner's Rev. St. 1897, § 2091*, punishing intoxication at public places.

Appeal from circuit court, Sullivan county; W. W. Moffett, Judge.

Sanford Tinchler, accused of being intoxicated in a public place, was acquitted, and questions were reserved on exceptions by the state. Affirmed.

Chas. D. Hunt, Pros. Atty., and W. A. Ket-cham, Atty. Gen., for the State. W. S. Maple, for appellee.

WILEY, J. This case is before us on a reserved question of law. The appellee was indicted for having been found in a state of intoxication in a public place, and on a plea of not guilty the cause was submitted to a jury for trial, and under an instruction of the court a verdict of acquittal was returned. The public place at which the appellee was charged to have been found in a state of intoxication was, in the language of the indictment, "at a public assemblage at the residence of James Williams," in Sullivan county, Ind. The facts disclosed by the record are as follows: There were an ice-cream supper and a dance at the private residence of one James Williams, and from 75 to 100 persons were in attendance. The record does not disclose whether the general public were invited, or whether those in attendance were there by special invitation. The two witnesses who testified in the case stated that they were not invited specially to the supper, but went because they had heard there was to be such a supper. They did not know whether other persons were specially invited or not. The record shows that there was an ice-cream stand out in the yard, near a public highway, where ice cream and other refreshments were sold. The state offered to prove by two witnesses that the appellee attended the supper, and while there was in a state of intoxication. The court excluded all evidence offered by the state to prove the intoxication of the appellee; such evidence being excluded, as shown by the record, on the ground that the "defendant was not in a public place when at said supper and dance." Following the exclusion of this offered evidence, the record recites that "the prosecuting attorney thereupon stated to the court that all the evidence the state had and proposed to introduce in this case relative to the defendant's being in a state of intoxication tended to show the de-

fendant's condition at Williams' at the supper and dance, and that the state had no evidence of his intoxication at any other place, whereupon the court excluded the evidence showing the defendant's intoxicated condition at the supper and dance, and announced and ruled that said supper and dance did not constitute a public place." To this ruling the state excepted, and has properly presented the question by a bill of exceptions. We have therefore for our decision this question: Did the private residence of James Williams, which was in the country, and at which a number of persons had gathered to attend an ice-cream supper and dance, constitute a public place, within the meaning of section 2081, Horner's Rev. St. 1897? The appellee has not favored us with a brief. "The term 'public place' is a relative one. What is a 'public place' for one purpose is not for another. * * * A place which is public in one community is not necessarily so in another." 19 Am. & Eng. Enc. Law, p. 563. In *Cahoon v. Coe*, 57 N. H. 572, it was said: "The term 'public place,' as used in the statute, is relative. What might be a public place in a crowded and populous city, and what would be a public place in a small town, sparsely inhabited, are entirely different questions." In *Parker v. State*, 26 Tex. 204, it was said: "A 'public place' does not mean a place devoted solely to the uses of the public; but it means a place which is in point of fact public, as distinguished from private,—a place that is visited by many persons, and usually accessible to the neighboring public." In Alabama there is a statute prohibiting cock-fighting in a public place, and providing a punishment for its violation. In *Finnem v. State* (Ala.) 22 South. 593, appellant was indicted for violation of such statute. It was shown that the cock-fight took place in an old field, grown up with bushes, etc., about one-fourth or one-half mile from the public road. The appellant requested the court to give the following instructions: "(1) I charge you that a place in the thick woods, one-half mile from any public highway, or other public place, is not a public place, unless made so by meeting at such place more than one time. (2) I charge you that it is no violation of law for seventy-five or one hundred men to meet in the thick woods, one-half mile from any public highway or other public place, for the purpose of fighting cocks." These instructions were refused, and the supreme court held that such refusal was correct, saying: "The charges requested by the defendant proceeded on the idea that the evidence did not show a public place, and were therefore well refused. But, aside from this consideration, it cannot be said, as matter of law, that a place where 75 to 100 men meet for the purpose of fighting cocks is not a public place, even though it be 'in the thick woods, one-half mile from any public highway or other public place,' which is the proposition embraced in these charges. The place, however secluded in and of itself, is made public by

the assemblage there of people in such numbers, and the right of the public generally to assemble there on the occasion for the purpose of engaging in or witnessing cockfighting, and it is wholly immaterial whether there has ever been any assemblage of people at that place for any purpose." To say that "in the thick of the woods, one-half mile from any public highway," in a secluded and unfrequented spot, where a number of persons congregate, upon one occasion only, to witness cockfighting, is a public place, within the meaning of a criminal statute, it seems to us, is a strained construction of the term, and one which does not meet with our approval. The construction put upon the term "public place" in the case last cited, as it is used in a criminal statute, is not, in our judgment, in harmony with the great weight of authorities. There is a wide distinction between the terms "public place" and "public assemblage" or gathering. The people who congregated at the residence of James Williams, as described in the indictment in the case before us, might have constituted a public assemblage, but, as to whether they did or did not, we do not decide; but we are clear that such assemblage of persons did not make his private residence a "public place," within the meaning of the statute. A private residence is not a public place, in any sense of the term, and the mere suggestion of the fact is a sufficient argument to support it. We are unable to see how a private residence can be made a public place by a number of persons in the neighborhood gathering there, with or without invitation, to pass an evening in social intercourse and innocent amusement. Whether a place is public or not cannot be determined by the number of people who may gather there for some legitimate purpose, but by the place itself. Nor can it be determined by people freely and voluntarily congregating at their own pleasure, or by the invitation of others. If this were true, then the most isolated place in an uninhabited region would become a public place, if a number of people should assemble there; or if a number of persons should congregate and go in a body to the home of one of their neighbors, to surprise him and celebrate with him some birthday or marriage anniversary, such fact would transform the privacy of his home into a public place. We cannot give the statute upon which this prosecution rests such a construction. As we have remarked, a private residence is not a public place, within the meaning of the statute, and it is not made a public place by the assemblage of a number of persons. In the case of *State v. Sowers*, 52 Ind. 311, this exact question was decided. There appellee was indicted for having been found in a state of intoxication in a public place, to wit, "at a social party held and had at the residence of Jackson Simmons." The court said, "The private house of a gentleman, at which he gives or holds a party, cannot, within the meaning of the statute, or in any sense of society or government, be

understood to be a public place. A public place is where all persons have a right to go."

The court did not err in excluding the offered evidence, or instructing the jury to return a verdict for appellee. Judgment affirmed.

(21 Ind. App. 147)

RAU v. BALL BROS. GLASS MFG. CO.

(Appellate Court of Indiana. Nov. 16, 1898.)

TRIAL—CONCLUSIVENESS OF SPECIAL VERDICT—EFFECT OF VERDICT ON DEFECTIVE AVERMENT.

1. Where the complaint, in an action for damages for failure of defendant to deliver certain goods, for which plaintiff had contracted, averred that plaintiff had performed all the conditions of the contract, and there was a special verdict, any insufficiency of such averment was cured by such verdict.

2. A special verdict, in an action for damages for failure of defendant to deliver certain goods by the date specified in the contract therefor, found that such goods were to be delivered on specifications to be furnished by plaintiff; that, after the expiration of the period specified, during which defendant had filled all orders for which plaintiff had furnished specifications, the time for the delivery of the remainder was extended by an agreement on which both parties afterwards acted; and that defendant thereafter delivered all such goods for which plaintiff furnished specifications. Such verdict also expressly declared that no damage was sustained by plaintiff from defendant's failure to deliver all the goods contracted for as originally specified, and failed to show that defendant was not ready to deliver all the remainder under the contract in question as extended. *Held*, that a conclusion that plaintiff was entitled to damages in a certain sum, on the facts found, was inconsistent with such findings, and that defendant was entitled to judgment on such special verdict.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Action by Ball Bros. Glass Manufacturing Company against John Rau, surviving partner, etc. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Ohas. F. Parker and H. J. Paulus, for appellant. Austin De Wolf, for appellee.

ROBINSON, J. This is an appeal from a judgment of the Grant circuit court rendered in an action by appellee against appellant to recover damages resulting from an alleged failure on the part of appellant to deliver to appellee certain personal property to be manufactured by appellant and delivered by a named date. There was a special verdict, and the sufficiency of the complaint is questioned for the first time in this court. Even where a demurrer has been filed and overruled, a special verdict will cure a defective averment, but it will not cure a defect consisting of the entire omission of a necessary averment. *Jone v. Casler*, 139 Ind. 382, 38 N. E. 812; *Assurance Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95; *Rhodes v. Hillgoss*, 16 Ind. App. 478, 45 N. E. 666; *Assurance Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265.

It is not claimed by appellant's counsel that there is the omission of a necessary averment,

but that it is not sufficiently averred that appellee performed all the conditions required by the contract. The pleading avers that all the conditions of the contract were fulfilled, and, although the averment may be defective, under the above rulings it is sufficient.

The special verdict shows that between the 16th and 22d day of April, 1891, appellant agreed in writing to sell and deliver on cars at Fairmount, Ind., 950 gross of standard quart fruit jars, at \$4.50 per gross, and 400 half-gallon jars, at \$6.35 per gross. The contract originally provided for the delivery on or before August 1, 1891. Said jars were to be delivered upon written specifications by appellee, stating number and size. Specifications were not delivered to appellant for all said jars prior to August 1, 1891. No jars were due appellee under contract for which it had furnished specifications on September 16, 1891. There was not due appellee under the contract on September 16, 1891, more than one car load of jars. On the 19th day of September, 1891, appellant, upon order of appellee, loaded a car with jars, and billed the same to Cincinnati parties. Appellant then had no specifications from appellee not filled. On August 15, 1891, appellee, by letter, extended the time for the delivery of the remainder of jars necessary by the contract. That said time was extended to the making of the first jars by appellant in September following. Appellant delivered the first jars made by him in September, 1891, for which he had specifications. Appellee received jars from appellant from June 20 to September 19, 1891. On August 6th appellee received from appellant under the contract a less number of jars than named in specifications, without objection on appellee's part, saying appellee would fill remainder of such specifications from jars it had at Muncie. Not including order of August 6th, appellant had no specifications for jars from appellee from August 1, 1891, to September 11, 1891. Appellant was delayed in filling specifications of September 11th until September 19th by reason of a change made by appellee on September 16th in the specifications of September 11th. Appellant delivered 862 quart jars and 324 half-gallon jars between April 19, 1891, and October 1, 1891. Quart and half-gallon jars could not be purchased in Fairmount in car-load lots on August 1st. The price of such goods in market nearest Fairmount, August 1st, in car-load lots, was \$8 per gross for quart, and \$11 per gross for half-gallon, jars. Prior to August 1, 1891, appellant notified appellee of its inability to furnish entire amount named in contract. Appellee agreed to accept jars of appellant to be delivered on the contract after August 1st. At no time between April 16th and August 1st had appellant enough jars to fill the contract. On August 1st appellant had less than — car loads of jars on hand. Between August 1st and September 25th appellant made two or

more car loads of quart jars. After September 25th appellant did not notify appellee of its readiness to deliver any jars. The jars shipped to Cincinnati parties were received too late for the then market, and were afterwards returned to appellee. The market price of those jars on the day they were loaded at Fairmount was \$8 per gross. "Interrogatory 26. If the jars were not delivered by the Fairmount Glass Works to the plaintiff by August 1, 1891, what amount of damage was sustained by the plaintiff as the direct result of such nondelivery? Answer. None." The special verdict concludes: "If, upon the foregoing facts, the law is with the plaintiff, we find for the plaintiff, and assess his damages at six hundred and fifty-two dollars."

If appellee is entitled to any damages, it must be by reason of the default of appellant to furnish jars after August 1st; for it is expressly found that no damage resulted by reason of the failure to deliver the jars by August 1st. The parties had the right to extend the time within which the contract should be filled, and this the verdict shows was done. The verdict shows, not only that there was an agreement to extend the time, but that both parties afterwards acted upon this agreement. The time was extended until the making of the first jars, in September. But, even then, appellant was only to furnish such jars for which appellee had given specifications. And the verdict expressly finds that when jars were made in September appellant furnished and shipped under the contract all jars for which specifications and directions had been given by appellee. And it further appears from the verdict that appellant at no time failed to furnish and deliver to appellee jars at such times and in such quantities as directed, and for which specifications were furnished by appellee. It is true that on August 6th appellant furnished a less number of jars than named in the specifications, but this number was received under the contract, and without objection, and with the statement by appellee that it would fill the remainder of the specifications from jars appellee had. It is also true that an order given September 11th was not filled until September 19th, but this delay was by reason of a change made by appellee on the 16th of September in the specifications.

The original contract provided for the delivery of the goods by August 1st. The old contract remained in force after that date, except as to the time for the delivery of the goods. The respective duties of the parties under the contract, as extended, were not different from those under the contract before the extension. It still remained the duty of appellee to place specifications for jars when wanted, and it was the duty of appellant to furnish jars only upon specifications. The burden was upon appellee to show a failure on appellant's part to comply with this contract as extended, and this the verdict fails to

do. It appears appellant did furnish all goods for which specifications were given, and, so far as the verdict goes, appellant may have been ready to furnish all the remainder of the goods at any time under the contract as extended.

The formal conclusion of the verdict, fixing the amount of the damages, is inconsistent with the finding that no damages were sustained by reason of the failure to deliver the goods by August 1st, and it has been held that such a conclusion is not to be regarded as a finding, and cannot be considered by the court in determining whether the law on the facts found is with the plaintiff or defendant. See *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, and 48 N. E. 788; *Turnpike Co. v. Overman*, 19 Ind. App. 309, 48 N. E. 874. Taking the special verdict as a whole, we can but conclude that it fails to find facts entitling appellee to damages, and that the court erred in sustaining appellee's motion for judgment. Judgment reversed, with instructions to render judgment in appellant's favor on the special verdict.

(21 Ind. App. 152)

MANN v. BARKLEY.

(Appellate Court of Indiana. Nov. 16, 1898.)

NEW TRIAL—GROUNDS—PLEADINGS—REFUSAL TO REINSTATE—LANDLORD AND TENANT
—APPEAL—DISCRETION.

1. The failure of a complaint to state a cause of action is no ground for a new trial.
2. A refusal to reinstate a cause after dismissing an appeal therein from a justice's court is no ground for a new trial.
3. A lease filed as an exhibit with a complaint to recover possession of the leased premises cannot be considered in determining the question as to the sufficiency of the complaint.
4. A refusal to reinstate a cause after dismissing an appeal therein from a justice's court for failure to file an additional bond will be sustained, in the absence of an abuse of discretion, where there was conflicting evidence as to whether appellant had used diligence in attempting to procure the bond within the prescribed time.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by Ida D. Barkley against Etta J. Mann in a justice's court. From a judgment for plaintiff, defendant appealed to the superior court, where the appeal was dismissed, and she again appeals. Affirmed.

Thos. Hanna, for appellant. McBride & Denney, for appellee.

BLACK, J. The appellee, as landlord, brought her action against appellant, as tenant, before a justice of the peace, for possession of certain leased premises alleged to be unlawfully held over by the appellant after the expiration of the tenancy, and for damages for the detention. The justice rendered judgment for the appellee; adjudging that she should recover possession of the premises, with a certain sum of money and costs. From this judgment the appellant ap-

pealed to the court below, where it was ordered that the appellant within 15 days file an additional bond in the sum of \$200, with approved surety. On the 3d of April, 1897, the court, for failure of the appellant to comply with said order to file an additional bond, dismissed the appeal, and rendered judgment that the appellant take nothing by her appeal herein, and that the appellee recover her costs. On the 13th day of April, 1897, the appellant filed her motion to set aside the judgment of dismissal and to reinstate the cause, and tendered her additional bond. In support of this motion the appellant filed a number of affidavits, and counter affidavits were filed by the appellee. The court overruled the appellant's motion to set aside its judgment of dismissal and to reinstate the cause. A motion of the appellant thereafter filed for a new trial was overruled. In this motion the appellant stated as causes for a new trial (1) that the court erred in overruling her said motion to reinstate the cause; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) that the judgment of the court is contrary to law. In the assignment of errors are three specifications: (1) That the court erred in overruling the motion for a new trial; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) that the court erred in overruling appellant's motion to reinstate the cause, as is set out in the motion for a new trial. We may consider these specifications in their own order.

As to the second and third causes stated in the motion for a new trial, they must be disposed of by saying that neither of them constitutes a cause for a new trial recognized by law in any case. The judgment of the court below, which the appellant sought to set aside, was not a judgment upon the merits of the cause, but one of dismissal of an appeal from a justice of the peace. An appeal from a justice, not being for the correction of errors, but for the trial of the cause de novo upon its merits, vacates the judgment. *Britton v. Fox*, 39 Ind. 369. Among the general statutory provisions relating to justices of the peace, it is provided (section 1501, *Horner's Rev. St. 1897*; section 1569, *Burns' Rev. St. 1894*) that the appeal shall not be dismissed for the insufficiency of the appeal bond, if the appellant will file a sufficient bond, to the acceptance of the court to which the appeal is taken. It is also provided (section 1504, *Horner's Rev. St. 1897*; section 1572, *Burns' Rev. St. 1894*): "When an appeal is dismissed by the court, such facts shall be certified to the justice by the clerk, and such judgment shall stand on the justice's docket as if no appeal had been taken." For the removal of a tenant holding over, special statutory provision is made. In such an action before a justice an appeal lies under the same regulations and restrictions as in other cases before justices; and an appeal bond, securing damages, if any, and costs, and the

prosecution of the appeal, must be given by the appellant. *Horner's Rev. St. 1897*, § 5234 (*Burns' Rev. St. 1894*, § 7115). The appeal supersedes proceedings in the justice's court. But if judgment before the justice shall have gone for the plaintiff, and the defendant appeal, and his appeal is dismissed, the clerk shall certify such dismissal to the justice, who shall issue process as if no appeal had been taken. *Horner's Rev. St. 1897*, § 5235 (*Burns' Rev. St. 1894*, § 7116). Here there was no trial in the court below upon the merits. There was a hearing of a motion to require an additional appeal bond, which the court sustained, and thereupon the court ordered the filing of such a bond within 15 days. No error is assigned of this action of the court. Thereafter, upon failure to comply with such order, the court, for such failure, dismissed the appeal. Ten days afterwards the appellant moved to set aside the dismissal and to reinstate the appeal. This motion was heard upon affidavits, and was overruled. The only decision upon the merits of the cause of action stated in the complaint is that standing upon the docket of the justice. The motion for a new trial must be regarded as an application for a new hearing of the motion to set aside the judgment of dismissal, and to reinstate the cause in the court below. A motion for a rehearing or a new trial of a motion, if proper practice, would be regarded as well taken simply on the ground that the court erred in overruling the motion, without stating wherein the decision upon the motion was erroneous. The question could, however, be presented by taking an exception to the ruling of the court upon the motion, and saving and presenting the motion and the evidence heard thereunder, consisting wholly of affidavits and exceptions to the ruling, by a bill of exceptions, and then, on appeal, assigning such as error. It would seem that there was no error in overruling the motion for a new trial. The appeal was taken from a judgment of dismissal of an appeal from a justice, which the court refused to reinstate on motion, and was not an appeal from a judgment taken in the court below upon the merits of the cause. The effect of the judgment is to reinstate the suspended judgment on the docket of the justice.

It has been denied in argument that an assignment that the complaint does not state facts sufficient to constitute a cause of action may properly be made in such case. This question need not be decided. It is not contended that the complaint is insufficient for any reason except that of an alleged disagreement between the complaint and a written instrument referred to in argument as a lease, which was filed with the complaint as an exhibit. But in such proceedings, brought by a landlord to recover possession of leased premises from his tenant unlawfully holding over, the lease is not the foundation of the action; and, though filed with the complaint

as an exhibit, it cannot properly be examined in considering the question as to the sufficiency of the complaint. *Whipple v. Shewalter*, 91 Ind. 114.

It is also suggested that we should disregard the last specification in the assignment of errors, that the court erred in overruling appellant's motion to reinstate the cause, as is set out in the motion for a new trial, because of the closing portion of the specifications referring to the motion for a new trial. While the intention, perhaps, is not as definitely indicated as would be desirable, we have deemed it proper to examine the affidavits set out in the bill of exceptions. Each party filed at different times a large number of affidavits, wherein, by way of asserting due diligence on the one hand, and denying it on the other hand, there was developed some controversy concerning the purport of interviews between opposing attorneys out of court. It would serve no useful purpose to set forth the conflicting statements of the affidavits. The reinstatement of an appeal under such circumstances must be treated as largely within the discretion of the court before which the proceedings were had. We cannot say that the court abused its authority in deciding the conflict in the affidavits submitted at the hearing of the motion to reinstate the appeal. Judgment affirmed.

PHENIX INS. CO. v. MOFFITT.

(Appellate Court of Indiana. Nov. 16, 1895.)

APPEAL—LAW OF THE CASE—INSURANCE POLICY—ACTION BY ASSIGNEE.

1. A decision on appeal holding a complaint defective for want of certain averments in effect holds it sufficient in all other respects, and, on an issue of the sufficiency of an amendment made pursuant to the decision, it becomes the law of the case.

2. In an action on a policy, an averment by plaintiff, claiming to have purchased the property and policy before the fire, that insured owned it when the policy was issued, and was in possession at the time of the fire, does not aver ownership or an insurable interest, and is hence insufficient.

Appeal from circuit court, Marion county; H. C. Allen, Judge.

Action by Jane Moffitt against the Phenix Insurance Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Chambers, Pickens & Moores, for appellant. W. V. Rooker, for appellee.

COMSTOCK, J. Appellee brought suit against appellant in the Marion circuit court on the 6th day of March, 1894. The complaint was in three paragraphs. A demurrer to each paragraph was sustained. Appellee refused to amend, and appealed to this court. The action of the lower court was sustained on the 16th day of November, 1895, as to the first and second paragraphs; overruled as to the third. The case is reported in 11 Ind.

App. 233, 38 N. E. 835. On the 19th day of March, 1895, an amended complaint was filed in said Marion circuit court, in three paragraphs. Appellant filed a demurrer to the first and second paragraphs, and moved the court to make the third paragraph more specific by showing clearly and distinctly who was the owner of the property destroyed by fire at the time the same was so destroyed. Said demurrers and motion were each overruled, and exceptions properly taken, and the case was put at issue by general denial. A trial by jury resulted in a verdict in favor of appellee for \$747. With its general verdict, the jury returned answers to interrogatories. The court overruled appellant's motion for a new trial, and rendered judgment on the verdict against appellant for \$747. The assignments of error challenge the actions of the court in overruling appellant's demurrers to the several paragraphs of the complaint, in overruling its motion to make the third paragraph more specific, as stated in the motion, and overruling its motion for a new trial.

The objections made by appellant's learned counsel to the first and second paragraphs of the complaint are that there is no sufficient averment of the assignment of the policy by Rooker to Moffitt, nor of the assent of the company to such assignment; that there is no averment that the policy was transferred by delivery from Rooker to Moffitt; no averment that the company consented to the assignment from Rooker to Moffitt, as provided for in the policy; no averment showing that a new contract was made between Moffitt and the defendant company whereby said company became liable to Moffitt upon said policy. The facts as alleged in the first paragraph are, in substance, that on the 9th day of January, 1893, the defendant (appellant), for value, executed its policy of insurance whereby it agreed to indemnify one F. B. Rooker against loss or damages by fire to an amount not to exceed the actual cash value of the property described in the policy, and in no event to exceed \$600 on said Rooker's 1½ story frame dwelling occupied by the assured, and \$200 on his frame barn, situate on certain described real estate in Hamilton county, Ind.; that on the 1st day of March, 1893, Rooker sold to the plaintiff the premises and property described in said policy; that, at the time of said sale, the defendant was notified that the plaintiff had purchased the property, and gave its consent thereto; that, at the time such notice was given, the defendant had the policy in its possession; that on the 29th day of March, 1893, the dwelling house, while still occupied by Rooker, was totally destroyed by fire originating from causes unknown; that the actual cash value of said house immediately preceding its destruction was \$1,200; that, within six days after such loss, said defendant was orally notified thereof by plaintiff; that, upon such notice being given, defendant

immediately repudiated its previous consent given to said transfer, and gave as its reason therefor that said consent was not expressed in writing, and declined to treat further with plaintiff concerning said loss; that the plaintiff has performed and offered to perform all and singular the duties and obligations imposed upon said Rooker and upon the plaintiff under the terms and conditions of said policy; that the defendant wrongfully declines and has refused to adjust or pay such loss. Upon the former appeal of this case, in passing upon the sufficiency of these paragraphs, the court said: "To be effective as an assignment or a new contract of insurance between the appellant and appellee, the consent must have been given with the knowledge that it was the purpose and agreement of Rooker and Moffitt to transfer the insurance as well as the property. For want of such averments, these paragraphs must be held insufficient." The averments in the amended complaint manifestly made to meet this holding of the court are as follows: "(1) That on, to wit, the 1st day of March, 1893, said Rooker sold to this plaintiff the premises and property described in said policy; that it was then and there understood and agreed by and between said Rooker and this plaintiff that said sale carried with it to this plaintiff every interest, right, and benefit of the said Rooker in, to, under, and by virtue of said policy, and that the same should be and were transferred to this plaintiff as a part of the transfer of title; that, at the time of said sale, the said defendant company was notified said plaintiff herein had purchased said property, and that such purchase carried with it the said interests, rights, and benefits of said Rooker in, to, under, and by virtue of, the said policy, upon which notice being given, the said defendant company gave its consent to said transfer of title, and insured and retained to itself the remaining portion of the premium paid on said policy; that, at the time of said notice, said defendant had the said policy in its possession." The court, having held upon the former appeal that these paragraphs were defective for want of averments supplied by the foregoing allegations, in effect held that they were in all other respects sufficient. This decision must remain as the law of the case, and we must therefore hold that the lower court did not err in overruling the demurrers to the first and second paragraphs of the complaint.

The motion to make the third paragraph show clearly and distinctly who was the owner of the property when it was destroyed by fire should have been sustained. It has been held in numerous decisions by the supreme and this court that a complaint upon a policy of insurance for damage or loss by fire is bad that does not show ownership or an insurable interest in the property at the time the fire occurs. *Assurance Co. v. McCarty* (Ind. App.) 48 N. E. 265, and authori-

ties there cited. This paragraph avers that Rooker, to whom the insurance was granted, was the owner of the property at the time the policy was issued, and that he occupied it at the time of the fire. These allegations fall short of an allegation of ownership at the time of the fire, or of an allegation that he then had an insurable interest in it.

We do not deem it necessary to pass upon the questions discussed under the motion for a new trial. They may not arise upon another trial. The death of appellee having been suggested since the submission of this cause, judgment is rendered as of the term when the submission was made. Judgment reversed, with instructions to the trial court to sustain appellant's motion to make the third paragraph more specific.

(21 Ind. App. 167)

STATE v. WABASH PAPER CO.

(Appellate Court of Indiana. Nov. 17, 1898.)

NAVIGABLE RIVERS—PUBLIC HIGHWAYS—JUDICIAL NOTICE—NUISANCE—PUBLIC PLACES.

1. A navigable river is a public highway.
2. Act Cong. March 26, 1804, § 6 (2 Stat. 279), provides that all navigable rivers within Indiana territory shall be deemed to be and remain public highways. Newspapers and other evidence show that the Wabash river was navigable in 1817 for some 450 miles from its mouth. The legislature by its acts has recognized that such river is navigable in its course through Wabash and Miami counties. *Held* sufficient to show that the Wabash river is a navigable stream, and hence a public highway, for 450 miles from its mouth.
3. Judicial notice will be taken that Wabash and Miami counties are less than 400 miles from the mouth of the Wabash river, and that certain cities and towns in said counties are situated on the banks of said river.
4. Evidence under an indictment for committing a nuisance in a "public place" is sufficient where it shows pollution of a navigable river, which is a public highway, as a public highway is *prima facie* a "public place."

Petition by appellee for rehearing. Overruled.

For former opinion, see 48 N. E. 653.

WILEY, J. The appellee has filed a petition for a rehearing, and supported the same in a vigorous brief. While the petition assigns six alleged errors for which a rehearing should be granted, there are in fact but two questions raised and discussed, to wit: (1) That the court erred in holding that the Miami circuit court had jurisdiction; and (2) that the court erred in holding that the indictment was sufficient in matter of form and substance.

On the question of jurisdiction appellee has not, in its brief, thrown any new light, nor cited us to any authority contrary to our holding in the original opinion. We have, however, re-examined the question with considerable care, and we have no doubt but that we reached a correct conclusion, and to that conclusion we strenuously adhere.

We will now notice the second proposition

discussed by the learned counsel for appellee in his brief on the petition for rehearing. Is the indictment sufficient in matter of form and substance? It is earnestly insisted by counsel that the indictment does not state facts which constitute an offense, and he bases this insistence upon the proposition that it is not alleged nor shown in the indictment that the offense was committed in a public place, or that the public were affected thereby. It must be conceded that, if the indictment does not show this, it is bad, and a rehearing should be granted. It was evidently the purpose and intention of the legislature in enacting the statute upon which this prosecution is based to protect the public as far as possible from the dangers, nuisance, and evils arising from the pollution of natural streams of water; and if the indictment does not show upon its face that the Wabash river was a public place at the point where it is charged that the offensive, etc., matter was discharged into the river, and where it was suffered to accumulate, or that the public were affected thereby, then it does not show a violation of the statute, and this prosecution should fail. In support of the contention that the indictment does not state an offense, appellee cites the following cases: *Mains v. State*, 42 Ind. 327; *State v. Houck*, 73 Ind. 37. We do not think these cases support the theory of appellee. In the first case cited, appellant was indicted for keeping a disreputable house, "to the great damage and common nuisance of all the citizens of the state of Indiana." It was not averred in the indictment where the house was situated, except as to the county and state. It was not charged that the house was situated in any public place, as in a city, town, or village, nor near any public street or highway; nor did it allege that any one resided near there, or that they were in the habit of passing thereby. It did not appear that the house was even in the vicinity of any inhabitants. The averment in the indictment that it was to the great damage and common nuisance of all the citizens of the state was a mere conclusion, and the indictment was held bad. In the second case, appellees were indicted for maintaining a slaughter house, to the injury of all the citizens of the state, etc. It not appearing in the indictment that the slaughter house was in a public place, etc., the supreme court held that it did not state any offense. The cases cited differ materially from the one we are here considering. In the indictment before us it is directly charged that the offense was committed by appellee by discharging into the Wabash river, in Wabash and Miami counties, the offensive and noisome substances constituting the nuisance. If the Wabash river is a public highway, then it affirmatively appears in the indictment that the offense was committed in a public place, and to the damage and nuisance of the public. Again, if the Wabash river is a navigable stream, then, under the

authorities, it is a public highway, and a public highway is a public place. By the act of March 26, 1804, § 6 (2 Stat. 279), it was provided by congress that "all navigable rivers, creeks and waters within the Indiana territory shall be deemed to be and remain public highways." It must follow from this act of congress that so much of the Wabash river as was in fact navigable in 1804 must be held navigable now, and to remain a "public highway." In the *Western Gazetteer* for 1817 (page 39) the Wabash river was said to be navigable for keel boats for 400 miles from its mouth; and at page 73 it was said that it was navigable for 470 miles. In 1819 there was a reprint of the *Gazetteer* in Ireland, and at pages 40 and 75 the same statements are made. In the *Indiana Gazetteer*, published in Indianapolis in 1850, at page 21, it was stated that the Wabash river was navigable for 450 miles. In article 4 of the ordinance of 1787 (Rev. St. 1881, p. 1430) it is provided: "The navigable waters leading into the Mississippi and Saint Lawrence and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other state that may be admitted into the Confederacy." It is a matter of public history that the Wabash river was used as a public highway between its mouth at the Ohio river and the portage somewhere between Huntington and Ft. Wayne for many years prior to the time when George Rogers Clark drove the British from Ft. Vincennes by this route up into Canada, February 25, 1778. In the case of *Depew v. Board*, 5 Ind. 8, the supreme court held that the ordinance above cited has been adopted and recognized by congress, and is a valid and subsisting law of the United States. See, also, *Nenderhouser v. State*, 28 Ind. 206; *Coolley, Const. Law*, p. 26. January 23, 1829, the legislature passed an act entitled "An act relative to navigable streams declared highways by the ordinance of congress of 1787." Acts 1829, p. 79. It was there provided: "Every person or persons who shall erect or keep, or who have erected and shall continue to keep, any mill dam or other artificial obstruction across the bed or channel of any stream or river which is navigable, and the bed or channel of which has not been surveyed and sold as land by the United States, shall, upon conviction by indictment, be fined in any sum not less than \$3 nor more than \$500 for every week when such obstruction may be kept and continued." Even as late as 1850 the legislature passed an act authorizing William McDowell, of Adams county, to erect a milldam across Wabash river, in said county. Local Laws 1850, p. 175. This act provided that said dam was "not to exceed six feet in height, with suitable slope or lock so as not to interrupt the navigation of said river, when the river is in the proper state for the same." In *Dawson v. James*,

64 Ind. 162, it was held that the Wabash river was a navigable stream, the bed of which had never been surveyed or sold. Courts take judicial knowledge of the geography of the country, and hence judicially know that Wabash and Miami counties are less than 400 miles distant from the mouth of the Wabash river. We also judicially know that the cities of Wabash and Peru, and other towns in said counties, are situated on the banks of said river.

From what we have said, and the authorities cited, we think it must be held that the Wabash river is a navigable river, and hence a public highway; and, as it is a public highway, it is, under the authorities, a "public place." It was therefore a "public place" where the appellee unlawfully caused and suffered certain offal, filthy and noisome substances, * * * to be collected and remain in * * * the Wabash river," etc., "to the damage and prejudice of the public." A public highway is *prima facie* a public place, and so it has been held. *State v. Morarity*, 74 Ind. 103; *Rosenstin v. State*, 9 Ind. App. 290. 36 N. E. 652; *State v. Berdetta*, 73 Ind. 185. In *State v. Morarity*, supra, appellee was indicted for having been found in a state of intoxication in a "public street, highway, and sidewalk." The court said, "The indictment, in charging that the offense was committed in a public street, shows at least a *prima facie* case." As the offense charged in the case before us is shown by the indictment to have been committed in a public place, it is sufficient to apprise the appellee of what it stands charged, and is a substantial compliance with the statute.

The second count of the indictment is not subject to the objections urged against it, and is, in our judgment, good. Petition overruled.

(21 Ind. App. 157)

STATE v. HERRING.

(Appellate Court of Indiana. Nov. 17, 1898.)

On petition for rehearing. Overruled.

For former opinion, see 48 N. E. 593.

WILEY, J. The same questions are presented and discussed as those in *State v. Wabash Paper Co.* (this day decided, on petition for rehearing) 51 N. E. 949; and, upon the authority of that case, the petition is overruled.

(22 Ind. App. 550)

FLICK v. STATE.¹

(Appellate Court of Indiana. Nov. 17, 1898.)

CRIMINAL LAW—LIMITATIONS—PROSECUTION "COMMENCED."

A criminal prosecution is "commenced" by the issuing of a warrant, within the statute requiring that prosecutions for certain offenses shall be commenced within two years after the commission thereof.

¹ Rehearing denied.

Appeal from circuit court, Orange county; John C. Lawler, Judge.

Isom Flick was convicted of carrying concealed weapons, and appeals. Reversed.

Saml. R. Lambdin, for appellant. W. A. Ketcham, Atty. Gen., and Merrill Moore, for the State.

HENLEY, C. J. Appellant was indicted, arrested, tried, and convicted of the offense of carrying concealed weapons. The indictment against appellant was returned by the grand jury at the March term, 1896, of the Orange circuit court; but no notice of the return of the indictment was given appellant, and he was not arrested until May 9, 1898. No warrant was issued for appellant's arrest until May 9, 1898. At the July term, 1898, of said court, appellant appeared and pleaded in abatement that he had continually resided in Orange county since March, 1896, and had not sought to avoid arrest or in any manner concealed his whereabouts, and that the warrant was issued upon said indictment more than two years after the date of the return of said indictment. A special answer, pleading the statute of limitations, averring all of said facts, was also filed by appellant. To each of these answers the lower court sustained a demurrer for want of facts, and it is these rulings of the lower court which are complained of by appellant.

Appellant's assignments of error present this question: When, within the meaning of the statute, does the prosecution of a criminal action begin? By the statutes of this state, the prosecution for an offense of this character must be commenced within two years after its commission; but there is no statute providing what shall be considered the commencement of a criminal prosecution. It is provided in regard to civil actions that "a civil action shall be commenced by filing, in the office of the clerk, a complaint, and causing a summons to issue thereon, and the action shall be deemed commenced from the time of issuing the summons." Burns' Rev. St. 1894, § 318 (Rev. St. 1881, § 314). It is provided by statute that, "when an indictment is found, the court may direct the clerk to issue a warrant returnable forthwith. If no order is made, the clerk shall issue a warrant upon all indictments within ten days after the close of the term." Burns' Rev. St. 1894, § 1750 (Rev. St. 1881, § 1681). It is also provided by section 1751, Burns' Rev. St. 1894 (section 1682, Rev. St. 1881), that the sheriff shall execute the warrant immediately upon its delivery to him. In this case it is apparent that no attempt was made to obtain jurisdiction of the person of the accused until long after the cause of action against him was barred by the statute of limitations. It is true that the indictment was returned within the two years, but no warrant was issued for appellant's arrest until more than two years had elapsed, even if we can count from the time allowed by the statute; that is, 10 days after the close of the

term at which the indictment was returned. The statute in regard to issuing the warrants upon all indictments, not ordered issued forthwith by the court, is mandatory. In commenting on this question, it was said by Gillette, in his work on Criminal Law, at section 53: "It will be noticed that the above statutes require proceedings to be 'commenced' within a certain time after the commission of the offense. As to what is a commencement has not been directly determined, but it is the opinion of an eminent law writer, upon a review of the English authorities, that upon the filing of an affidavit before an examining magistrate, and the issuance of a warrant, the proceedings may be deemed commenced." Mr. Bishop is the eminent law writer referred to in the above quotation. Bish. St. Crimes, § 261; *Foster v. State*, 38 Ala. 425; Reg. v. Austin, 1 Car. & K. 621. It is the universal rule that criminal statutes shall be construed strictly as against defendants, and liberally in their favor. A civil action is deemed commenced from the time of issuing the summons. Shall not a criminal action be deemed commenced from the time of the issuing of the warrant? The process in both instances is to obtain jurisdiction of the person of the defendant. The proceedings of a grand jury are secret. The jurors themselves and all the officers of the state are sworn to secrecy in regard to all matters brought to their attention. It would be manifestly unfair and unjust, and not within the meaning or spirit of the law, to hold that an indictment might be returned against a person, and be allowed to remain in the clerk's office in the county where the defendant resides, without a warrant being issued thereon, until the crime with which defendant is charged is barred by the statute of limitations, and then that the defendant be held to answer for the crime so charged. It is further provided by statute in this state that indictments against persons not in custody, and who have not given bail, are in the keeping of the clerk, and cannot be inspected by any person except the clerk, or his deputies, the court, and the prosecuting attorney, "until after the arrest of the defendant," and that if a grand juror, prosecuting attorney, clerk, judge, or other officer discloses the fact that an indictment has been found, until after the defendant is arrested, such action is punishable as a contempt. Burns' Rev. St. 1894, §§ 1744, 1745 (Rev. St. 1881, §§ 1675, 1676).

Now, it is plain to be seen that if the issuing of a warrant could be withheld for 2 years, and the operation of the statute of limitations be suspended, by simply returning an indictment, and secretly charging defendant with a crime, the issuing of the warrant could in the same way be withheld 10 or 20 or any number of years, and defendant be liable to be called upon to defend himself against a criminal charge, of the existence of which he was not aware, and which, by lapse of time,

might become difficult to disprove. The law provides that public officials charged with certain duties can be punished for a failure to discharge those duties. Conspiracy to which the defendant was a party, absence from the state, concealment to avoid arrest, or any fraudulent action to which the defendant was a party, to prevent the officers from doing their duty, would suspend the operation of the statute of limitations. The statutes governing this cause are plain. Their rigid enforcement would oppress no one. It is the failure to enforce the law, not its enforcement, that is oppressive. We can arrive at no other conclusion in this case than that the commencement of the proceedings dated from the issuing of the warrant. The action was barred by the statute of limitations. The demurrer to the special answer, pleading the statute of limitations, ought to have been overruled. Judgment reversed, with instructions to the lower court to overrule the demurrer to appellant's answer.

(21 Ind. App. 177)

STATE ex rel. WHISTLER v. HEROD.

(Appellate Court of Indiana. Nov. 18, 1898.)

APPEAL—DEMURRERS—SUFFICIENCY OF TRANSCRIPT—DISMISSAL.

An appeal will be dismissed where the transcript merely shows that demurrers were sustained and exceptions taken, there being no final judgment from which an appeal will lie.

Appeal from circuit court, Boone county; J. A. Abbitt, Special Judge.

Action by the state, on the relation of Thomas Whistler, against John J. Herod. Demurrers to the complaint were sustained, and plaintiff appeals. Dismissed.

A. J. Shelby and C. M. Zion, for appellant. Ralston & Keefe, for appellee.

BLACK, J. The question earnestly argued by counsel is not properly before us. The rulings of the court sustaining demurrers of the appellee to the complaint of the appellant are assigned as error. In the transcript of the record filed in this court, such rulings, with the exceptions thereto of the appellant, are shown, but no further proceedings are set forth in the transcript. What final judgment, if any, was rendered, does not appear. Sustaining a demurrer to a complaint is not a final judgment, and from such ruling alone, without the further action of the court, an appeal will not lie. *Brannock v. Stocker*, 76 Ind. 573; *Slagle v. Bodmer*, 58 Ind. 465; *Thomas v. Railroad Co.*, 139 Ind. 462, 39 N. E. 44; *Gray v. Singer*, 137 Ind. 257, 36 N. E. 209, 1109; *Champ v. Kendrick*, 130 Ind. 545, 30 N. E. 635; *City of Jeffersonville v. Tomlin*, 7 Ind. App. 681, 35 N. E. 29; *Masten v. Foundry Co.*, 19 Ind. App. 633, 49 N. E. 981; *Foster v. Lindley* (Ind. App.) 50 N. E. 867. Appeal dismissed.

(21 Ind. App. 186)

UNITED STATES EXP. CO. v. HAMMER.
(Appellate Court of Indiana. Nov. 22, 1898.)

CARRIERS—PACKAGE SENT IN CARE OF THIRD PERSON—RIGHT OF ADDRESSEE—REPLEVIN—DEMAND.

An express package was directed to one person "in care of" another, and the latter declined it. The addressee demanded it of the express company, which refused, although it knew he was the person addressed. The company had no claim on it. *Held*, that the addressee could maintain replevin for the package, since the one in whose care it was sent had no interest in it.

Appeal from circuit court, Marion county; H. C. Allen, Judge.

Action by Royal C. Hammer against the United States Express Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Baker & Daniels, for appellant. Marshall & Crapsey, for appellee.

WILEY, J. This was an action in replevin, commenced before a justice of the peace, wherein appellee was plaintiff and appellant was defendant. The case was tried in the justice's court, resulting in a judgment for appellee. Upon appeal to the court below, the facts were agreed to, adopted by the court as its special finding of facts, upon which conclusions of law were stated, and judgment rendered thereon in favor of appellee. The facts found are as follows: That appellant was a common carrier of goods for hire; that it had and maintained an office in the city of Indianapolis, and at the town of Ray, in Steuben county, Ind.; that in 1895 one Teeters was indebted to appellee in the sum of one dollar, and sent said sum by appellant company, as a common carrier, from Ray, Ind., to Indianapolis, in an envelope package, addressed as follows: "For R. C. Hammer, Indianapolis, Ind., in care of American Express Co.," that, on the day said package reached appellant's office at Indianapolis, it tendered the same to the American Express Company, at its office in said city; that said American Express Company refused to accept the same, "with the statement that Royal C. Hammer was not employed by or connected with said American Express Company"; that the American Express Company made no claim to the said package; that appellee learned that said package was in the possession of appellant, at its office in Indianapolis, and called at said office, and requested that it be turned over to him, which was refused; that thereupon he made a formal demand for the package, which was refused; that said package contained one dollar; that it was not taken for a tax, assessment, or fine pursuant to statute, or seized under an execution or attachment against the property of appellee; that the charge for transmission of said package had been prepaid; that appellant had no claim or demand upon the same on account

of any service rendered in connection with said package; that the agent of appellant at Indianapolis, upon whom appellee made demand for said package, knew that appellee was the person named upon the address inscribed thereon; that appellee was kept out of the possession of the package six days, to his damage, etc. As conclusions of law, the court stated: (1) That appellee was entitled to the delivery to him of the property described; (2) that the detention of said property from appellee was unlawful; (3) that appellee was entitled to possession of the property and five dollars damages for its detention. To each conclusion of law, appellant excepted. Upon the special findings and conclusions of law, judgment was rendered for appellee.

The appellant has assigned as error that the court erred in each of its conclusions of law. In their brief, the learned counsel for appellant say: "This appeal presents a single question of novel impression, and it is a question of importance, not only to common carriers, but also to the public. Broadly stated, that question is this: What are the rights of each of the parties concerned in a shipment by an express company, which is consigned to one person 'in care of' another? It seems to us that, on principle, this question can be easily answered. In the shipment of goods, both the carrier and the consignee have rights which courts will respect and protect. The duty of the common carrier is to carry safely the goods intrusted to it for shipment, and to deliver to the consignee within a reasonable time. It is the duty of the consignee to receive the goods, when tendered, and to comply with all the reasonable rules of the carrier regulating such shipment and delivery. These are general propositions, and need not here be enlarged upon. If the American Express Company had received and taken into its possession the property in controversy, when tendered by appellant, it might have been a sufficient delivery, and might have relieved appellant from any further responsibility or liability. In fact, this is the rule, and so held in many cases. We cite the following: *Ela v. Express Co.*, 29 Wis. 611; *Russell v. Livingston*, 16 N. Y. 515. But, because of this rule, it does not follow that such delivery is the only good or proper delivery that would relieve the carrier from liability.

The fact does appear from the special findings that the American Express Company refused to receive the package when tendered, and that it gave its reasons for such refusal. It further appears that the package was addressed to appellee; that it belonged to him; that appellant knew he was the identical person to whom it belonged; that he demanded that it be delivered to him; and that he was entitled to its possession. From these facts, the court below could not have reached a different conclusion than that announced. Counsel for appellant cite the case of *De-*

spatch Co. v. Merriam, 111 Ind. 5, 11 N. E. 954, in support of the proposition that, if a common carrier delivers a consigned package to the wrong person, such carrier is liable for conversion. This is true, but it has no application here; for it abundantly appears that the package belonged to appellee, and that he was entitled to its possession. Here appellant refused to deliver the property to the right person after a proper demand had been made for its delivery. Counsel also say that the rule prevails in this state that the law presumes that the consignee is entitled to the possession of the property consigned to him, but that this presumption will not prevail against facts which show that there is another party in interest, and cite *Pennsylvania Co. v. Holderman*, 69 Ind. 18, *Pennsylvania Co. v. Poor*, 103 Ind. 554, 3 N. E. 253, *Cleveland, C., C. & St. L. R. Co. v. Moline Plow Co.*, 13 Ind. App. 225, and *Express Co. v. Dickson*, 94 U. S. 549, in support of their contention. It is the law as held in the last two cases cited that where the facts show that one, other than the consignee, is a party in interest, the presumption does prevail that the consignee is entitled to the possession of goods shipped, after they arrive at their destination; yet the rule can have no application here, because there is not even a pretense that the American Express Company had any interest in the property, while, on the contrary, it distinctly appears that it did not have any interest, and that appellee was the sole owner of and entitled to the possession of the package of goods. When it clearly appears, as it does in this case, that the carrier refuses to deliver the goods shipped to the owner and real party in interest, with a knowledge of the fact that the party claiming the goods is the identical person to whom they are addressed and consigned, the right of the owner to the possession is removed from the possibility of doubt. Counsel for appellant say: "We concede that the question in this appeal is a new one, and, so far as we have been able to discover, there is no precise precedent in this state or any other state of the Union." With all due deference to counsel, we are not surprised that a case identical to this has not found its way into the books, for the principle here involved is not new, but has been long settled. The real question in the case is, who was entitled to the possession of the package in controversy at the time the action commenced? The facts found by the court resolve this inquiry in favor of appellee, and judgment was properly rendered for him. The judgment is affirmed.

(21 Ind. App. 184)

PIERCE v. PIERCE.

(Appellate Court of Indiana. Nov. 22, 1898.)
WILLS—WIDOW—ELECTION—STATUTORY ALLOWANCE.

A widow accepting the provisions of her deceased husband's will, making no provision

for her, other than a devise of a life estate in his lands, where there is no declaration that the provision is in lieu of her rights under the will, is not barred from receiving the statutory allowance of \$500.

Appeal from circuit court, Montgomery county; Jerre West, Judge.

Action by Delbert W. Pierce, administrator of the estate of Rhoda A. Pierce, deceased, against Delbert W. Pierce, executor of the will of James B. Pierce, deceased, to recover a balance due plaintiff's intestate for the statutory allowance payable to her as the widow of defendant's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

Ristine & Ristine, for appellant. Wright & Seller, for appellee.

HENLEY, C. J. It appears from the record in this cause that one James B. Pierce died testate in Montgomery county, Ind., the owner in fee of real estate in said county of the value of \$4,930, and personal estate of the value of \$542.79, all of which was disposed of by his will. Appellee was named in said will as the executor. The said will was duly probated, and appellee qualified as such executor. Afterwards, and on the 25th day of January, 1897, Rhoda A. Pierce, the widow of said James B. Pierce, died intestate, and the said Delbert W. Pierce was appointed administrator of her said estate. After the death of said James B. Pierce, and during the lifetime of his said widow, appellant, as executor of the will of said James B. Pierce, paid to his said widow the sum of \$121.54, as part payment of her statutory allowance of \$500. This action was begun by the administrator of said widow, Rhoda A. Pierce, against the estate of her deceased husband, to recover the balance due said widow on the \$500 allowed by statute. The said claim was filed in regular form in the office of the clerk of the circuit court, and was transferred to the issue docket for trial. Appellant answered in two paragraphs. The first paragraph is based entirely upon the provisions of the will of James B. Pierce, deceased; it being contended by appellant that the devises in said will to appellee's intestate were intended to be, and were, in lieu of her statutory allowance. The will of James B. Pierce is set out in full in the answer. The second paragraph of answer was a general denial. The lower court sustained a demurrer to the first paragraph of answer. There was a trial and finding for appellee. The ruling of the lower court in sustaining appellee's demurrer to appellant's first paragraph of answer is the only question raised by the assignment of errors.

That item of the will of James B. Pierce which made provision for his wife, and which covers all the bequests to her, was as follows: "I give and devise to my wife, Rhoda A. Pierce, for and during her natural lifetime, the following described real estate, situate in said county and state, viz. [describing the land], containing ——— acres, to have and to hold the same to the said Rhoda A. Pierce for and dur-

ing her natural lifetime; and upon the decease of the said Rhoda A. Pierce the land so devised to her shall revert, and become the property of my children and heirs at law." The widow, in her lifetime, accepted the provisions of the will. This court has said in the case of *Richards v. Hollis*, 8 Ind. App. 353, 35 N. E. 572, that "the general rule is that when it clearly appears from the will, either by express statement or otherwise, that the provisions therein made for the wife are intended to be in lieu of that made by the law, she must elect between the will and the law, and cannot have the provision made by both; but this rule should not have an unreasonable, arbitrary, and technical construction against the widow." *Snodgrass v. Meeks*, 12 Ind. App. 70, 38 N. E. 833; *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896; *Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285. In this case the husband did make provision in his will for his widow, but he did not in terms declare that such provision should be in lieu of her rights under the law, and there is nothing in the will in this case inconsistent with the widow's claim to take both the statutory allowance of \$500 and the provision made for her in the will. We find no error in the record. Judgment affirmed.

(21 Ind. App. 191)

STORMS et al. v. STORMS.

(Appellate Court of Indiana. Nov. 23, 1898.)

FORECLOSURE—CONVEYANCE TO AVOID FORECLOSURE—PROMISE TO REPAY—CONSIDERATION—EVIDENCE—BURDEN OF PROOF—HIGHEST OBTAINABLE PRICE—MARKET VALUE—PRESUMPTION—APPEAL AND ERROR.

1. Pending foreclosure, the mortgagor conveyed to junior lienors by warranty deed, to avoid the expense of foreclosure; and the latter agreed to use all efforts to sell the land at the best price, and to repay the mortgagor all sums left after payment of the liens. *Held*, that the promise was based on a sufficient consideration.

2. They permitted the foreclosure to go to sale, and one of them bought in the land; and, without seeking to get any higher price, they sold it to a third person for the amount of the liens, which was considerably less than the market value. *Held*, in an action for failure to secure the market value, that the burden was on defendants to show that by reasonable efforts they could not obtain a higher price than was obtained.

3. Where mortgagees accepted a conveyance to avoid expenses of foreclosure, agreeing to use due efforts to sell at the highest possible price, and repay to the mortgagor the balance left after payment of liens, in the absence of showing of any other price as the best that could be obtained by reasonable efforts, it was not error for the court, in an action for failure to secure such price, to assume the market value proved as the price which might have been obtained.

Appeal from circuit court, Tippecanoe county; W. L. C. Taylor, Judge.

Bill by Sarah C. Storms against Osborne J. Storms and others. There was a decree for plaintiff, and defendants appeal. Affirmed.

R. P. Davidson, for appellants. Kumler & Gaylord, for appellee

BLACK, J. The appellee, Sarah C. Storms, sued the appellants, Osborne J. Storms, Allen Storms, and Nathan E. Storms. A demurrer to the complaint for want of sufficient facts was overruled, and issues were formed, which were tried by the court. A special finding was rendered, and the appellants excepted to the conclusions of law therein. A motion for a new trial having been overruled, the court rendered judgment upon the special finding, in favor of the appellee, for \$640.73. It is said in the brief for the appellants that the facts are stated in the special finding substantially as averred in the complaint. We may therefore first determine whether the court erred in its conclusions of law upon the facts. It was found, in substance, that the appellee, with her husband, on the 18th day of November, 1882, executed to one William Wallace a mortgage on certain land described (in this state), owned by the appellee, to secure the payment of a note executed by the mortgagors to the mortgagee for \$1,600, and on the 30th of September, 1889, the appellee and her husband executed to one John Storms a mortgage on said real estate to secure the payment of a note executed by the mortgagors to the mortgagee for \$629.34; that on the 31st of July, 1891, said Wallace commenced suit in the court below to foreclose his mortgage; that on the 22d of September, 1891, while the appellee was still the owner in fee simple and in possession of said real estate, she, with her husband, conveyed it by warranty deed to the appellants, who thereupon executed to the appellee their written agreement, which was set out in the finding, and which, after referring to said conveyance, which was stated to be subject to the mortgages and the taxes on the real estate, and after also stating that the conveyance was made to avoid the foreclosure of said mortgages, proceeded as follows: "Now, in consideration of said conveyance to us as aforesaid, we agree to and with said Sarah C. Storms that we will use all due efforts to sell said real estate at the best possible price, and upon the best terms possible, and that we will pay to her, without relief from valuation or appraisal laws, any and all moneys which may remain in our hands after the payment of said two several mortgages, together with the interest that may accrue thereon from this date until the day of sale, and after the payment of the taxes now thereon, and which may accrue before the time of sale. Witness," etc. This was signed by the appellants. It was further found that on the 12th of November, 1891, said Wallace recovered judgment on his said note and mortgage against the appellee for \$1,841.66, and a decree ordering the sale of said real estate to satisfy the same; that on the 26th of December, 1891, the sheriff, under said decree, sold the real estate to the appellant Allen Storms for \$1,945.09, the amount of said judgment and accrued interest and costs, and the sheriff executed to said

Allen Storms a certificate of purchase of said real estate; that afterwards on the same day said Allen Storms, for the consideration of \$2,720, assigned said certificate to one William J. Inskip, and agreed to deliver to him within 10 days a proper warranty deed of said real estate, and in pursuance of this agreement the appellants, their wives, and one Susan Storms, who were the heirs and widow of said John Storms, on the 30th of December, 1891, conveyed by warranty deed said real estate to said Inskip; that on the 28th of December, 1892, the sheriff, pursuant to said certificate of purchase and said assignment thereof, executed his deed for said real estate to said Inskip. It was further found: That the appellee conveyed the real estate to the appellants with a view of avoiding a foreclosure of said mortgages, and the attending expenses, and solely upon the terms, conditions, and trust set forth in said contract of September 22, 1891. That said real estate on the 22d of December, 1891, and during the remainder of said year, was of the reasonable cash value of \$3,400, and by due and reasonable efforts on the part of the appellants could have been sold for that sum. That on the 26th of September, 1891, there was owing by the appellee, and due, on account of said Wallace judgment, \$1,945.09; on account of the note and mortgage to John Storms, \$729.34; and on account of taxes, \$39.27; making a total of \$2,713.70. That the only effort made by the appellants, or either of them, to sell said real estate, was the placing of the same for sale in the hands of Throckmorton & Son, who were real-estate agents residing and doing business in the county where the land was situated, and also authorizing two persons named, who were attorneys at law, and not engaged in the real-estate business, and who did nothing in the premises, to assist in the sale. That the appellants on the night of the day on which they received from the appellee said deed, and executed said contract of September 22, 1891, returned to their home, in the state of Illinois, and they did not, nor did either of them, by letter or otherwise, make any personal effort to sell said real estate, nor did they afterwards, by correspondence or otherwise, urge said Throckmorton & Son to endeavor to sell said real estate, nor did they correspond with their attorneys. That the only price fixed by the appellants with Throckmorton & Son at which they would sell said real estate was the total of the amounts owing on account of the Wallace and Storms mortgages, and they did not, nor did either of them, make any effort to sell said real estate for a larger sum. That the appellants did not, nor did either of them, use due efforts to sell the real estate as provided in the contract of September 22, 1891; but they permitted it to be sold by the sheriff to the appellant Allen Storms as aforesaid,

and thereafter conveyed to said Inskip, for a price \$640.73 under its market value. That the appellants have never paid or accounted to the appellee in any way for any money realized from the sale of said real estate, and the only consideration or thing of value which the appellee has received for her said conveyance to the appellants is the release and satisfaction of said two mortgages, and the payment of said taxes. Upon these facts the court stated as its conclusion of law that the appellee was entitled to recover from the appellants \$640.73 and her costs.

It seems to be thought by counsel for the appellants that no consideration is shown for their promise. But in the arrangement for the payment without foreclosure of the mortgage to John Storms, to be effected through this transaction between his heirs, the appellants, and the appellee, the promise of the appellants appears on the face of the writing signed by them to have been made in consideration of the conveyance made by the appellee to the appellants, whereby she relinquished her equity of redemption and her right of possession. Clearly, there was more than the conferring of a mere agency for the sale of the land, with the creation of a naked trust for the simple purpose of enabling the agents to reconvey the land. There was also a promise, supported by a consideration, to use all due efforts to sell at the best possible price, and upon the best terms possible.

It is also urged that the contract does not specify, and the court did not find, what acts of the appellants would have constituted due and reasonable effort, or what should have been done by the appellants, or what acts of theirs would have caused the land to sell for its value, and yet the court took the market value of the land as the basis for measuring the damages. But the appellee having shown a promise of the appellants, supported by a sufficient consideration, to use all due efforts to sell the real estate at the best possible price, and having proved the reasonable market value of the land, and that the appellants had suffered and caused it to be sold for a lower price, and had failed to obtain or pay the market value, it then devolved upon the appellants to show that by reasonable efforts on their part made, and best known to themselves, they could not obtain more than the price at which the land was in fact sold. But it appears that their only effort was to obtain enough to pay the incumbrance. In the absence of a showing of any other price as the best that could be obtained through reasonable efforts proved to have been made by the appellants, the court did not err in assuming the market value found as the price which might have been obtained. Upon this view of the case, nothing in addition need be said in relation to the question as to the sufficiency of the evidence. The judgment is affirmed.

(21 Ind. App. 196)

McAFEE v. MONTGOMERY.

(Appellate Court of Indiana. Nov. 23, 1898.)
REPLEVIN—PLEADING—EXECUTORS AND ADMINISTRATORS—POSSESSION—EVIDENCE—ASSESSMENT LISTS—INSTRUCTIONS—TRIAL.

1. A complaint not alleging that defendant came into possession of property of a decedent unlawfully, nor showing that he was an intermeddler in the estate of such decedent, is insufficient to charge him as an executor de son tort.

2. Plaintiff alleged his appointment as administrator; that his decedent was the owner of certain notes, which defendant was in possession of, and wrongfully detained; and that he had demanded possession, which had been refused. *Held* to sufficiently state a cause of action in replevin.

3. Where, in replevin, the title and right of possession were in issue, a general verdict for plaintiff was sufficient.

4. In replevin it was alleged that defendant was wrongfully in possession of property, which he denied. *Held*, a verdict not finding that the property was unlawfully detained was sufficient, as such finding would be unnecessary.

5. Where evidence is conflicting, the verdict of the jury on questions of fact is conclusive.

6. In an action by an administrator for possession of notes of his decedent, assessment lists made by decedent in his life would be competent evidence, as tending to prove ownership of the property listed.

7. Where a party testified on cross-examination as to possession of property in controversy, evidence of contradictory statements as to such possession made out of court were competent to affect the weight of his testimony.

8. Ownership of personality can be presumed from possession, and a claim of ownership under circumstances indicating it, and, when once shown to exist, is presumed to continue until the contrary is proven.

9. Where an instruction is correct so far as it goes, it cannot be treated as erroneous because of incompleteness, but a further instruction should be requested, and exception taken to its refusal.

10. Where defendant testified, in an action for possession of notes, as to their ownership, it would be competent to show that he had testified differently in a deposition previously given in another case.

Appeal from circuit court, Wells county;
 L. J. Kirkpatrick, Special Judge.

Action by Wendell B. Montgomery, administrator of the estate of Elizabeth McAfee, deceased, against Jacob McAfee, to recover possession of notes. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin & Eichhorn and Dailey, Simmons & Dailey, for appellant. Sharp & Sturgis, for appellee.

ROBINSON, J. Appellee alleged in his complaint that he was duly appointed administrator of the estate of Elizabeth McAfee, deceased; that at the time of her death said decedent was the owner of 5 promissory notes, of \$1,000 each, executed by appellant (Jacob McAfee), John McAfee, and Peter McAfee; that said notes were executed on the 27th day of December, 1888, each bearing 4 per cent. interest, payable annually, and due in 5, 6, 7, 8, and 9 years after date; that said notes ever since the death of said de-

cedent have been, and are still, in the possession of appellant; that since appellee's appointment as such administrator, and prior to bringing suit, he has demanded possession of said notes, which appellant has refused to give, but wrongfully detained the same, and by reason thereof he is unable to give a copy of either of said notes, or more particularly describe them. Wherefore he asks judgment "for the value of said notes, to wit, the sum of \$7,000; that defendant be ordered and required to bring said notes into court and deliver the same to the plaintiff, and for ten per cent. damages in addition, for said unlawful intermeddling and refusal to deliver said notes, and for all other proper relief." A demurrer to the complaint for want of sufficient facts was overruled. The cause was put at issue by the general denial; trial by jury, which returned the following verdict: "We, the jury, find for the plaintiff, Wendell B. Montgomery, administrator, that, at the time of her death, Elizabeth McAfee was the owner of the promissory notes described in the complaint; that plaintiff is entitled to recover said notes, with ten per cent. damages in addition thereto." The facts stated in the complaint do not state a cause of action against appellant as an executor de son tort of the estate of said decedent. It is not alleged that appellant obtained possession of the notes wrongfully. So far as the pleading shows, he has done nothing since the decedent's death but retain possession of the notes, which, presumably, he rightfully had at decedent's death. No facts are alleged showing him to be an intermeddler in any way in the estate of the decedent. Having come into the possession of the notes lawfully, his possession was prima facie proof of ownership, and could become wrongful only after refusal to deliver up the possession. The complaint states a cause of action in replevin. A sufficient excuse is pleaded for not describing the property more particularly. If the facts pleaded are true,—and this the demurrer admits,—appellee is entitled to recover possession of the particular property. There was no error in overruling the demurrer to the complaint.

It is argued that the verdict of the jury is defective. The title and right of possession of the notes in controversy were in issue. In such case a general verdict for the plaintiff is a sufficient finding of these facts. *Van Gundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 933, and cases there cited. It is true, the verdict does not find the value of the property; but such omission cannot possibly work appellant any harm, as the judgment was against him. This rule was declared in *Van Gundy v. Carrigan*, supra. It is also true that the verdict does not find that the property in question was "unlawfully detained by the defendant." But it has been held that in such a case that portion of the verdict which finds that the property is unlawfully detained by the defendant is unnecessary, and may be

treated as surplusage. *Kluse v. Sparks*, 10 Ind. App. 444, 36 N. E. 914, and 37 N. E. 1047. In that case the court said: "The appellants admitted the detention of the property by denying the appellee's claim of ownership set up in the complaint. The only question as to such detention was whether it was lawful or unlawful, and this question was involved and decided by the finding that the plaintiff was the owner, and entitled to the possession, of the property." See *Payne v. June*, 92 Ind. 252. We can but conclude that the verdict was sufficient in form, and that there was no error in overruling the motion for a venire de novo.

Upon appellee's motion for judgment on the verdict, the court sustained the motion as to the possession of the property, and denied the motion as to the 10 per cent. damages found in the verdict. It appears from the evidence that in the spring of 1888 Samuel McAfee, the husband of decedent, Elizabeth McAfee, and father of appellant (Jacob McAfee) and John and Peter McAfee and three daughters, was the owner of 160 acres of land in Wells county, Ind., and also certain personal property. Having disposed of his personal property, and leaving his wife in possession of the farm, Samuel McAfee went to Arkansas, where he purchased real estate and engaged in business. In the fall or winter of 1888 the three sons visited their father, in Arkansas; and while there an agreement was made whereby the sons were to purchase from the father the farm in Wells county, on which the decedent was then living. Afterwards the three brothers signed the five promissory notes in controversy in this suit, and appellant took the notes and a deed to the land to his father, in Arkansas. The father, Samuel McAfee, executed and acknowledged the deed, and accepted the five promissory notes, but at once wrote his name across the back of each note, and gave them to appellant, who returned home to Indiana, bringing back both the notes and the deed, when the decedent, as the wife of Samuel McAfee, signed and acknowledged the deed, which was put on record within a few days. There is evidence that these notes were afterwards in the possession of the decedent, and that she claimed them as her own. The evidence upon this point is very conflicting, but there is evidence that these notes were given to the decedent at the direction of the payee of the notes, who signed his name across the back of the notes, and that they were afterwards given by decedent to appellant for safe-keeping. It is true, there is much evidence against this; but the jury, and the trial court in passing on the motion for a new trial, have determined where the preponderance lies, and their conclusion, under the long-settled rule, binds us. We have carefully considered all the evidence in the case, and there is evidence that the notes in controversy were the property of Elizabeth McAfee, and that she had given them into

the possession of appellant for safe-keeping, and that appellant had such possession at the time of her death.

Certain assessment lists of the decedent were introduced in evidence over appellant's objection. Such lists were competent evidence, as tending to prove ownership of the property listed. *Painter v. Hall*, 75 Ind. 208; *Burket v. Phelster*, 114 Ind. 503, 16 N. E. 813. An assessment list may be looked to for the purpose of determining what particular personal property a person had on a given date. See *Towns v. Smith*, 115 Ind. 480, 16 N. E. 811. Such lists are not competent to prove value, but such was not the purpose in the case at bar. *Railroad Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571. One of the questions in issue was whether the decedent had ever owned these notes. The presumption would be, in the absence of countervailing proof, that, if the decedent was at one time the owner of the notes, she continued the owner, and was such owner at the time of her death. Moreover, there was evidence that these lists were made at the suggestion of appellant, who is now denying that the decedent ever owned the notes. In its instruction to the jury the court limited the consideration of these lists to the question of the ownership of the notes.

Complaint is made that appellee was permitted to show that appellant had made certain statements out of court, in which he had said that his mother, the decedent, was the owner of the notes in suit, and that soon after his return from Arkansas he had given the notes to his mother, because his father had requested it. Appellee called appellant as a witness, and in answer to questions he testified only concerning the demand that had been made upon him by appellee for the possession of the notes, and he also stated that he had been in possession of the notes ever since they were executed. On cross-examination he was asked by his attorneys whether the notes were ever in the possession of his mother, and he said they never were. He had been asked nothing about the possession of these notes by his mother in his examination in chief, but while on the stand he became his own witness as to a material fact in the case. If his mother never had possession of the notes, they were never delivered to her, and they never became her property. If he had made statements out of court contrary to this, appellee was entitled to prove such statements. Such statements were not proof that his mother had owned the notes, but were competent as affecting the weight of appellant's evidence upon that point.

The court instructed the jury that if it was shown by the evidence that at one time the decedent was in possession of the notes in question, claiming them as her own, and under circumstances indicating ownership in her, the presumption of law from such facts is that she was at the time the owner of the notes, and this presumption of ownership would follow until it was shown by the evi-

dence that she was not such owner at such time, or had at some time parted with such ownership. There was evidence upon which to base this instruction. The jury was not told that ownership could be presumed from mere possession, but that ownership might be presumed from possession and a claim of ownership under circumstances indicating such ownership; and, when such ownership is once shown to exist, it is presumed to continue until the contrary appears. *Kidder v. Stevens*, 60 Cal. 414; *Eames v. Eames*, 41 N. H. 177; *Spaulding v. Sones*, 11 Ind. App. 562, 39 N. E. 526. Under the issues formed, the jury might have found that appellee was entitled to the possession of a part only of the notes in question, and an instruction to that effect was not erroneous.

It is argued that instruction No. 2 is erroneous. This instruction was to the effect that a gift is valid in law, provided at the time of such gift the donor has sufficient other means subject to execution or sale with which to pay his indebtedness. While this instruction is perhaps not as complete as it should be, yet, in so far as it goes, it is good. Where an instruction is correct as far as it purports to go, it cannot be treated as erroneous because of its incompleteness. It is only by asking a special instruction covering the omitted matter that a question can be reserved in such case. To present any available question upon an incomplete instruction, the court should be requested to give a further instruction supplying the omitted matter, and an exception should be saved to the refusal to do so. This was not done in this case. *Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Railroad Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

Complaint is also made of the introduction of certain evidence of what was deposed by appellant in his deposition taken on the trial of another case. It appears that, some time prior to the bringing of the present action, certain creditors commenced suit against Samuel McAfee, and appellant was made a garnishee defendant. In that suit appellant's deposition was taken. In that deposition he testified about the ownership and possession of the notes in controversy. As we have already seen, appellant himself testified in the case at bar that his mother never had possession of the notes in suit. Certain witnesses were called, and testified to what they heard appellant testify in his deposition concerning the ownership and possession of the notes. These witnesses testified that appellant deposed in that deposition that the notes belonged to the decedent. Such evidence was competent. He had testified, as we have seen, that his mother never had possession of the notes, and it was competent to show that he had made, out of court, contradictory statements. The suit in which the deposition was taken was compromised, and the deposition delivered to appellant. An unsuccessful effort was made to have appellant produce that

deposition at the present trial. The notary before whom it was taken made a copy, which he testified he had carefully compared with the original. In his testimony he was permitted to refresh his memory as to what appellant had deposed on the subject of the ownership and possession of the notes from this copy. Neither this copy nor the deposition itself was given in evidence. These witnesses simply gave in evidence what they had heard appellant say at a former time about the ownership of the notes. It was not an attempt to have them testify as to the contents of the deposition. Appellant is a party, and, when his counsel had him testify that the notes appellee seeks to recover in this action were never in the possession of the decedent, appellee certainly had the right to show that he had made statements prior to that time contrary to what he now testifies. There was no error in the admission of this evidence.

We have carefully examined every question raised by counsel, and find no error in the record for which judgment should be reversed. We have nothing to do with the preponderance of the evidence. There is some evidence to support the verdict, and that concludes the appellate tribunal. The instructions given by the court were certainly as favorable to appellant as could be asked. What, if anything, may be due on the notes, is not before us. The only question now is, who is entitled to their possession? From the whole record, we can but conclude that the judgment of the trial court should stand. Judgment affirmed.

(21 Ind. App. 205)

SPEGAL, Sheriff, v. KRAG-REYNOLDS CO.
(Appellate Court of Indiana. Nov. 23, 1898.)

NOTARIES—COLLATERAL ATTACK—DE FACTO POWERS—ASSIGNMENT FOR BENEFIT OF CREDITORS—CHATTEL MORTGAGE—FORECLOSURE—RIGHTS OF PURCHASER.

1. In replevin it cannot be claimed that a deed of assignment and a chattel mortgage were void because acknowledged before a notary whose office had become vacant by operation of law, since that is a collateral attack on the authority of the notary, whose right to office cannot be tried in that action.

2. Under Burns' Rev. St. 1894, § 8041 (Rev. St. 1881, § 5966), providing that no person holding any lucrative office shall be a notary public, and his acceptance of any such office shall vacate his appointment as notary, a notary who accepted the office of city attorney, at a salary of \$400 per year, was a notary de facto, in thereafter taking an acknowledgment of a deed of assignment.

3. Where an insolvent debtor gave a chattel mortgage to certain creditors, which was recorded, and then made an assignment for the benefit of creditors, and put his assignee in possession, and the assignee of the mortgage replevied the mortgaged property, and bid it in at the mortgage sale, and took possession, he is entitled to the chattels, as against a subsequent execution creditor, even though the mortgage and assignment were void, because the insolvent, if he chose, might have preferred such creditors by turning over his property.

Appeal from circuit court, Hancock county;
C. G. Offett, Judge.

Action by the Krag-Reynolds Company against Noah W. Spegal, sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

R. A. Black, Chas. E. Barnett, and Henry Warrum, for appellant. Marsh & Cook, for appellee.

COMSTOCK, J. Action in replevin to recover possession of personal property, consisting of goods, wares, and merchandise. Appellant, who was defendant below, answered, in substance: That the plaintiff, a corporation, ought not to maintain its action, because Marcellis J. Walker was on the 27th day of October, 1897, the owner and in possession of the property described in the complaint, and on said date signed and pretended to acknowledge a chattel mortgage on the same to certain of his creditors (naming them), to secure them severally the payment of certain indebtedness then owing them by him, which mortgage was duly delivered to the mortgagees, and recorded in the proper record in the recorder's office of Hancock county, Ind. (the county where said Walker then resided), within 10 days of the pretended execution thereof. That on the 1st day of November, 1897, said Walker, still being the owner and in the possession of said goods, subject only to said mortgage, made and pretended to acknowledge a certain deed of assignment, in which he pretended to convey to one Thomas H. New, as his assignee, all his real and personal property, choses in action, rights and credits, for the benefit of creditors, under the statute provided, and put his said assignee into possession of all his property, including that mentioned in the complaint, who thereupon took possession and claimed to hold the same as such assignee. Said deed of assignment was duly recorded in the proper record of said county on the day last mentioned. On the 2d day of November, 1897, New Bros., J. C. Alexander, David A. Endrich, John N. Thomas, James G. Walker, Hughes Burns, and John M. Cline, said creditor mortgagees, sold and assigned all their right, interest, and claim to the indebtedness owing to them from said Walker, and all their right and interest in said pretended mortgage, and delivered said pretended mortgage, to the appellee. That on the — day of November, 1897, appellee replevied the property described in the mortgage from Thomas H. New, assignee, and obtained possession of the same, and on the — day of November, 1897, after having posted notices as provided by law, sold said goods at public outcry, and, having bid for said goods the highest sum offered therefor, the same were struck off to it as purchaser. Afterwards, on the — day of November, 1897, one George W. Stout recovered judgment against said Walker for \$565.75, upon which an execution was duly issued to satisfy said judgment out of the property of said Walker, which execution was on the

— day of December, 1897, levied upon the property described in the complaint as the property of said Walker, whereupon plaintiff (appellee) began this action in replevin. That said pretended mortgage and said pretended deed of assignment are null and void, and that the personal property mentioned therein is still the absolute property of said Walker, subject to execution, for the reason that said pretended mortgage and deed of assignment were both acknowledged before one Elmer J. Blinford, who at the time pretended to be a notary public, appointed and qualified, and to be acting as such, and who certified to said acknowledgment, attesting the same with a notarial seal. That at the time of said acknowledgments said Blinford was not a notary public, and had no authority to take or certify acknowledgments of deeds or other instruments, because after his appointment and qualification as notary public, which was in November, 1893, he was on the 5th day of June, 1895, duly elected city attorney of the city of Greenfield, Ind.,—a city duly organized under the general laws of the state of Indiana for the incorporation of cities,—qualified as such, and entered upon its duties, and has ever since continued to be and act as such city attorney. That by reason of his acceptance of said office of city attorney, which is a lucrative office, with a salary of \$400 per annum, the appointment of said Blinford as notary public became vacated, and his pretended acknowledgments became null and void. The trial court sustained a demurrer to this answer, and, appellant refusing to plead further, judgment on said demurrer was rendered in favor of appellee. The action of the court in sustaining the demurrer to the answer is the only question presented by this appeal.

For a reversal of the judgment, appellant's learned counsel rely upon the proposition that Blinford, in accepting the office of city attorney, vacated his commission as notary public, and thereby invalidated the deed of assignment and chattel mortgage acknowledged before him. The argument of appellant's counsel is addressed solely to the support of this proposition. They cite and rely upon the following statutory provisions: "All assignments under this act shall be by indentures duly signed and acknowledged before some person authorized to take acknowledgments of deeds of record within ten days after the execution thereof. * * * No assignment under this act shall convey to the assignee any interest in the property so assigned until such assignment is recorded as provided for in this section." Burns' Rev. St. 1894, § 2900 (Rev. St. 1881, § 2663). "No assignment of property by way of mortgage shall be valid against any other person than the parties thereto where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in the case of deeds of conveyance and recorded in the recorder's office of

the county where the mortgagor resides and within ten days after the execution thereof." Horner's Rev. St. 1897, § 4913. "No person holding any lucrative office or being an officer in any bank, corporation or association possessed of banking power, shall be a notary public, and his acceptance of any such office shall vacate his appointment as notary." Burns' Rev. St. 1894, § 8041 (Rev. St. 1881, § 5066). If this one question alone were presented by the demurrer, it would be necessary only to determine whether or not the office of city attorney is, within the meaning of the constitution and statutory provisions, a lucrative office; but there are other questions presented by the demurrer. Conceding, for the sake of argument (without deciding), that the office of city attorney is a lucrative one, there are yet controlling reasons for affirming the judgment of the trial court. The office of notary public is a public office. The right to a public office cannot be tried in an action of replevin. 20 Am. & Eng. Enc. Law, p. 1047. The attack on the authority of the notary is collateral, and his authority cannot be so questioned. The answer avers that he was a duly appointed, qualified, and acting notary public at the time he certified to the acknowledgment of the judgment and deed of assignment. It has been repeatedly held in this and other states that the official acts of an officer acting under color of election or appointment can only be questioned in a direct proceeding to contest his right to hold the office. *Crelghton v. Piper*, 14 Ind. 182; *Gumberts v. Express Co.*, 28 Ind. 181; *Mowbray v. State*, 88 Ind. 324; *Baker v. Wambaugh*, 99 Ind. 312; *Desmond v. McCarthy*, 17 Iowa, 525; *McInstry v. Tanner*, 9 Johns. 135; *Potter v. Luther*, 3 Johns. 486; *Reed v. Gillet*, 12 Johns. 296; *Parker v. State*, 133 Ind. 178, 32 N. E. 886, and 33 N. E. 119; *Wilcox v. Smith*, 5 Wend. 234; *Grim v. Adkins*, 51 N. E. 494 (present term of this court). The authority of a notary de facto cannot be questioned collaterally, and *Binford* at the time of taking the acknowledgment in question was at least a notary public de facto. *Hamilton v. Pitcher*, 53 Mo. 334; *Bullene v. Garrison*, 1 Wash. T. 587; *Hastings v. Vaughn*, 5 Cal. 315; *Davidson v. State*, 135 Ind. 259, 34 N. E. 972; *Waterhouse v. Black* (Iowa) 54 N. W. 342; *Brown v. Lunt*, 37 Me. 423; *Wilson v. Kimmel* (Mo. Sup.) 19 S. W. 24. In *Davidson v. State*, supra, objection was made to the introduction in evidence of a deed "because the acknowledgment was void, having been taken before a notary public who was at the time filling the office of deputy recorder." The court said that the objection was not tenable. "The notary was at least an officer de facto, and his acts, as to third parties, were valid,"—citing *Leech v. State*, 78 Ind. 570; *Baker v. Wambaugh*, supra.

Appellee had taken possession of the mortgaged property before the rights of appellant had attached. In *Weber v. Mick* (Ill. Sup.) 23 N. E. 646, the court said: "As the pos-

session of the property was delivered to the mortgagees at the time the mortgage was executed, and remained with them, it was unnecessary to show that the mortgage was acknowledged at all." In *Re Burnett*, Fed. Cas. No. 2,172, it is held that, if the possession is taken by the mortgagee before the rights of others have attached, it cures any irregularity in the acknowledgment. *Kothe v. Krag-Reynolds Co.* (Ind. App.) 50 N. E. 594, cited by appellant, is not in conflict with the foregoing decisions. The answer shows that appellee had purchased the property in question at public auction, and had possession of the same prior to the rendition of the judgment in favor of appellant, and before appellant could rightfully attach. The answer does not aver that appellant did not have actual knowledge of the existence of appellee's mortgage, or that it was recorded. It is not averred that appellant did not know of said defective acknowledgment, nor that the mortgage was fraudulent, or that it was executed without consideration. Walker would have had the right, in falling circumstances, to prefer his creditors. Instead of executing a mortgage, he might have delivered the property mortgaged to the mortgagees in good-faith payment of their claims, and their title thus obtained would have been unquestioned. After the mortgage had been recorded, and before the lien of appellant's execution had attached, Walker could have delivered the mortgaged property in payment of the debt the mortgage had been given to secure, and the title would have been perfect. If the mortgagees had been compelled to replevin the property mortgaged of the mortgagor, and had afterwards sold the same at public auction, pursuant to the terms of the mortgage, to satisfy their claims, prior to the time appellant's execution was issued, the purchaser at said sale would have taken a good title. And, under the facts set out in the answer, the assignee of the creditors (appellee) having become the owner of the property by purchase at public sale under the mortgage, and having obtained possession as owner prior to the time appellant's execution could have become a lien thereon, it cannot be admitted that appellant's execution gave him the right to resist the validity of the mortgage because of the alleged pretended acknowledgment. In our view of the law, it could make no difference whether *Binford* did or did not vacate the office of notary public by accepting that of city attorney. Judgment affirmed.

(175 Ill. 187.)

DELANEY v. DELANEY et al.

(Supreme Court of Illinois. Oct. 24, 1898.)

MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF BENEFICIARIES—WAIVER OF CONDITIONS—RIGHTS UNDER ABANDONED CONTRACT—CREDITORS AS BENEFICIARIES.

1. Though one assured by an ordinary life insurance policy has not the right, as a general rule, to change the beneficiary named in such policy, the beneficiary in an endowment cer-

tificate issued by a mutual benefit society has no vested right in the contract of insurance evidenced thereby, as such contract is between the society and the member to whom the certificate is issued, and not between the society and the beneficiary named in the certificate; and, therefore, where there is no provision in the statute under which the society is organized, or in the charter or by-laws of such society, or in the certificate itself, either expressly providing for or prohibiting a change of the beneficiary, the power to make such change is vested in the member during his lifetime, by reason of the character and purposes of such society.

2. Under a certificate of a mutual benefit society, promising to pay a certain sum to a person named therein, on the death of the member to whom it was issued, on condition, *inter alia*, that "this certificate shall not have been surrendered by said member, and a new certificate issued at his request, in accordance with the laws of this order," the right of such member to change the beneficiary, and the right of such society to issue a new certificate, did not depend on the surrender of the first certificate to the association, as such requirement is a provision made for the benefit of the association, and may therefore be waived by it, and as it is only essential that such change of the beneficiary should be made by the member with the consent of the association.

3. On trial of an issue to determine which one of two adverse claimants was entitled to the proceeds of a certificate of a mutual benefit association, the widow of the member claimed under a certificate in which she was named as the beneficiary, and which contained a promise to pay, on condition, *inter alia*, that "this certificate shall not have been surrendered by said member, and another certificate issued, at his request, in accordance with the laws of this order." The husband presented to the association his affidavit that such certificate had been either "lost, destroyed, or stolen," and requested a new certificate in place thereof to be issued to another beneficiary; and thereupon, in accordance with a custom adopted by the association, a new certificate in favor of the substituted beneficiary, and in other respects like the original, was issued, without requiring the surrender of the old certificate. He subsequently surrendered the second certificate, indorsed as required by the laws of the order, to the association, and, at his request therefor, received a third certificate, similar to the others, but in favor of another person as beneficiary, who thereunder, after the death of such member, claimed the fund in question, as against the widow, who had possession of the first certificate. It appeared that she had abandoned her husband, and, on his demand, refused to give up such certificate; that the subsequent certificates had been issued with her knowledge; that the beneficiary named in the third certificate had, with her knowledge, ever since such change of beneficiaries, paid the dues of the assured and provided for his support; and that he also paid his funeral expenses. *Held*, that the withholding of such original certificate, when it was demanded of her, was a wrong towards her husband of which the widow could not take advantage; and that, as the contract evidenced by such certificate was abandoned by both parties thereto, no rights thereunder remained to her.

4. The fact that the beneficiary named in a certificate of a mutual benefit association, issued for the purpose of appointing a new beneficiary, was not related to the member of such society to whom such certificate was issued, was immaterial, where the association in question was organized under Act March 28, 1874, providing that associations which are intended to benefit widows, orphans, heirs, and devisees of deceased members thereof "shall not be deemed insurance companies," and where such

beneficiary was a creditor of such member, and therefore capable of taking as his devisee.

5. Where the beneficiary in an endowment certificate, issued by a mutual benefit society organized under Act March 28, 1874, relating to "corporations not for pecuniary profit," was changed by issuing a new certificate in lieu thereof, prior to the passage of Act June 22, 1893, providing that the payment of death benefits by such societies should be made only to the families, heirs, etc., of the deceased member, and that they should "not be willed, assigned, or otherwise transferred to any other person," the rights of the beneficiary named in the new certificate were not affected by such later act.

Appeal from appellate court, First district.

Bill of interpleader by the High Court of the Independent Order of Foresters against Mary Delaney and Daniel Delaney, to determine which of them is entitled to the amount due on an endowment certificate issued by complainant to Martin Delaney. From a judgment of the appellate court (70 Ill. App. 130) affirming a decree in favor of said Daniel Delaney, said Mary Delaney appeals. *Affirmed*.

This is a bill of interpleader, brought by the High Court of the Independent Order of Foresters against Mary Delaney and Daniel Delaney. The bill was filed for the purpose of compelling the appellant, Mary Delaney, and the appellee Daniel Delaney, to interplead, and settle their respective claims to \$1,000, admitted by the order to be due from it upon an endowment certificate payable upon the death of Martin Delaney, a member of the said order, who died October 25, 1896. The appellant was the wife of Martin Delaney, and the appellee was his second cousin. Answers were filed to the bill by Mary Delaney and Daniel Delaney, and replications were filed to the answers. The \$1,000 was paid into court, and the High Court of the Independent Order of Foresters was dismissed, with its costs and attorney's fees, and the cause was retained for the purpose of deciding to whom the money should be paid. The circuit court entered a decree in favor of the appellee Daniel Delaney, from which decree the appellant, Mary Delaney, prosecuted her appeal to the appellate court, where the judgment of the circuit court was affirmed. The present appeal is prosecuted from such judgment of affirmance.

The facts, so far as it is necessary to state them in order to understand the questions involved, are as follows:

The complainant below, the High Court of the Independent Order of Foresters, is a fraternal and benevolent organization, organized under the laws of Illinois, for the purpose of "giving to its members, or the members of such subordinate courts as it may institute, life insurance, to be paid upon the death of the member obtaining the same to such person or persons as may be designated by the endowment certificate issued by" it. The complainant corporation was organized under the act concerning cor-

porations of April 18, 1872, as amended by the act of March 28, 1874, concerning "corporations not for pecuniary profit." 1 Starr & C. Ann. St. (2d Ed.) pp. 988, 1020, 1021; Pub. Laws Ill. 1871-72, p. 296; Pub. Laws Ill. 1873-74, p. 74.

In April, 1881, Martin Delaney made application for membership in said order, which application contained the following words: "I direct that, in case of my decease, all benefit to which I may be entitled from the Independent Order of Foresters of the state of Illinois be paid to Mary Delaney, related to me as my wife, subject to such future disposal of the benefit to my widow, orphans, heirs, or devisees as I may hereafter direct, in compliance with the laws of the order."

The charter contains the following provision, to wit: "Second. That the object for which it is formed is to give charitable and moral aid to its members, and to the widows, orphans, and devisees of deceased members, of said order, and to establish and charter subordinate courts." The by-laws contain similar provisions to that contained in the charter above quoted.

On November 14, 1882, the order issued to Martin Delaney, as a member of Court Fidelity No. 37, Independent Order of Foresters of Illinois, a certificate, duly signed, attested, sealed, and recorded, and accepted in writing by said member, wherein, after reciting that it is to be issued upon condition that the statements made in the application for membership and the statements certified to the medical examiner are made a part of the contract, and upon condition that the said member complies with the laws, rules, and regulations governing the said order, or that may thereafter be enacted by the high court, the following words are used: "These conditions being complied with, the said High Court of the Independent Order of Foresters of Illinois hereby promises and binds itself to pay to Mrs. Mary Delaney, his wife, \$1,000, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate, provided that said member is in good standing in this order at the time of his death, and provided, also, that this certificate shall not have been surrendered by said member, and another certificate issued at his request, in accordance with the laws of this order."

On June 6, 1887, Martin Delaney made and presented to the order an affidavit, in which he swore that said benefit certificate No. 1,087, above set forth, had been either "lost, destroyed, or stolen," and requested a new certificate in place thereof to be issued to the Mercy Hospital of Chicago. Thereupon an endowment certificate, No. 12,725, was issued in accordance with said request. On July 24, 1888, Martin Delaney surrendered and delivered said certificate No. 12,725 to the said order, with the following indorsement on the back thereof: "I herewith surrender and return to the High Court of the Independent Order of Foresters of Illinois the within bene-

fit certificate No. 12,725, and direct that a new one be issued, to be payable to Daniel Delaney, my cousin;" which indorsement was signed by Martin Delaney. Accordingly, a new certificate, No. 18,770, was issued to Martin Delaney, as such member, wherein, after reciting the same conditions as were recited in No. 1,087, the high court of the order promises and binds itself to pay to Daniel Delaney, cousin of said member, \$1,000, upon satisfactory evidence of the death of said member, and upon surrender of the certificate, provided said member is in good standing at the time of his death, and provided, also, that "this certificate shall not have been surrendered by said member, and a new certificate issued at his request, in accordance with the laws of this order."

Martin Delaney was at the time of his death, on October 23, 1893, a member in good standing of said order, and proofs and notification of his death were presented, as required by the constitution and by-laws then in force. He left surviving him his widow, Mary Delaney, who had a daughter and three granddaughters. After a hearing had upon the pleadings and testimony, the circuit court entered a decree, in which it found, among other things, that Martin Delaney did not give said certificate to appellant, or make any contract with her that she should receive the insurance money mentioned therein, or that he would not change the beneficiary mentioned therein; that said Martin, in 1886, became an object of charity, dependent for his support upon his friends and relatives; that Daniel Delaney was a cousin of said Martin, and at his request, on January 6, 1887, made an agreement for him with the Mercy Hospital of Chicago, by which said hospital agreed to board and clothe said Martin during the balance of his life, and said Martin agreed to surrender said endowment certificate No. 1,087, and have a new one issued; that said Daniel agreed to pay the dues and assessments that might thereafter be payable by reason of the membership of said Martin in said order so long as said Martin lived; that said Martin delivered endowment certificate No. 12,725 to said hospital, which thereupon commenced to board, lodge, and clothe him, and continued to do so until about May 1, 1887; that said Daniel paid all dues and assessments for said Martin in said order from January 6, 1887, until said Martin's death; that on or about May 1, 1887, said hospital ceased to take care of said Martin, and surrendered said certificate upon the payment by said Daniel of what was then due to it for board and lodging; that said Daniel, at the request of Martin, made an agreement, on the latter's behalf, with the Little Sisters of the Poor, who conducted a home for the aged in the city of Chicago, by which said Sisters agreed to board, lodge, and clothe said Martin during the balance of his life, and he agreed to surrender said certificate No. 12,725, and have a new one issued, payable

to said Daniel Delaney; that said Daniel Delaney agreed to pay said Little Sisters, upon the death of said Martin, out of the insurance to be collected, for the board, etc., furnished by them to said Martin; that the said certificate No. 18,770 was thereupon issued, payable to said Daniel, and delivered to him, and he paid \$60 due to said Mercy Hospital, and has paid all dues thereafter to the said order; that said Sisters took care of said Martin until his death, and that said Daniel paid his funeral expenses; that said Mary Delaney knew of the issuance of certificate No. 12,725, and of the surrender of the latter certificate in July, 1888, and of the issuance of said certificate No. 18,770, and knew of the payments by Daniel Delaney of the dues and assessments to the order, and also knew of the furnishing by the said hospital and said Sisters of support to said Martin; that appellant never made known to said Daniel, or to said hospital, or to said Sisters, or to said high court, the fact that she had possession of said endowment certificate No. 1,087, nor did she claim the same to be in full force; that said Mary has been guilty of laches in the assertion of any right she may have had under certificate No. 1,087; that the issue of said certificate No. 12,725, and the issue of said certificate No. 18,770, were the free and voluntary acts of said Martin Delaney, and not done at the request of Daniel Delaney.

James E. White (Ward B. Sawyer, of counsel), for appellant. Francis T. Colby, for appellees.

MAGRUDER, J. (after stating the facts). The first endowment certificate, No. 1,087, which was issued to the deceased, Martin Delaney, by the High Court of the Independent Order of Foresters, was made payable to the appellant, Mary Delaney. She obtained and retained the possession of said certificate, and produced it after the death of Martin Delaney. Her contention is that there was no surrender of the original endowment certificate No. 1,087 issued to her, and that the circuit court erred in so holding. The main question in the case, therefore, is whether the order had the right to issue a new certificate in the place of the one issued to the appellant under the circumstances developed by the evidence in this record.

It seems to be well settled by the weight of authority, both in this state and in other states, that the beneficiary in an endowment certificate, issued by a mutual benefit society, has no vested rights in the contract of mutual benefit insurance. The right of the beneficiary named in the certificate of membership to the benefit to accrue upon the death of the member is not such a right as can be enforced until the death occurs. The contract of insurance is between the society and the member to whom the certificate is issued, and not between the society and the beneficiary named in the certificate. If the bene-

ficiary has no vested interest in the contract of insurance, it follows that, during the life of the member to whom the certificate is issued, the latter may change the beneficiary, subject to such restrictions as are imposed by the statute, the charter, the by-laws, or the endowment certificate itself. Such right of the assured to change the beneficiary does not exist, as a general thing, in the case of an ordinary life insurance policy. The decisions in the text-books are not altogether in accord as to the reasons which exist for the distinction in this regard between certificates issued by a mutual benefit society and ordinary life insurance policies. But, whether there are any good reasons for the distinction or not, it is too well established by authority to be here controverted. *Martin v. Stubblings*, 126 Ill. 387, 18 N. E. 657; *Catholic Knights v. Franke*, 137 Ill. 118, 27 N. E. 36; *Benton v. Brotherhood*, 146 Ill. 570, 34 N. E. 939; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543; *Nibl. Ben. Soc. & Acc. Ins.* (2d Ed.) § 212, and cases in notes; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151.

Inasmuch as the member to whom the certificate is issued has the power of changing the beneficiary, and appointing a new one, at any time during his life, except so far as he is restricted by the organic law of the society, or by his contract with the society, it becomes necessary to inquire whether any restrictions upon the power of appointment existed in the present case.

We have been referred to no provision in the statute under which the appellee the High Court of the Independent Order of Foresters was organized, or in its charter or by-laws, which expressly authorizes a change in the beneficiary. It is well settled that, where the contract of mutual benefit insurance does not take away the power to change the beneficiary, the member has that right. *Nibl. Ben. Soc. & Acc. Ins.* § 212. Because of the right which the member has to change the beneficiary during his lifetime, the only right which the beneficiary has until the death of the member is a mere expectancy. *Id.*; *Martin v. Stubblings*, supra. It will always be presumed that the member has full right to change the beneficiary, or to control the benefit, during his lifetime, until the contrary is made to appear. Where there is no provision in the statute, or in the charter or by-laws, or in the certificate of insurance itself, which expressly provides for a change of the beneficiary, or which prohibits such a change, the power to change the beneficiary is vested in the member during his lifetime by reason of the character and purposes of the benefit association itself. *Carpenter v. Knapp*, supra.

The original certificate, No. 1,087, issued to Mary Delaney, contains a promise on the part of the association that it will pay the \$1,000 to her upon satisfactory evidence of the death of Martin Delaney, and "upon the surrender of this certificate, provided that such member

is in good standing in the order at the time of his death, and provided, also, that this certificate shall not have been surrendered by such member, and another certificate issued at his request, in accordance with the laws of the order." The certificate itself upon its face recognizes the right of Martin Delaney, the member, to have another certificate issued at his request in accordance with the laws of the order. The power of appointment, or the power to change the beneficiary, is thus embodied in the terms of the contract between the society and the member in the present case. But it is contended, on behalf of the appellant, that the right of the member, Martin Delaney, to change the beneficiary, and the right of the association to issue a new certificate, depended upon the surrender of the first certificate to the association. It is said that here there was no surrender of certificate No. 1,087, issued to Mrs. Delaney, but that she had such certificate in her possession. It is therefore argued that, inasmuch as there was no surrender of the original certificate, the association had no power to issue a new certificate, and that thus the contract of insurance itself upon its face contained a restriction upon the power of appointment, to wit, the surrender of the existing certificate.

It would seem to follow, as a necessary corollary from the doctrine that the certificate is a contract between the society and the member, and not between the member and the beneficiary, that the society and the member can modify or change their contract in any way satisfactory to themselves. An expectancy, which is the only interest held by the beneficiary prior to the death of the member, is not property, and therefore a change of the contract made by the society and the member together could not injure or affect in any way a property interest of the beneficiary. It is true that, by the terms of the certificate, the change is to be made upon a surrender of the certificate; and that, when the mode of changing the beneficiary is specified in the contract, it must be substantially followed. *Nibl. Ben. Soc. & Acc. Ins.* § 218. But the parties to the contract may agree between themselves upon a change of the mode of appointing a new beneficiary. The provision that a new certificate may be issued upon the surrender of the old certificate is a provision which is made for the benefit of the association, and may, therefore, be waived by the association. It has been held that the material question is whether the change of the beneficiary is made by the member with the consent of the society, and that, if it is so made, it is immaterial whether or not the requirements of the by-laws upon that subject have been complied with or not. *Id.* § 215. "A member and the society may during the life of the member waive these requirements, and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties." *Id.* § 222. "Although the rule is settled that change of beneficiary must be made in the manner pre-

scribed by the laws of the society with some exceptions, it is also now equally well settled that the society may waive compliance with the required formalities." 1 *Bac. Ben. Soc.* § 308; *Splawn v. Chew*, 60 *Tex.* 532; *Martin v. Stubbings*, *supra*; *Society v. Lupold*, 101 *Pa. St.* 111.

In the case at bar the evidence shows that the association had been in the habit of granting a new certificate at the request of the member, and therein changing the beneficiary, without a surrender of the old certificate, provided the member should make an affidavit that the original certificate was lost or destroyed or stolen. Here, Martin Delaney made an affidavit that certificate No. 1,087 was lost, destroyed, or stolen. It turned out, after his death, that the certificate was in the possession of his wife, Mary Delaney, at the time when he made such affidavit. There is some conflict in the testimony as to the circumstances in regard to the disappearance of the certificate. The testimony on the part of the appellant tends to show that Martin Delaney gave her the certificate, and requested her to keep it. Other testimony is to the effect that she abandoned him in the fall of 1886, leaving his home, and that he was obliged to obtain support through others, and that, upon his demand, she refused to give up the certificate. It is not clear, however, from other portions of the evidence, that he knew where the certificate was, or whether she had destroyed it or still kept it. The circuit court found in favor of the contention of the appellees upon this subject, and we are not disposed to disturb the finding of the circuit court upon such a question of fact. Where the chancellor sees and hears the witnesses, his findings upon mere questions of fact, when the testimony is conflicting, will not be disturbed on appeal, unless they are clearly and manifestly against the preponderance of the evidence. *Burgett v. Osborne*, 172 *Ill.* 227, 50 *N. E.* 206. Such is not the case here.

It is well settled that even if the certificate, issued by a mutual benefit society, is given to the beneficiary therein, such beneficiary holds it subject to the right of the member to whom it was issued to change the beneficiary. The beneficiary always takes the certificate subject to such right of change in the member during his lifetime. If Mrs. Delaney purposely withheld this certificate when it was demanded of her, inasmuch as the law presumes her knowledge of the right of her husband to change the beneficiary, she was guilty of a wrong towards her husband, and cannot now take advantage of her own wrong.

Not only was there an affidavit as to the loss of the original certificate No. 1,087, but, by agreement between Martin Delaney and the association, a new certificate, No. 12,725, was issued to the Mercy Hospital. The purpose of taking up the old certificate, and issuing this new one, was to obtain from the

Mercy Hospital for Martin Delaney board, lodging, and clothing, and Mrs. Delaney knew of the issuance of the new certificate, and for what purpose it was issued. Subsequently, when the Mercy Hospital declined further to support Martin Delaney, certificate No. 12,725 was taken up, and a new certificate, No. 18,770, was issued to Daniel Delaney, to enable him to obtain support for Martin Delaney from the Little Sisters of the Poor upon the conditions and in the manner set forth in the statement preceding this opinion. There is conflict in the testimony as to the cause of the separation between Martin Delaney and his wife in 1886, she claiming that such separation was due to his fault, but other testimony in the case shows that it was not his fault. Whatever may have been the cause of such separation, it is certain that, during the last six years of his life, he was supported at the Mercy Hospital, and at the institution known as the "Little Sisters of the Poor," through the efforts of Daniel Delaney, and by means of the insurance money, which was expected to be paid upon said certificate when the time of his death should arrive.

It thus appears that the original contract between the parties, evidenced by certificate No. 1,087, was abandoned by both parties to it, to wit, the member and the society, before the death of Martin Delaney. "It is difficult to see what rights remain to the beneficiary under it. * * * The member and the society are the parties to a contract of mutual benefit insurance, and they may, during the life of the member, agree to a change of the beneficiary in any manner which is satisfactory to both parties. When they have agreed to a change of the beneficiary, a new contract is in force, and, to the extent of the modification made, the old contract is abandoned and superseded. * * * When a society has actually changed the beneficiary at the request of the member, all questions as to whether the manner and mode of changing the beneficiaries provided in the contract have been followed are concluded and absolutely disposed of." *Nibl. Ben. Soc. & Acc. Ins.* § 219; *Titworth v. Titworth*, 40 Kan. 571, 20 Pac. 213; *Barton v. Association*, 63 N. H. 535, 3 Atl. 627; *Gladling v. Gladling* (Sup.) 8 N. Y. Supp. 880; *Lamont v. Association*, 30 Fed. 817; *Simcoke v. Grand Lodge*, 84 Iowa, 383, 51 N. W. 8; *Bowman v. Moore*, 87 Cal. 306, 25 Pac. 409. It has been held in a number of cases that the mere withholding of a certificate by a beneficiary does not defeat the right of a member to change the beneficiary. In *Isgrigg v. Schooley*, supra, Schooley was the holder of a beneficiary certificate in a mutual benefit society. The by-laws of the order provided that when a member decided to change a beneficiary named in a certificate he must, among other things, surrender the old certificate. The beneficiary originally named had been the wife of the deceased. She abandoned him, however,

and refused to live with him, and, without his consent, took the certificate away with her, and, upon a demand for its return, she stated that it was lost. The deceased, being desirous of changing the beneficiary, complied with all the requirements of the by-laws in respect thereto save the surrender of the certificate, assigning its alleged loss as the reason for his failure to do so; and it was there held that the right of the assured to make a change in the beneficiary existed as soon as the certificate was issued; that it was his duty, while it was within his power to do so, to follow the mode provided in the by-laws in making the change, but that, whenever a state of circumstances existed which deprived him of the power to literally comply with the conditions of the by-laws, he was relieved from a literal compliance therewith, but was not divested of the right to make a change; and it was further held that the acts of the decedent constituted an equitable change of beneficiary, and that a person in whose favor the deceased desired a new certificate to be issued was entitled to the fund, and that, as he had done all in his power towards complying with the by-laws in making the change, and had been prevented by his wife from formal compliance, she could not, after his death, set up her own wrongful act to prevent a recovery for the benefit of the new beneficiary. *Grand Lodge v. Child*, 70 Mich. 163, 38 N. W. 1; *Hirsch v. Clark*, 81 Iowa, 200, 47 N. W. 78; *Schmidt v. Association*, 82 Iowa, 304, 47 N. W. 1032; *Carpenter v. Knapp*, supra; 1 *Bac. Ben. Soc.* §§ 308, 310; *Association v. Bunch*, 109 Mo. 560, 19 S. W. 25.

It is contended, however, that Daniel Delaney does not come within the class of persons for whose benefit the charter of the association in this case authorizes benefit certificates to be issued, and that, therefore, he was not a legal beneficiary, and is not entitled to the fund in dispute. The act of March 28, 1874, under which the present association was organized, provides as follows: "Associations and societies, which are intended to benefit widows, orphans, heirs and devisees of deceased members thereof, and where no annual dues and premiums are required, and where the members shall receive no money as provided or otherwise, shall not be deemed insurance companies." The same class as those mentioned in the statute are also mentioned in the charter and by-laws of the association. It is said that Daniel Delaney is neither an heir nor devisee of the deceased, Martin Delaney. If this were an original question, it would demand serious consideration. But this court has held that the statute, by empowering a member to name as his beneficiary his legatee or devisee without restriction, proceeds upon a policy much broader than do those statutes which limit the benefits to accrue upon the death of the member to his relatives, or those in some way dependent upon him; that, un-

der the name of "legatee or devisee," a member is given the power to appoint as his beneficiary any person, whether related to him or not related to him at all; that he may, in the selection of his beneficiary, be governed by circumstances of affection or duty, or he may yield to the dictates of mere caprice, subject only to the limitation that the appointment be made by will; that, the legislature having thus enlarged the category of those capable of being selected as beneficiaries so as to include all persons whom the member may select as his legatees or devisees, there is no rule of public policy which would be violated by the adoption of a different mode of selecting a beneficiary; that no substantial rights of any party are better secured or promoted by one mode of appointment than another; that the mode of selection is a mere matter of form, and does not go to the substance of the right to select beneficiaries; and that the assignment of a certificate by a member in his lifetime to a creditor, as security for a debt, was, under the contract, valid and binding upon both the beneficiary and the society. *Martin v. Stubbings*, supra. So, also, in *Association v. Blue*, 120 Ill. 121, 11 N. E. 331, it was held that, as a member might under the charter in that case devise the benefits of his policy to a stranger, so he might in the first instance take out a policy payable to a stranger. In the latter case the charter was construed as not only authorizing a member to name a devisee other than one of his heirs, but we went further, and decided that, as he might so devise it to a stranger, so he might take out the certificate in the first instance payable to one who had no insurable interest in his life. *Association v. Bunch*, supra; *Nibl. Ben. Soc. & Acc. Ins.* §§ 166, 173, 212-214; *Lamont v. Association*, supra.

In view of what has been said, it is immaterial whether Daniel Delaney was or was not related to Martin Delaney. The rights of appellee Daniel Delaney are to be determined by the language of the act of March 28, 1874, and of the constitution and by-laws of the society passed in pursuance thereof. The proof showed, and the circuit court found, that Martin Delaney was indebted to Daniel Delaney at the time of his death. Inasmuch as Daniel Delaney was a creditor of Martin Delaney, the doctrine of the case of *Martin v. Stubbings*, supra, was precisely applicable. There was not here an assignment of the certificate to Daniel Delaney, but the appointment of him as beneficiary in a new certificate had the same effect as though there had been such assignment. *Nibl. Ben. Soc. & Acc. Ins.* § 186, note 3. The rights of the appellee Daniel Delaney are not impaired by the act of June 22, 1893, in relation to fraternal benefit societies. 2 *Starr & C. Ann. St.* (2d Ed.) p. 2278; *Voigt v. Kersten*, supra. The judgment of the appellate court affirming the decree of the circuit court is affirmed. Judgment affirmed

(59 Ohio St. 96)

CARTER et al. v. DAY et al.

(Supreme Court of Ohio. No. 1, 1898.)

ESTATE IN COMMON—PARTITION—LINE OF DESCENT—MUTUAL RELEASES—COMPETENCY OF EVIDENCE.

1. The line of descent is not broken by partition of an estate theretofore held in common, whether the partition be made in a legal proceeding, or by the interchange of mutual releases. In either case the title of each parcener in the share set off to him in severalty remains the same as that by which his undivided interest in the land was held.

2. Where the estate in common came by descent, devise, or deed of gift, the parcel allotted to a parcener who dies seised of the same descends according to the provisions of section 4158 of the Revised Statutes.

3. When partition is made by mutual releases, they should be read and construed together, in the light of the circumstances attending their execution; and it is competent to show that their only purpose was to accomplish the partition, and no other consideration passed between the parties, though a pecuniary consideration be expressed in the deeds.

(Syllabus by the Court.)

Error to circuit court, Richland county.

On the 30th day of September, 1892, Joseph Day and Ellzey Day brought suit in the court of common pleas of Richland county against Merchant Carter and others, for the partition of 60 acres of land situated in that county. The petition alleges that the plaintiffs are the owners in fee simple of the undivided eight-ninths of the land, and the defendants, as tenants in common with them, own, in various proportions specified, the other undivided one-ninth. The defendants, by their answer, claim title to the whole of the land, and deny that plaintiffs have any interest or estate in it. The circuit court, where the cause was tried on appeal, found the issues for the plaintiffs, and ordered partition accordingly. The reversal of that judgment is sought here. Reversed.

W. L. Sewell, H. P. Sewell, and Cummings & McBride, for plaintiffs in error. Bradford & Morehouse and Donnell & Marriott, for defendants in error.

WILLIAMS, J. The cause was submitted to the trial court upon admitted facts and unconflicting evidence which show that Robert Carter, Sr., died in 1865, seised of a tract of land situated in Richland county, containing nearly 600 acres, which he devised by will to his nine children, all of whom were then living, "to be divided equally between them." These children, on the 2d day of April, 1869, made amicable partition of the land by the interchange of deeds of release, by which the 60 acres in controversy in this case were set off in severalty to the testator's daughter Martha Carter, as her equal share, and she relinquished her interest in like shares to each of the other children. Martha was married to Marcus Day in 1866, and died in 1887, intestate and without issue, seised of her tract of 60 acres. Her husband survived her,

and in 1890 conveyed the land to his children by a former marriage, and died in 1892. His grantees are the plaintiffs in the action below; and their claim is that on the death of his wife, Martha, he took by inheritance from her an estate in fee simple to the eight-ninths of the land so held by her under the partition, which estate, by his conveyance, became vested in them. The defendants in the action are the surviving brothers and sisters of Martha, and the representatives of those now deceased; and it is their claim that the whole of the land of which she died seised descended to them, subject only to a life estate of her husband therein. Which one of these conflicting claims must prevail depends upon the nature of the title by which Martha held the land at the time of her decease, and that depends upon the effect of the partition. If she thereby acquired a new title to eight-ninths of the land, that interest passed to the surviving husband in fee simple, under section 4159 of the Revised Statutes, and was conveyed by his deed to the plaintiffs below. On the other hand, if, notwithstanding the partition, she continued seised of her title as devisee, then its descent is controlled by section 4158, under which the husband took an estate for life only, and, on his death, it went to her brothers and sisters and their representatives, the plaintiffs in error.

A partition of land by action, the authorities maintain, creates no new title to the shares set off to the parceners in severalty. While its effect is to locate the share of each in his allotted parcel of the land, and extinguish his interest in all the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held. *Tabler v. Wiseman*, 2 Ohio St. 208; *McBain v. McBain*, 15 Ohio St. 337. The effect upon the title is different where, in such proceeding, it is found impracticable to divide the land among the tenants in common, and there is an election by one or more of them to take the land or some parcel of it at the valuation returned by the appraisers. The grounds of the distinction are satisfactorily stated in *Freeman v. Allen*, 17 Ohio St. 527, and need not be repeated here. But no satisfactory reason can be assigned why partition by metes and bounds among tenants in common, by the interchange of mutual releases, where each one receives no more than his proper share of the land, should have any different effect upon the title from that of a like partition under the statute. The former is a convenient and less expensive mode of attaining the same result, and the difference is in the method only, and not in the legal consequences. The latter is not less effectual than the former in extinguishing the interest of each parcener in the parcel allotted to the others, and in transferring to each the interest of the others in his parcel. The controlling fact common to both is that each parcener receives in severalty no greater estate than he before held in common.

With regard to the effect of partition in either mode upon the title, it is said in the case of *Freeman v. Allen*, supra, that a tenant in common has the right to have his share "located in a distinct part of the premises by proceedings in partition, or the same thing might be effected by mutual releases. No new title would be acquired in either case, and the estate in the land would remain the same as before. The tenancy in common only would be dissolved, and the estate of each thereby become separate." True, the question we have before us was not involved in that case; but it was directly presented and decided in the case there cited (*Crosthwaite v. Dixon*, 5 Adol. & E. 834). In that case one of two parceners aliened his moiety in fee, whereby the allenee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the allenee and the remaining parcener, the land was divided by metes and bounds, and each took a moiety in severalty. The question was whether by that deed the parcener took anything as purchaser, so as to break the line of descent. It was held that he did not. Lord Denman, C. J., said: "It is admitted that, if the deed of partition had been made between the parceners themselves, the descent would not have been broken. Com. Dig. 'Parcener,' c. 15. But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if anything was taken from him, but we are of opinion nothing was taken by the parcener from the allenee under the deed. The effect of it was only that the parcener had it by a divided moiety in severalty, discharged of any right of the allenee, instead of an undivided moiety in common; but he had the same estate in the land as before." In 5 Com. Dig. pp. 240, 241, under the title of "Parceners" (chapter 15), the rules on this subject are stated to be that: "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct. But a co-parcener, after partition, continues in the same privity of estate as before; for it does not convey or make any alteration in the estate. So, parceners shall be in from the common ancestor as before, for the partition does not make any degree."

The precise question we have here was decided by this court in the unreported case of *Smith v. Carver*. In that case Clara Bell Carver, an adopted daughter of Henry Carver, took by descent from him, as tenant in common with his children. Partition was made by mutual releases of land so inherited, and afterwards Clara Bell died intestate, without issue, and unmarried. The children of the ancestor survived her, and she left brothers and sisters of the half blood, children of her father, who brought partition, claiming that she took by purchase the land set off to her in severalty by the partition deeds, and that it

descended to them. This claim was contested by the children of Henry Carver, who contended the land descended to them as ancestral property. The courts below held that the estate was not changed by the partition from one by descent to an estate by purchase, and therefore its course of descent was controlled by section 4158 of the Revised Statutes, and that holding was affirmed by this court. See *Smith v. Carver*, 55 Ohio St. 642, 48 N. E. 1118.

If the testator in this case had divided his land into nine parts, and by his will given one part to each of his children, the parcel given to Martha would have descended to the plaintiffs in error. Instead of doing that, he gave each of his children an equal undivided share in the whole body of his land, leaving the division to be so made among themselves. This they did by the execution of deeds of release to each other; and we are of opinion that by the partition thus made no new title was acquired, and consequently the course of descent was not changed.

We have examined the cases of *Brower v. Hunt*, 18 Ohio St. 312, *Hershizer v. Florence*, 39 Ohio St. 516, and *Bank v. Wallace*, 45 Ohio St. 168, 12 N. E. 439, and other cases cited by counsel for the defendants in error, and find they do not raise the question here under consideration, nor conflict with the conclusion arrived at in this case.

It is urged, however, that the judgment below should nevertheless be affirmed, because, if certain incompetent evidence were excluded, the deed to Martha Carter would appear to have been made for a money consideration actually paid, and her estate in the land one acquired by purchase. That deed was introduced and relied on by the plaintiffs below, and, against their objection, the defendants put in evidence all of the deeds made to accomplish the partition. Each one recites a pecuniary consideration of the same amount. The defendants also proved that in fact no money was paid, but that the only purpose of the conveyances was to make amicable partition of the land, and each was the sole consideration for the others. As sustaining their contention that the evidence was incompetent, counsel for the defendants in error cite and seem to rely largely on the case of *Burage's Lessee v. Beardsley*, 16 Ohio, 438, and other cases of like import. That case holds that, "where a deed purports to be executed for a valuable consideration, and is impeached by proving that no consideration passed, it cannot be sustained by proving that it was executed for natural love and affection." But this rule, it is said in *Steele v. Worthington*, 2 Ohio, 182, 187, is applicable only where the deed is impeached for fraud. And it was held in *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, that a deed not impeached for fraud may be shown to be a gift, notwithstanding the consideration expressed in the deed is a pecuniary one. Where the deed is not impeached or attacked, the recital of the considera-

tion has no other effect than as an admission, and, like other admissions, is open to explanation. *Harrison v. Castner*, 11 Ohio St. 339; *White v. Brocaw*, 14 Ohio St. 339. Here the validity of the partition deeds was not attacked by either party; nor was the evidence to which the objection was made designed or calculated to impeach them, nor yet to sustain them, but rather to prove that the real transaction was nothing more than an amicable partition, and that the recital of a uniform consideration in each deed was adopted as a means of showing that each tenant in common actually received no more than his equal share of the estate. And all of the deeds having been made at the same time, as parts of a single transaction, for the accomplishment of a common purpose, the partition of the land among the parties, their admission in evidence was proper, so that they might be considered and construed together, in the light of the circumstances attending their execution, and according to the intention of all the parties. Judgment reversed, and judgment for the plaintiffs in error.

(59 Ohio St. 106)

KIHLEN v. KIHLEN et al.

(Supreme Court of Ohio. Nov. 1, 1898.)

FRAUDULENT CONVEYANCE—AGREEMENT TO RECONVEY—DEATH OF GRANTOR—RECONVEYANCE TO WIDOW OF FORMER GRANTOR—RIGHTS OF GRANTOR'S HEIRS.

1. Where an owner of ancestral lands conveys them to another, on a written agreement that he will, upon request, reconvey them, the ancestral character of the land is thereby destroyed; and if a request to reconvey is made, but the grantor dies before it is executed, without issue, but leaving a widow and brothers and sisters, a conveyance to the widow is a proper execution of the trust, and the brothers and sisters of the deceased grantor have, as heirs, no legal or equitable title to the land.

2. Where an owner of ancestral lands, to hinder and delay a possible creditor, conveys them to a third person, who, after the death of the grantor without issue, conveys them to his widow, the brothers and sisters of the grantor cannot, for this additional reason, maintain an action against her to compel a conveyance of the lands to them. They stand in the shoes of the grantor, and have no rights in law or equity to the lands but such as could have been asserted by him; and he, by reason of his fraud, had none.

(Syllabus by the Court.)

Error to circuit court, Ottawa county.

The plaintiffs below, Ferdinand Kihlen and others, as the brothers and sisters and only heirs at law of Henry B. Kihlen, deceased, brought suit against Frederika Kihlen, his widow, to have a conveyance to her of certain described lands, made by John H. Kihlen, set aside, and such other relief as they, in equity, might be entitled to. After a judgment in the common pleas, the defendant appealed to the circuit court, where the case was tried on the pleadings and evidence, and judgment rendered in favor of the plaintiffs, requiring the defendant to convey the land to them, subject to a life estate in herself. Er-

ror is prosecuted here to reverse this judgment. Reversed.

At the request of the defendant the court made a finding of the facts, and its conclusions of law thereon. The finding of facts is as follows:

"First. That the plaintiffs are brothers and sisters, and are the only heirs at law, of one Henry B. Kihlken, who died intestate on the 28th day of February, 1894, leaving the defendant his widow.

"Second. That on the 21st day of May, 1888, said decedent, Henry B. Kihlken, was seised in fee simple of the following described real estate: Situated in the township of Carroll, county of Ottawa, and state of Ohio, and known as and being the south half of the northeast quarter of section twenty-nine, township seven, range fifteen, containing eighty acres of land, more or less,—and that said Henry B. Kihlken acquired said real estate by devise from his father.

"Third. That on the 21st day of May, 1888, said Henry B. Kihlken executed and delivered to one of the plaintiffs (John H. Kihlken) a deed of the aforesaid real estate, whereby he conveyed the legal title of said real estate to said John H. Kihlken. That, as the sole consideration for said conveyance, the said John H. Kihlken and Henry B. Kihlken entered into a contract in writing whereby it was agreed by and between said John H. Kihlken and Henry B. Kihlken that Henry B. Kihlken had that day sold and conveyed to said John H. Kihlken the real estate above described; that the said John H. Kihlken agreed to reconvey said premises to said Henry B. Kihlken at any time on demand made by him in person; that, should the said Henry B. Kihlken die before making such demand, then said agreement to be void and of no effect. That said agreement was executed contemporaneous with said deed, and was a part of the same transaction.

"Fourth. That on the 15th day of January, 1894, the said Henry B. Kihlken duly performed all the conditions of said agreement on his part to be performed, and duly demanded of the said John H. Kihlken a reconveyance of the said real estate to him (Henry B.) as provided in the said contract, which reconveyance the said John H. was then ready and willing to make, and thereafter and at all times remained and was ready and willing to make. That on the 15th day of January the said Henry B. and John H. Kihlken agreed that a few days later they would meet in Port Clinton, and have a proper deed of conveyance drawn up, and the said John H. agreed he would then execute the same; and, at the time agreed upon, the said John H., together with his wife, went to Port Clinton for the purpose of meeting his brother Henry B., and for the purpose of executing a deed of conveyance to him in accordance with the terms of the said written contract, and also in accordance with the terms of the verbal arrangement made on the 15th day of

January, 1894; but the said Henry B. Kihlken did not meet John H. at Port Clinton at the time agreed upon, but was on that day confined at home by sickness, which soon after caused his death, and which occurred before a reconveyance of the said property was made to him by the said John H. Kihlken.

"Fifth. That said Henry B. Kihlken on said day (May 21, 1888), for the purpose of defrauding the said Caroline M. Miller out of her just claim against him as aforesaid, and to hinder and delay her, the said Caroline M. Miller, in collecting any judgment that she might recover against him in any bastardy proceedings that she might institute against him, made said conveyance of the aforesaid real estate to the said John H. Kihlken, and without any other motive or purpose or consideration; and the said John H. Kihlken received said deed to said premises for the purpose of assisting his said brother to defraud said Caroline M. Miller, and to hinder and delay her, the said Caroline M. Miller, in collecting her just claim against the said Henry B. Kihlken.

"Sixth. That, at the time said conveyance and agreement to reconvey was entered into, the said Henry B. Kihlken was an unmarried man, and that afterwards, to wit, on the 28th day of June, 1893, the defendant, Frederika Kihlken, and said Henry B. Kihlken were married, and that said marriage relation existed until his death, on February 28, 1894.

"Seventh. That on or about the 8th day of March, 1894, the said Frederika Kihlken, by her father, Henry Schwick, requested the said John H. Kihlken to convey said real estate to her, and that the said John H. Kihlken did on said day convey said real estate to said Frederika Kihlken by a warranty deed, and that said conveyance was made by the said John H. Kihlken in ignorance of the law, and was made by him unadvisedly, improvidently, and without due deliberation, and under the supposition that he was carrying out the intention of the parties as provided for by the terms of said contract, and that the said Frederika Kihlken never paid to said John H. Kihlken any consideration whatever for said conveyance, and no consideration for said conveyance has ever passed between the said Frederika E. Kihlken and John H. Kihlken."

As a conclusion of law the court found that the conveyance of May 21, 1888, by Henry to John Kihlken, was made in trust for Henry, and that the plaintiffs, as heirs at law of Henry, are entitled to a reconveyance of the property from the defendant, subject to a life estate in herself. The defendant excepted, and prosecutes error here for the reversal of the judgment.

C. I. York, for plaintiff in error. E. G. Love and Bartlett & Wilson, for defendants in error.

MINSHALL, J. (after stating the facts). The land in question was devised to Henry Kihlen, now deceased, by his father; and he conveyed it to his brother John in 1888, on a written agreement that it was to be reconveyed on request. There was no real consideration for the conveyance, but it was done for a purpose we will not now consider. Before his death, Henry made the request, but died before a reconveyance was made. Thereupon John conveyed the land to Henry's widow, believing at the time that under the trust this was in accordance with his duty. This presents the first aspect of the question arising upon the facts as found. The claim of the plaintiffs below is that by reason of the fact that the land in question was devised to Henry by his father, and that Henry died without issue, it should descend to them as ancestral property, under section 4158, Rev. St., notwithstanding the conveyance to John and by John to Henry's widow. This we think is erroneous. Had John, as requested, conveyed to Henry just before his death, the immediate title of Henry to the land would have been the deed of John, and not the devise of his father. In *Brower v. Hunt*, 18 Ohio St. 311, after partition had been made between brothers of land devised to them by their father, two of them (Jacob and Thomas) exchanged the lands each had received in the partition, by a reciprocal execution of deeds. There was no other consideration received by either for his conveyance than the land received from the other. The court held that by this exchange the lands lost their ancestral character. The reasoning is stated as follows by White, J.: "The title mentioned in the statute is the title under which the intestate immediately holds. The title to these lands came to Thomas by deed of conveyance from Jacob, and the character of the consideration cannot alter the fact, and make that a title by devise from the ancestor which was in fact a title by deed from Jacob." It is true that in partition, though effected by deeds, it is held to be different, because partition acts only on the possession, and not on the title. Partition does not change the character of the title. *Freeman v. Allen*, 17 Ohio St. 527; *Carter v. Day* (Ohio) 51 N. E. 967. We are unable to see why the reasoning in *Brower v. Hunt* does not apply with equal force to the case before us. Had the conveyance been made by John to Henry in his lifetime, as requested, he would have died seised of them as nonancestral lands, under the deed, for whatever previous equity he had would have been merged in the deed; and the lands would have descended to his wife, under section 4159, Rev. St., as an absolute estate in fee simple. It is said in *Stembel v. Martin*, 50 Ohio St. 495, 525, 35 N. E. 208, 213: "The descent of real estate is controlled by the legal title, and when the legal and equitable title unite in the same person the latter becomes merged in the former, and does not

descend separately. The legal title draws to it the whole estate, and carries it in the same channel of descent as if the equitable estate had never existed." So, in *Patterson v. Lamson*, 45 Ohio St. 77, 12 N. E. 531, the same principle was applied. There, a father, desiring to make an advancement to his daughter on the eve of her marriage, purchased a tract of land, paying therefor \$6,000, and caused the deed to be made directly to her. On her death without children, the land was held to be nonancestral, because the immediate title under which she held the land was the deed of the person from whom her father purchased it. Hence John did not mistake his duty under the trust when he conveyed the lands to Henry's wife; for it was his duty to convey them, if there was any in the premises, to the person that would have inherited them had the reconveyance been made to Henry. There is no room for a question of good faith or fraud on the part of the owner of ancestral lands in changing their character. He has, during life, the power to dispose of them as he pleases; and it is only where he does not, and dies seised of them, without issue, that his brothers and sisters take any estate whatever in them. They simply take in the character of heirs, and not otherwise. In Indiana it appears that the surviving wife of a deceased husband inherits one-third of his lands in fee simple, subject to the provision that, if she again intermarries, she cannot, during such marriage, alienate them; and, if she dies during such subsequent marriage, the lands go to the children of the husband, from whom the lands came. And in *Nesbitt v. Trindle*, 64 Ind. 183, it was held that a widow could change the heritable character of the lands descended to her from her deceased husband by a deed made without consideration to a third person, who, after she had remarried, reconveyed to her. She, as the court observed, had the power, before her remarriage, to dispose of the lands as she pleased; and whether she did so for a consideration, or not, was immaterial to the rights of her children by the former husband, from whom she derived title, for they, as heirs, had no vested estate in the lands while she remained a widow.

The second aspect of the question on the plaintiffs' right to recover arises upon the fact averred in the answer of the defendant, and found by the court to be true,—that the deed made by Henry to his brother John in 1888 was made for the fraudulent purpose of hindering and delaying one Catherine Miller in the collection of any judgment she might recover against him in a contemplated bastardy proceeding, and was accepted by John to assist him in this purpose. This, we think, is an additional reason why the plaintiffs below are not entitled to recover. It is too well settled in this state to need the citation of many authorities, that neither a grantor nor his heirs can have any relief in law or equity

for the recovery of lands so conveyed. Trimble v. Doty, 16 Ohio St. 119; Robinson v. Robinson, 17 Ohio St. 480; Vanzant v. Davies, 6 Ohio St. 52; Barton v. Morris, 15 Ohio, 408, 431; Tremper v. Barton, 18 Ohio, 418, 422. But it is claimed that these cases do not apply here, because it is not shown or found by the court that the Miller girl had any valid claim against him, or had in fact commenced any proceeding in bastardy. Conceding that this is a correct construction of the finding,—which is doubtful, as the finding is that the conveyance was made to defraud her out of “her just claim,”—still it does not help the plaintiffs below. This very question here raised was disposed of in *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84. It was there held that “where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered adversely to him, conveys his property to another, with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he cannot, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey to him the property.” The fact that no suit is pending at the time of the conveyance cannot vary the application of the principle, where it was made to defeat the satisfaction of any claim that might be established against him. The fact of the conveyance having been made may have dissuaded the girl from commencing any suit, just as was said in *Pride v. Andrew* it may have caused the party to abandon his suit rather than enter upon the task of pursuing the property. The case of *Norton v. Blinn*, 39 Ohio St. 145, much relied on, is not in point. There Norton, as agent, received from Blinn \$500, to be invested in margins on wheat. He invested the money, and made \$395, and refused to account for the principal and what was made, on the ground that the transaction was an illegal one. The agent was required to account, on the ground that “it is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business, and under their control.” In the case before us the defendant below was not acting in the capacity of agent for any one. The conveyance was made to and accepted by her in her own capacity and right, and not as a trustee or agent to transmit the title to some one else. If the application here claimed for *Norton v. Blinn* were admitted, it would result in overruling all the decisions heretofore made, denying any relief to one making a conveyance to hinder and delay his creditors.

The defendant below, by leave of the court, amended her answer, adding a prayer that her title to the property be quieted. We think she is entitled to the relief asked. Therefore, judgment reversed, and judgment for the widow, quieting her title.

(173 Mass. 197)

McDERMOTT v. WARREN, B. & S. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 28, 1898.)

STREET RAILROADS—CONSTRUCTION—ASSESSMENT OF DAMAGES.

Pub. St. c. 109, § 4, as amended by St. 1884, c. 306, allowing an assessment by selectmen for damages to abutting property caused by the construction of lines of “companies for the transmission of intelligence by electricity,” and “electric light and electric power lines,” does not authorize the selectmen to assess damages for the construction of an electric street railroad.

Appeal from superior court, Worcester county; John Hopkins, Judge.

Action by one McDermott against the Warren, Brookfield & Spencer Street-Railway Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

J. R. Thayer and A. P. Rugg, for appellant.
N. Sumner Myrick and J. A. Brackett, for appellee.

KNOWLTON, J. The plaintiff's declaration is founded on an award of the selectmen of Brookfield assessing damages, on the plaintiff's petition, against the defendant corporation, for the construction of an electric railway in the usual manner along and upon the highway opposite the plaintiff's land. The defendant demurred to the declaration, and the principal ground of the demurrer is that the selectmen had no jurisdiction to entertain the plaintiff's petition and make an award in her favor. The principal question in the case is whether Pub. St. c. 109, § 4, amended by the statute of 1884 (chapter 306), is applicable to ordinary street railways which use electricity as a motive power. This chapter of the Public Statutes, prior to its amendment, related only to “companies for the transmission of intelligence by electricity.” The amendment above referred to extends the provisions of section 4, allowing the assessment of damages in certain cases, to “electric light and electric power lines.” At the time of the enactment of this amendment, electric railways were not known, or at least were not in common use. In the statute as amended there is no reference to street railways. The statute in regard to street railways is Pub. St. c. 113, and it contains elaborate provisions authorizing the construction and operation of such railways. By section 39 of this chapter it is provided “that a street railway may use such motive power on its tracks as the board of aldermen of cities or the selectmen of towns through which it is located may from time to time permit.” Under this provision, in recent years street railways generally have adopted electricity as their motive power. In *Howe v. Railway Co.*, 167 Mass. 46-48, 44 N. E. 386, 387, it is said that “the statutes of the commonwealth make no provision for compensation to abutters when an electric railway is

laid in a public way," etc.; and we are of opinion that the legislature did not intend by St. 1884, c. 306, § 1, to abridge the rights of street-railway companies, or to affect them in any way. It seems, rather, that companies for the production and sale of electric power or of electric light were intended to be brought within the provisions of the statute. While electric railways use electric power, they are not properly called electric power companies. Their use of power is only in their own business of maintaining and operating railways for the transportation of passengers or freight. In the same way they use electric light for the illumination of their cars, but they are not for either of these reasons electric power companies or electric light companies. They are not in the business of manufacturing or furnishing electric power or electric light for others. We are of opinion that the statute relied on is inapplicable to the facts stated in the petition, and that it gives the selectmen no jurisdiction to act upon the petition. It follows that their action was without warrant in law, and that their award was void. *Lawrence v. Smith*, 5 Mass. 362; *Riley v. City of Lowell*, 117 Mass. 76; *Custy v. City of Lowell*, Id. 78. Judgment affirmed.

(172 Mass. 189)

BOWLER v. O'CONNELL.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 22, 1898.)

INJURY BY HORSE—INSTRUCTIONS—EVIDENCE TO WARRANT.

Refusal of the court, in an action for injury from the kick of a horse, where there was a dispute as to whether the accident occurred on the sidewalk or in the barnyard, to instruct that "the question of the sidewalk" was immaterial, was error, the testimony of both parties showing that plaintiff was approaching the horse not as a traveler, but for the purpose of getting to him and with the intention of touching him; so that the question of plaintiff being injured as a traveler on the highway, and in disregard of his rights as such, should not have been left to the jury.

Exceptions from superior court, Hampden county.

Action by Patrick H. Bowler against Frank O'Connell for injury to plaintiff by being kicked by defendant's horse. Verdict for plaintiff. Defendant excepts. Exceptions sustained.

Brooks & Hamilton, for plaintiff. T. B. O'Donnell, for defendant.

HAMMOND, J. At the close of the evidence the defendant requested the court to rule—First, that there was no evidence of negligence of the defendant; and, second, that the question of the sidewalk was immaterial. The court declined so to rule, submitted the question of negligence to the jury, and instructed them in such a manner as to indicate that, in certain aspects of the case, "the question of the sidewalk" might become material, closing this part of his charge

as follows: "I want to draw a distinction whether the boy was a traveler on the street in the ordinary sense, and not for the purpose of following the horse, or whether or not he was following the horse. If his purpose was simply to follow the horse, then it makes no difference whether he was on the sidewalk or in the middle of the street. But you will have a right to take it into account if he was simply going along the sidewalk for any purpose, but following the horse."

We think the second instruction should have been given. Whether the accident occurred upon the sidewalk or in the barnyard was in dispute, but both sides agreed that at the time the plaintiff was injured he was approaching the horse, not as a traveler, but for the purpose of getting to him, and with the intention of touching him. The plaintiff in his examination in chief testified as follows: "He [defendant] says, 'Would you like to have a ride on this horse?' I says, 'Yes.' He says, 'Come along; I will give you a ride.' At this time he was pretty near the gate, when he said, 'Come along, I will give you a ride.' I ran up to get a ride. He stopped the horse. Before I ran up I was about five or six feet from the horse's heels. As I ran up to get a ride, the horse kicked up, and hit me in the eye." And in cross-examination as follows: "He asked me if I wanted a ride, and I said I did, and I started forward to get the ride, and, as I got pretty near, the horse kicked up." And also: "The horse had been stopped until I got up to the horse. It wasn't long, and I was about as far away from him as from that [showing] to me, and I ran up to get my ride." The defendant testified thus: "The horse made a kind of a little lunge forwards, and I looked behind, and Patrick was there just in the act like that [showing], reaching out towards the horse's tail, and before I could say a word to him the horse had kicked him in the eye." And on cross-examination as follows: "I saw him reaching out as if he was going to take hold of the colt's tail with his right hand. I remember that. And right there, at the same instant, the colt lunged forward with his head, and lunged upwards with his heels. The colt lunged before I saw Patrick. He made this lunge, and I looked back, and saw Patrick reaching out with his hands, I should think as if to take hold of his tail." And also: "I turned around this way [showing], and could see back there, and could see Patrick back of the horse, reaching his hand to take hold of the tail." No other witness saw the accident. The testimony of Knowles and O'Connor, concerning the admission of the defendant, is not inconsistent with this, upon the question whether the plaintiff at the time of the accident was approaching the horse with the intention of touching him. It is plain, we think, upon the whole evidence, that there was nothing to warrant a verdict that the plaintiff was injured as a traveler upon the highway, and in disregard of his

rights as such traveler. Therefore the "question of the sidewalk" was not at all material. Exceptions sustained.

(172 Mass. 220)

ELLIS v. PIERCE.

(Supreme Judicial Court of Massachusetts.
Plymouth. Nov. 23, 1898.)

INJURY TO EMPLOYEE—NEGLIGENCE—EVIDENCE.

The question of the master's negligence is properly submitted to the jury, the employé having given testimony tending to show that the accident was caused by the slipping of a belt on a pulley; that the belt would sometimes slip, which would cause the upper part of the machine to come down quickly; that he had called the attention of the superintendent to it two or three times, and he tightened it once; it seeming that such tightening was part of the work devolving on the master in keeping the machinery in a safe condition; and the master having made an admission to the employé tending to show liability, saying, "I do not want to tell you to sue me, but, if it was me, I should sue," though in the same connection he stated he was insured against liability on account of the machines.

Exceptions from superior court, Plymouth county.

Action by Ellis against Pierce. Verdict for plaintiff. Defendant excepts. Exceptions overruled.

Hosea Kingman, for plaintiff. F. M. Bixby, for defendant.

KNOWLTON, J. The plaintiff's mother testified without objection that the defendant said her son was a good workman, and that "his getting hurt was not due to any carelessness of his, and that he was a very steady fellow, and attended to his business." The evidence that the defendant said: "I do not want to tell you to sue me, but, if it was me, I should sue. My machines are all insured, and you will have to sue me to get at the insurance company,"—was competent. What he said about insurance was immaterial. But the statement came as a part of a sentence in which he indicated an opinion that he was liable for the injury to the plaintiff. This was in the nature of an admission which was evidence against him. The weight of it may be affected by the fact, if it was a fact, that he was insured.

There was evidence tending to show that the plaintiff was in the exercise of due care. The only other question in the case is whether there was any evidence of negligence on the part of the defendant. A part of the plaintiff's testimony tended to show that the accident was caused by the slipping of a belt on a pulley. He testified that the belt would sometimes slip, which would occasion the upper part of the machine to come down on the molder quickly; that he had called the attention of the superintendent to it two or three times, and he tightened the belt once. The tightening of the belt, if it was too loose, seems to have been a part of the work which devolved on the defendant in the perform-

ance of his duty to keep the machinery in a condition safe for his employés to work upon it. The testimony of the plaintiff was not clear and definite in support of the contention that the defendant failed to perform this duty, but some things in his testimony had a slight tendency in this direction. When we consider this testimony in connection with the admissions of the defendant tending to show his liability for the injury, we are of opinion that the presiding justice rightly submitted the case to the jury. Exceptions overruled.

(172 Mass. 234)

DOREY v. METROPOLITAN LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1898.)

INSURANCE—QUESTIONS FOR JURY.

Where right to recover on a life policy depends on whether insured was in sound health at the time he was insured, and plaintiff's testimony would warrant a verdict for her, and defendant's testimony a verdict for it, the case is for the jury.

Exceptions from superior court, Bristol county.

Action by Dorey, administratrix, against the Metropolitan Life Insurance Company. Verdict for plaintiff. Defendant excepts. Exceptions overruled.

J. W. Cummings, Edw. Higginson, and Jas. T. Cummings, for plaintiff. Jennings & Morton, for defendant.

HAMMOND, J. This is an action by the administratrix of the estate of Orisime Dorey on an insurance policy on the life of said Dorey, dated May 13, 1895. By the terms of the policy, no obligation was assumed by the defendant, unless the insured was, at its date, in sound health. At the trial before a jury, the only issue was whether or not Dorey was in sound health at that time. Upon this question, evidence was introduced on each side. Without reciting it here in detail, it is sufficient to say that the evidence introduced by the plaintiff would, if believed, warrant a verdict for the plaintiff, and that introduced by the defendant would, if believed, warrant a verdict for the defendant. A pure question of fact, and not of law, was raised. The first request was rightly refused. Although the second request was not given in its exact terms, it was substantially given, and in clear language. Exceptions overruled.

(173 Mass. 247)

BRENNAN et al. v. McINNIS et al.

BRENNAN v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 23, 1898.)

GARNISHMENT—PREMATURE APPEAL.

An appeal by a trustee from an order denying his motion to be discharged on his an-

swer, made before the action against the principal defendant has been tried, is premature.

Appeals from superior court, Suffolk county.

Separate actions by Miles F. Brennan and others and Brennan alone against Alexander McInnis. A motion by W. S. Rendle to be discharged as a trustee in each case was denied, and he appeals. Dismissed.

P. W. Carver, for appellant. U. D. Pratt, for appellees.

FIELD, C. J. These actions were begun by trustee process. The trustee in each case has appealed from an order of the superior court overruling his motion that he be discharged on his answer, and also from an order of said court requiring him to answer certain interrogatories propounded by the plaintiff. It does not appear that the actions against the principal defendant have been tried, and it is, of course, uncertain whether the trustee ultimately will be charged or discharged. The plaintiffs may fail to maintain their actions against the principal defendant, or, if they obtain a verdict against the principal defendant, the trustee may be discharged. These appeals therefore have been prematurely entered, and must be dismissed. *Elliott v. Elliott*, 133 Mass. 555; *Lowd v. Brigham*, 154 Mass. 107, 26 N. E. 1004. In *Nutter v. Railroad Co.*, 131 Mass. 281, it appears from the report that the trustee had been defaulted and adjudged a trustee before his exceptions were entered and heard in this court. It also appears from an examination of the original papers in said cause that the principal defendant had been defaulted, and that damages had been assessed against him, and that the trustee, in addition to its exceptions to the order of the court requiring it to answer certain interrogatories, which it declined to do, appealed from the judgment of the court ordering it to be defaulted and adjudged a trustee. Appeals dismissed.

(172 Mass. 187)

COMMONWEALTH v. ELDER.

(Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 22, 1898.)

ARSON—EVIDENCE.

An allegation in an indictment for arson that a barn was within the curtilage of the dwelling house of a person named is satisfied by proof that it was within the curtilage of a dwelling house owned by her and occupied by a tenant.

Exceptions from superior court, Hampshire county; Fessenden, Judge.

John F. Elder was convicted of arson, and he brings exceptions. Exceptions overruled.

J. C. Hammond, for the Commonwealth. Felker & Edwards, for defendant.

BARKER, J. In this indictment, under Pub. St. c. 203, § 2, the averment was of a burning of a "barn, of the property of one Sarah L. Wright, then and there situate and being within the curtilage of the dwelling house of her, the said Sarah L. Wright, there also situate"; and the proof was that the barn was the property of Sarah L. Wright, situated within the curtilage of a dwelling house owned by her, but in which she had never dwelt, and which at the time of the burning was occupied by her tenant, who dwelt with his family in the house, and occupied the barn and the curtilage. The indictment alleged all the elements of a statute offense, of which the proof showed the defendant guilty. The averment and the proof were that he burned the barn of another, within the curtilage of a dwelling house. Whether there was a variance depends upon whether the words, "within the curtilage of the dwelling house of her, the said Sarah L. Wright," are an averment that the barn was within the curtilage of a dwelling house in which Sarah L. Wright then lived. There is no reason why they must be so construed. The offense is statutory, and while the facts that the barn was the barn of another, and that it was within the curtilage of a dwelling house, must be averred, there is no statute requirement that the dwelling house must be alleged to have been the dwelling house of the person who there dwelt. On the contrary, the offense is one in relation to real estate, and the provisions of Pub. St. c. 214, § 14, are applicable, under which, in such prosecutions, it is enough if it is proved on the trial that when the offense was committed "either the actual or constructive possession of the general or special property" was in the person alleged to be the owner. See *Com. v. Wade*, 17 Pick. 395, 398. Neither *Com. v. Barney*, 10 Cush. 478, nor *Com. v. Hayden*, 150 Mass. 332, 23 N. E. 51, governs the present case. In *Com. v. Barney* the contention was whether the building was a dwelling house, within the meaning of the statute, and not whether there was a variance between the proof and the allegation that it was the dwelling of its owner. The house had not been dwelt in for months, and was the dwelling of no one. So, in *Com. v. Hayden* the house was not occupied as a dwelling house at the time of the burning, and for that reason was not a dwelling house, within the meaning of the statute; and it was not the dwelling house of Thayer, as alleged, because it was not a dwelling house, within the meaning of the statute. In the present case the alleged dwelling house within the curtilage of which the barn was burned being actually inhabited by a family of persons was a dwelling house, and the averment that it was the dwelling house of the owner was satisfied by the proof that it was an actual dwelling, and of other ownership. Exceptions overruled.

(172 Mass. 199)

SHANE v. LYONS.(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1898.)**MARRIED WOMEN—LIABILITY FOR ACTS OF HUSBAND AS AGENT.**

A married woman can be civilly responsible for personal injuries inflicted, not in her presence, on a third person, by her husband, while acting within the scope of his authority as her agent, she having of her free will, and without coercion, appointed him agent.

Exceptions from superior court, Essex county.

Action by Mamie Shane against Mary J. Lyons for an assault and battery committed by defendant's husband. The court refused the rule as requested by defendant as to her liability, and she excepts. Exceptions overruled.

D. B. Kelly and J. Frank Batchelder, for plaintiff. C. H. Poor and E. B. Fuller, for defendant.

HAMMOND, J. The only question is whether a married woman can be civilly responsible for personal injuries inflicted, not in her presence, upon a third person, by her husband, while acting within the scope of his authority as her agent. The act of the agent is the act of the principal, and she must be held unless there is something in the relation of husband and wife which takes the case out of the general rule. It is claimed by the defendant that, while the wife is liable for assaults and other torts committed by her when not acting under the coercion of her husband, she is not so liable when acting under such coercion, and that, as the husband was present at the time of this assault, she herself, if she had been personally present, and had actually joined in the assault, would have been presumed to have acted under coercion, and so would not have been liable, and that, a fortiori, she ought not to be held liable when absent. But this presumption of coercion is simply a presumption which may be rebutted by evidence, and a wife may be held responsible, either criminally or civilly, for assaults committed of her own free will, and while actually under no coercion from her husband, even although he be present and join therein. *Com. v. Eagan*, 103 Mass. 71; *Handy v. Foley*, 121 Mass. 259, and cases cited; *Ferguson v. Brooks*, 67 Me. 251. Our statutes have given to a married woman the right to hold, manage, and dispose of her property in the same manner as if she were sole; and a necessary consequence of this enlargement of her power is a corresponding increase of her responsibility for all acts relating thereto, and growing out of her management and control. If she appoints her husband as her agent in such a matter, and, in making such appointment, acts of her own free will, and without coercion from him, we see no reason for regarding her as incapable of authorizing any act to be done by him in

her name, and on her behalf, or for shielding her from responsibility. It must be held that whatever is done within the scope of the agency is done by her authority. Exceptions overruled.

(172 Mass. 183)

DICKINSON v. TODD et al.(Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 21, 1898.)**APPEAL—REVIEW—DECISION OF CHANCELLOR.**

The decision of the chancellor on questions of fact arising on oral testimony heard before him will not be reversed unless it is plainly wrong.

Appeal from superior court, Hampshire county.

Bill by one Dickinson against one Todd and others. There was a decree for plaintiff, and defendants appeal. Affirmed.

Hamlin & Reilley and W. G. Bassett, for appellants. J. C. Hammond, H. P. Field, and S. S. Taft, for appellee.

KNOWLTON, J. The justice of the superior court found that the deed in question was procured by fraud of the grantee, and entered a decree for the plaintiff. The defendants appealed, and the question before us is whether the finding of the judge was erroneous. An appeal in equity brings to the appellate court questions of fact which arise upon the record as well as questions of law. But the practice which has long prevailed in Massachusetts of presenting the testimony in suits in equity orally, instead of in writing, has materially changed the effect of appeals in such suits upon questions of fact. Under the old practice, of presenting all the testimony by deposition, the appellate tribunal had before it the evidence in the same form as when it was considered by the lower court. But, under the present system, the judge who sees and hears the witnesses has a great advantage in the search for truth over those who can only read their written or printed words. For this reason the rule has long been established that, upon an appeal from a decree of a judge in equity upon questions of fact arising on oral testimony heard before him, his decision will not be reversed, unless it is plainly wrong. *Reed v. Reed*, 114 Mass. 372; *Chase v. Hubbard*, 153 Mass. 91, 28 N. E. 433; *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Wentworth v. Machine Co.*, 163 Mass. 28, 39 N. E. 414; *Gutlon v. Marcus*, 165 Mass. 335, 43 N. E. 125; *McKay v. Kean*, 167 Mass. 524, 46 N. E. 120; *Edwards-Hall Co. v. Dreser*, 168 Mass. 136, 46 N. E. 420. In the present case there was testimony at the trial on which the court could properly find for the plaintiff. It would serve no useful purpose to review the evidence. The judge of the superior court saw the witnesses, observed their manner of testifying, formed his opinion about them, not merely in regard to their credibility

in the ordinary sense, but, in the case of the plaintiff and the female defendant, in regard to everything in their temperament, experience, and habits of life, which would help him in discovering the truth. Seldom is there a case in which the reasons for the rule that weight should be given to the impressions produced by seeing and hearing the witnesses are so strong as in this case. From reading the printed testimony a majority of the court is unable to say that the judge who presided at the trial, and had opportunities for ascertaining facts which we cannot have, was wrong in his conclusions. Decree affirmed.

(157 N. Y. 353)

DE WITT v. AGRICULTURAL INS. CO. OF WATERTOWN, N. Y.

(Court of Appeals of New York. Nov. 29, 1898.)

INSURANCE—TRANSFER OF POLICY—RIGHTS OF TRANSFEREE—ADDITIONAL INSURANCE—PROOFS OF LOSS—WAIVER—VENDOR AND PURCHASER.

1. The vendee of insured and incumbered property went into possession under an executory contract to purchase, and procured insurance thereon; and the mortgagee, without the knowledge of the vendor or vendee, caused the insurer to indorse on the policy that the vendee "is now recognized as the owner of this policy and the property mentioned as insured hereinunder," subject to the policy's conditions. *Held*, that the vendee did not thereby become "the insured," within conditions requiring insured's interest to be correctly stated, and avoiding the policy for other insurance procured by him without the insurer's consent.

2. Insurance procured by a vendee in possession under an executory agreement to purchase the insured property does not vitiate a policy held by the owner which forbids additional insurance, since the two policies are on different interests.

3. An insurer waives a condition requiring proofs of loss to be made by insured by receiving and retaining without objection proofs made by a vendee of insured who obtained a deed after the loss, and before the proofs were made.

Appeal from supreme court, general term, Second department.

Action by Peter De Witt against the Agricultural Insurance Company of Watertown, N. Y. From a judgment of the general term (36 N. Y. Supp. 570) affirming a judgment for plaintiff, defendant appeals. Affirmed.

A. H. Sawyer, for appellant. Theron G. Strong, for respondent.

PARKER, C. J. The defendant insists that it is not legally liable to the plaintiff under the policy of insurance upon which this action is founded. Its claim is that the insured therein, at the time he became such, had another policy of insurance covering the same property, and hence this policy became void at the moment the indorsement was placed upon it declaring George E. Nichols, this plaintiff's assignor, to be the owner of the property and of the policy. There was

no attempt on the part of Nichols, or of any of the other parties having to do with either of the policies, at any stage of the transaction with which they were connected, to defraud the defendant or to procure double insurance. Indeed, the effect of obtaining the insurance complained of by this defendant has been, because of the payment made by the company issuing the policy, to reduce the recovery to a point much below what it would have been had such insurance not been obtained. Nichols contracted to buy the land upon which the burned buildings were situated, and immediately thereafter entered into possession, and began extensive alterations and repairs upon the buildings; and he took out a policy of insurance for \$3,500 on the residence, and \$1,500 on the barns, in the London & Liverpool & Globe Insurance Company. This was on the 22d of December, 1892. A few days later, and on December 27th, Hanford Lockwood, who had once been the owner of the property, but then was a mortgagee, and as such the payee, to the extent of his mortgage interest, in the policy of insurance that occasioned this action, apparently supposing that Nichols, plaintiff's assignor, had become vested with the fee of the real estate, made application to the company to have an indorsement put upon the policy acknowledging and consenting to the changed ownership; and this he did without consulting Nichols or the owner of the policy, who was also the person in whom the fee to the property was still vested. Lockwood's application was granted, and the company indorsed on the policy the following: "George E. Nichols is now recognized as owner of this policy and the property mentioned as insured hereinunder, subject, nevertheless, to all the rules and conditions of this policy, none of which is hereby waived or avoided." The appellant contends that the effect of this indorsement was to make Nichols the insured under the policy, and at the same moment of time the policy became void, for two reasons: (1) Because, five days before, Nichols had taken out a policy of insurance in another company, although he was at that time ignorant of the existence of this policy. (2) Because the indorsement did not truly state Nichols' interest in the property, in that it was not in fact that of unconditional and sole ownership.

Lockwood, who was a very old man, in fear, doubtless, of the clause in the policy providing that it should become void in the event of a change in the title without notice to the company, attempted in good faith to preserve the policy by having the change of ownership noted thereon. He was mistaken merely about the fact of ownership. Nichols had a contract of sale, instead of being the unconditional and sole owner of the property. If, however, the legal effect of Lockwood's action was to make Nichols the insured under this policy, then the position of the defendant would seem to be well taken; for

when Nichols became the insured, under the policy, the clause therein which provides that it "shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," constituted a part of Nichols' contract with defendant, and Nichols did then have other insurance. If the effect of this indorsement was to make Nichols the insured, the defendant's other point is also well taken: for Nichols was not the sole and unconditional owner, and therefore the interest of the insured in the property was not truly stated therein, and in such event certain conditions of the policy provide that it shall become void. But in our view Nichols did not become the owner of the policy, or the insured inurender, by the indorsement made thereon by the company at the request of Hanford Lockwood, the payee therein, to the extent of his mortgage interest.

At this point we stop to state in their proper order the several transactions which induce this conclusion: On the 27th day of June, 1892, Hanford Lockwood was the owner of the property, and on that date he obtained from this defendant the policy of insurance upon which this action is founded. Subsequently he sold, and by a good and sufficient deed conveyed, the property to Warren E. Smith, taking back from him a purchase-money mortgage; and immediately thereafter, and on August 18, 1892, there was indorsed upon the policy the following: "Warren E. Smith is now recognized as owner of this policy and the property mentioned as insured hereinafter, subject, nevertheless, to all the rules and conditions of this policy, none of which are hereby waived or avoided; and loss, if any, first payable to Hanford Lockwood, mortgagee, as interest may appear. Twenty thousand dollars incumbrance is hereby permitted." Smith was the owner of the property prior to the making of that indorsement. As soon as it was made he became the owner of the policy, Hanford Lockwood being simply the payee therein to the extent of his mortgage interest. He had no other right or interest therein. The contract was one between Smith and the defendant insurance company. As the appointee to receive the moneys thereunder to the extent of his mortgage interest, Lockwood had rights that he could enforce. But it was not his policy. It was Smith's. The contract of the company was with him. The defendant could not by any arrangement with Lockwood relieve itself from liability to Smith in the event of a fire. It was beyond its power, without notice to Smith, to deprive him of his ownership of the policy, or of any rights under it. About three months after Smith had become the owner of the policy, he entered into a contract of sale of the property with George E. Nichols. For some reason of convenience, the transfer of the title was not made at once, but Nichols was allowed to go into pos-

session for the purpose of making improvements to the buildings; and a month and two days after the contract of purchase was executed he procured a policy of insurance from the Liverpool & London & Globe Insurance Company for \$5,000; \$3,500 of it being on the residence,—a sum not exceeding one-half the value of the building. Nichols had an insurable interest in the property. The policy was a valid one, and it has been paid. When it was issued it had no effect upon Smith's policy. Nothing that Nichols could do by way of taking out insurance could affect Smith's right under his policy. The policies could co-exist, because, while relating to the same property, they affected different interests therein; and neither the policy of the law nor the contracts of insurance forbid, but, on the contrary, permit, as many several insurances upon the same property as there are separate interests. *Insurance Co. v. Allen*, 43 N. Y. 389, 395; *Lowell Mfg. Co. v. Safe-guard Fire Ins. Co.*, 88 N. Y. 591. Smith's policy then was unaffected by the taking out of another policy by Nichols, so that on the 27th day of December, 1892, and down to the moment when defendant indorsed upon the policy the clause to the effect that Nichols was owner of the property and policy, it constituted an enforceable contract, upon which Smith, its owner, had a right to rely for protection in the event of an accidental fire; and it was a valid policy after the indorsement, because the indorsement did not and could not affect Smith's rights thereunder, it having been made without his knowledge or consent. As against him, the indorsement was an absolute nullity, for it is not pretended that he either knew of or consented to it. Hanford Lockwood and this defendant were responsible for it. It is true that the indorsement was made by the defendant under the supposition, doubtless, that Lockwood was correct in his information. But he was not correct; he was mistaken. Nichols had not become the owner, in the sense in which Lockwood understood it, nor in the sense in which that word was used in the indorsement on the policy. But it matters not whether the indorsement was the result of Lockwood's mistake or not; for the defendant and Lockwood had not the power, by this or any other indorsement, to deprive Smith, without notice, of the rights that, as owner of the property and of the policy, were vested in him under that contract of insurance. If the fire had occurred the night following the last indorsement, no one would question the right of Smith, as the owner, and the insured, to enforce the contract of insurance. The property did not burn that night, but it did in about two weeks thereafter; and in the meantime nothing had happened to change the rights or the interests of these parties, either in the policy of insurance or in the title to the real estate. When the fire actually took place, Smith was still the owner of the fee of the property, and the owner of the policy

of insurance, subject to the right of Hanford Lockwood to have paid to him such sum, if any, as was then due on the mortgage held by him. Afterwards Smith assigned his interest in the policy to Nichols, and it was intimated that at the time of the fire Lockwood had no interest in it, because his mortgage had been paid; but whether that be so or not is unimportant, for Smith, as owner of the policy, was entitled to all that should be paid thereunder, except such sum as the mortgagee should be entitled to. But the mortgagee also assigned his interest under the policy to Nichols, and thus Nichols acquired all the rights of both Smith and Lockwood. The rights that Nichols obtained from Smith and Lockwood under this policy were subsequently, but before the commencement of this action, acquired by the plaintiff.

The defendant also insists that if Smith, instead of Nichols, was the insured under the policy at the time of the fire, then there should have been no recovery, because proofs of loss were not made by the insured, as required by the policy. It is true that the policy requires that notice and proofs of loss shall be furnished by the insured; and it has been held over and over again that nonperformance of these conditions, or any of them, constitutes a complete defense to any claim for recovery on the policy. But this action differs from those asserting the general rule, in that proofs of loss were here furnished. Smith, as owner of the property and of the policy, should have furnished them; but, almost immediately after the fire, Nichols completed the contract of purchase, by paying over the balance of the purchase price, and taking a deed of the property and an assignment of the policy. Nichols may have thought that this indorsement on the policy made him the owner of it, as the appellant argues it did, and so deemed himself the proper one to make out the proofs. But, whatever the reason, he did make out the proofs of loss, and delivered them to the defendant; and it has retained them, with full knowledge of all the facts and circumstances that have attended this policy from its birth. No objection whatever was made by the defendant to the proofs of loss until upon the trial, when defendant's counsel discovered that the plaintiff was insisting that Nichols was not the insured referred to in the policy. Then the defendant objected to the proofs of loss, and insisted that, if the referee should find that Nichols was not the insured, he should hold that the action could not be maintained, because proofs of loss were not made by the proper person. But it was then too late to make that objection, as the receipt and retention of the proofs by the defendant, with full knowledge of all the circumstances, and without objection, until after the trial of the action had begun, constituted a waiver of the objection. *Kernochan v. Insurance Co.*, 17 N. Y. 428. The judgment should be affirmed, with costs. All concur, except O'BRIEN, J., not voting. Judgment affirmed.

(157 N. Y. 699)

POLLOCK v. PENNSYLVANIA IRON- WORKS CO.

(Court of Appeals of New York. Nov. 22, 1898.)

APPEAL—REVIEW—WAIVER.

Omission of defendant to move, at the close of evidence, either for a dismissal or a verdict, is a consent to a submission of the cause to the jury, and prevents a review of the evidence.

Appeal from common pleas of New York city and county, general term.

Action by Alexander Pollock against the Pennsylvania Iron-Works Company. A judgment of the city court (33 N. Y. Supp. 1133) for plaintiff was affirmed by the common pleas of New York (34 N. Y. Supp. 129), and defendant appeals. Affirmed.

William H. Maginnis and John Cummins, for appellant. Charles De Hart Brown, for respondent.

PER CURIAM. The legal effect of the omission of the defendant at the close of the testimony to move either for a dismissal of the complaint or the direction of a verdict in its favor was to consent to the submission of the case to the jury. We are therefore prevented from considering whether the defendant was entitled to judgment. None of the exceptions to the charge call for a reversal. The judgment should be affirmed. All concur. Judgment affirmed.

(157 N. Y. 218)

SANGER v. FRENCH.

(Court of Appeals of New York. Nov. 22, 1898.)

FINDINGS OF REFEREE—REVIEW—STATUTE OF FRAUDS—PARTNERSHIP—ACCOUNTING—PARTIES.

1. In order to sustain a reversal of the referee on the facts, it must appear that his findings are against the weight of evidence, or that the proofs so clearly preponderate in favor of a contrary result that it can be said with a reasonable degree of certainty that his conclusions were erroneous.

2. The defense of statute of frauds, to be availed of, must be pleaded.

3. The statute of frauds, if having any application to an oral partnership agreement, where it is wholly or partially executed, is to make the partnership one at will.

4. A partner may have an accounting of profits, through an action in equity, without a dissolution of the partnership.

5. A partner in an action for accounting of partnership profits need make defendant no other than the one with whom he had had his agreement, though there was a secret or undisclosed arrangement between the defendant and another as members of another firm.

Appeal from supreme court, general term, First department.

Action by Frank W. Sanger against Thomas Henry French. From a judgment and order of the general term (36 N. Y. Supp. 853) reversing a judgment for plaintiff, entered on report of a referee, and granting a new trial, plaintiff appeals. Reversed.

Almon Goodwin, for appellant. A. J. Dittenhoefer and David Gerber, for respondent.

O'BRIEN, J. The questions litigated in this action were questions of fact. The plaintiff was the manager of a theater. The defendant was the junior member of a firm composed of himself and his father, known as the firm of Samuel French & Son, having an office or place of business both in New York and London. The defendant represented his firm in this country, and his father had charge of the firm business in Europe. The business of the firm was the purchase and leasing or subletting of plays and dramas to theaters and theatrical managers in the United States and Canada, subject to the payment of royalties to the authors or owners thereof. The firm was also engaged in the publication and sale of printed plays and dramatic works, and in the sale of theatrical supplies. In the month of April, 1887, the plaintiff and defendant conceived the project of building the Broadway Theater, in New York, in conjunction with another person, who was to furnish a portion of the necessary capital. It was a part of the scheme that the business was not to be confined to the "theater," properly so called, but that the associates in the enterprise should have the first option to take such plays as should be suitable for the new theater, whether procured or controlled by the plaintiff or the defendant or the defendant's said firm, and that such plays, when suitable, should not only be produced at the theater, but should also, taking advantage of the reputation and prestige acquired by the successful production of the same at the Broadway Theater in New York, afterwards, in theatrical language, be "toured" or "exploited" in the country throughout the United States and Canada, for their individual profit, to be shared equally between the associates. A contract in writing, embracing substantially this scheme, was entered into between the parties to this action and one Bailey, but it was subsequently canceled at the request of the latter on account of ill health, and at his suggestion another man was substituted in his place. It seems that this man did not possess the necessary financial resources, and for this and other reasons this written agreement was also canceled. A third party, who owned the land upon which the Broadway Theater now stands, was willing to embark in the enterprise, and furnish half the capital necessary for building the theater, provided a corporation should be formed for that purpose. He was not willing, however, to go any further than to furnish half the capital for the project, and that on condition that the company to be formed leased from him the land for the erection of the theater at a rental of \$18,000 per year, for which not only the corporation, but the parties to this action, were to become personally responsible. The new associate was not willing to engage in

the business of touring or exploiting plays in the country for profit, or to participate in the theater business, otherwise than as a stockholder in the new theater. The plaintiff and defendant accepted his proposition. The corporation was formed; a long lease of the land, with provisions for renewals, was made, in such form that the parties to this action became personally responsible for the rent; and the theater was built, at the cost of about \$320,000, of which the plaintiff and defendant furnished one half in equal shares, and the lessor and owner of the land the other half.

The plaintiff claims and alleges that when this third associate came into the project, but declined to become in any way a partner in the theater business with any one, then a verbal agreement was made between the plaintiff and defendant alone on the lines of the Bailey contract, already referred to, whereby they were to be and become equal partners in touring and exploiting through the country such plays as had obtained reputation at the Broadway Theater, and which were owned or controlled by either of them, or by the defendant's firm; and, to this end, a firm composed of the plaintiff and defendant, and operating outside the corporation, should have the first option to take or purchase such plays as either of them owned or controlled. It seems that the word "purchase," when applied to a play, means that a party has acquired from the author or owner the right to use it, upon payment of a stipulated royalty.

The principal question in this case was whether the verbal agreement of partnership claimed by the plaintiff, under which he was entitled to share equally with the defendant in the profits of touring and exploiting plays, had ever in fact been made as alleged. All the issues in the case, including the accounting as well as the existence of the partnership in any form, were referred to a referee to hear and determine; and he found on all these issues in favor of the plaintiff. The important finding in the case is that which sustains the plaintiff's allegation that there was a partnership agreement. After finding in detail the scope and purpose of the original scheme, the written agreement with Bailey and his substitute, the cancellation of the respective agreements between them and the parties to this action and the cause, as hereinbefore stated, all of which preceded and led up to what the plaintiff claimed to be the final agreement, the referee finds substantially as follows: On the 25th of April, 1887, the plaintiff and defendant, with Young, who was the person substituted at the suggestion of Bailey in his place, with their counsel, went to the office of the counsel for the landowner, who was to lease the land for the purpose of the theater, and the latter, on being informed that Bailey had withdrawn from the enterprise, objected to making the lease to the new firm, but offered himself to fur-

nish a portion of the money for carrying out the project, providing a corporation could be formed for that purpose. This proposition, however, had reference only to the building and managing of the new theater, and did not include any business of touring and exploiting plays outside the theater. The negotiations having thus assumed a new phase, the plaintiff and defendant retired to an adjoining room to consult between themselves, and the situation was fully discussed, and the finding states that it was then and there agreed that they would accept the proposition of the landowner, and form a corporation to build and own the theater on the terms suggested by him, including the personal liability of plaintiff and defendant jointly for the ground rent, and their obligation to furnish each one-quarter of the capital for the enterprise. It is also found that the parties to this action agreed to become equal partners in the business of exploiting plays in the country after exhibition at the new theater, and that the firm of French & Sanger, thus formed, should, to that end, have the first option to take any and all plays owned or controlled by either member of the firm which should be suitable for the new theater for the purpose of producing them at the theater, and then exploiting them throughout the United States and Canada, including the plays owned and controlled by defendant's firm of Samuel French & Son, which plays he in fact controlled, since he was the managing representative of that firm in this country.

The Broadway Theater was completed and opened on the 3d day of March, 1888, by a corporation formed under the agreement already mentioned. The plaintiff became the president and general manager, and the defendant the treasurer. In the month of June, thereafter, the defendant's firm of Samuel French & Son purchased or acquired from Mrs. Frances Hodgson Burnett the American rights to her play entitled "Little Lord Fauntleroy." This transaction took place in London, where Mrs. Burnett, the authoress, then resided, and where the defendant also temporarily was. The agreement was in writing, and in consideration of the stipulated royalty, a part of which was advanced by the defendant or his firm, the right to produce the play in this country and in Canada was acquired. On the return of the defendant from Europe, about July 1, 1888, he and the plaintiff agreed that the new play thus acquired was suitable for and should be produced at the Broadway Theater, and toured through the country under the agreement above mentioned, as is claimed by the plaintiff. The play was produced first at Boston, and then at the new theater in New York, and subsequently exploited through the country with great financial success. It is the net profits of this play that constitute the subject-matter of this action. All these profits have come to the hands of the defendant, and the plaintiff claims that he is entitled to a share of them

as a partner under the general arrangement of April 25, 1887, and the referee found that the claim was well founded. After deciding the disputed question of fact, he proceeded to state the account of these profits, and to adjust the respective rights of the parties. On the defendant's statement of the account, after deducting all expenses, it appeared that the net profits of the play, not including Boston or New York, exceeded \$120,000, and he directed judgment in favor of the plaintiff for one-half of such net profits, and judgment was entered accordingly. The learned general term has reversed this judgment, on the law and the facts, and granted a new trial (36 N. Y. Supp. 653); and from that order and judgment the plaintiff has appealed to this court. The action was commenced nearly 10 years ago, and the appeal was decided before the present constitution and Code went into effect. It is therefore a case in which we are required to review the conclusions of the court below upon the facts, under section 1338 of the Code, existing at the time the decision was made. The learned court below had power, and it was its duty, to review the facts found by the referee; but the scope and nature of the review in such cases are limited and qualified by a principle which is now well settled.

A court on appeal cannot set aside the findings of the trial court merely because they are of opinion that, upon the record before them, they would feel constrained to find the fact the other way. It must appear judicially from the record that the findings are against the weight and preponderance of proof so plainly that it can be held that the trial court or referee could not reasonably have arrived at the conclusion expressed in the decision. In order, therefore, to sustain in this court a reversal of the referee upon the facts, it must appear that his findings are against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that his conclusions were erroneous. *Foster v. Bookwalter*, 152 N. Y. 166-168, 46 N. E. 299; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430; *Devlin v. Bank*, 125 N. Y. 756, 26 N. E. 744; *Aldridge v. Aldridge*, 120 N. Y. 614, 24 N. E. 1022; *Baird v. Mayor, etc.*, 96 N. Y. 567.

On the main point in issue, the plaintiff's testimony was to the effect that the partnership agreement was made as found by the referee. The defendant denied it, and hence the referee had to determine which of the witnesses told the truth. He determined that question in favor of the plaintiff, not only from the testimony of other witnesses, but from the mass of facts and circumstances, letters, and documents appearing in the case, all pointing, as he held, in that direction. The record contains over 1,100 printed pages, which we have examined with considerable care; and as we have arrived at the conclusion that the referee properly disposed of the

case, and that the learned court below was not warranted in reversing his conclusion, it is perhaps due to the magnitude and importance of the case, to the parties themselves, and to the learned court below, that we should state in as brief a manner as possible the reasons that have led us to this result. In order to avoid prolixity, we will deal only with a few leading facts that are admitted or so clearly established that we regard them as out of the range of controversy in this court, omitting many minor facts and details that have some direct or remote bearing on the issue of fact which the case presented.

(1) It is quite clear that these parties, in all the negotiations which culminated on the 25th of April, 1887, contemplated some such arrangement as that found by the referee. This is made plain by the provisions of the written agreement, first with Bailey, and subsequently with Young, since these two papers contain substantially such an arrangement between the parties as that found by the referee. This fact suggests the inquiry whether, upon the introduction of a new party into the general scheme, the plaintiff and defendant, during the interview of half an hour or less in the private room of the office where they were, abandoned or ignored an important part of the original project, which had long been under consideration, and which had been twice reduced to writing. The plaintiff says that the understanding was that it was still to be a part of the scheme, with two partners instead of three, the defendant and himself constituting the firm, and sharing equally in the profits. His statement is thus made quite reasonable and probable by all the acts of the parties preceding the arrangement which he says was actually made. The defendant, in denying the partnership agreement testified to by the plaintiff, evidently thought it necessary to also deny that the same or any similar agreement had been made previously with either of the two parties who successively contemplated joining with them in the enterprise, but who dropped out for the reasons stated, and so he denied that any such arrangement had ever been contemplated, but the subsequent production of the two written agreements satisfied him that he was, at least, mistaken. He then claimed that the provision with respect to the exploiting of plays in the country, outside the regular business of the new theater, had been inserted without his knowledge, although it appeared to have been interlined in the handwriting of his own counsel. The conduct of the parties on and prior to the 25th of April, with reference to the question that was in dispute, was entitled to great weight with the referee in ascertaining what the truth was with respect to the arrangement sworn to by the plaintiff and denied by the defendant. It seems to us that these acts of the parties tended very decidedly to corroborate the plaintiff's version of the transaction.

(2) The conduct of the parties subsequent to

April 25th is equally significant, since it plainly appears that the arrangement which the plaintiff claims was then made with the defendant was acted upon, and, at least to some extent, carried out. We find these parties, subsequent to that date, actually engaged in procuring and exploiting plays, other than the one now in controversy, dividing the net profits between themselves, and using the firm name of French & Sanger in the transaction of the business. This conceded fact had an important bearing upon the issue of fact in the case, since it is not very clear why there should be a partnership as to these several plays, and no partnership with respect to the one now under consideration. The referee had a right to consider this circumstance as bearing upon the credibility of the parties, and it is quite evident that he did.

(3) It clearly appears that, after the right to use the play of "Little Lord Fauntleroy" had been acquired, written contracts in the name of the firm were made with actors who were to assist in its production, and for the printing, or some part of it. These were acts tending to prove a partnership, and to corroborate the plaintiff's testimony. It is true that they were drawn by the plaintiff, or under his direction, but it is quite inconceivable that he was then manufacturing testimony for a future litigation, or that the defendant was ignorant of what was being done. It was a fact which the referee had the right to consider, with all the explanations on the part of the defendant, since it had an important bearing upon the principal fact in issue, namely, the existence of any partnership agreement whatever.

(4) The plaintiff produced several witnesses who testified to the defendant's admissions or declarations to them or in their presence, in substance to the effect that the parties were partners in the play of "Little Lord Fauntleroy." While this class of proof was subject to explanations and contradictions on the part of the defendant, it was a feature of considerable importance in the case; and it was for the referee to decide how far and to what extent it sustained the plaintiff's version of the transaction, or impeached that of the defendant. The value of such testimony must always depend very largely upon the character of the witnesses, and the apparent candor and honesty with which the testimony is given. The trial court, and not the appellate tribunal, is generally the place where the real weight and force of such testimony must be determined.

(5) There is another circumstance in the case that tends to throw much light upon the main fact in controversy. That fact, of course, was at every stage of the inquiry whether the alleged agreement of April 25, 1887, concerning the partnership testified to by the plaintiff, had ever been made. About the 6th of July, 1888, after defendant's return from Europe, the plaintiff and defendant were busily engaged in preparing to produce the

play in question; but it was found that they had made prior arrangements to produce another play, in the profits of which it is conceded that they were jointly interested, known as "Mr. Barnes of New York." It became necessary to arrange, if possible, for a postponement of that play, in order to produce the play in question at the time stipulated in the contract with the owner, Mrs. Burnett. Accordingly, they succeeded in making an arrangement with the owner of "Mr. Barnes of New York" to postpone that play for the one in question, on the condition that they should pay a forfeit of \$3,000 in case they failed to produce it before the 18th of February following. This arrangement for the postponement of that play was reduced to writing, and signed by the owner and both of the parties to this action. Why the plaintiff should incur such obligations in postponing a play in which he was jointly interested, in order to produce one in which he had no interest at all, as a partner, is somewhat difficult to perceive; whereas, upon the assumption that he was interested in both alike, his conduct is explicable. Subsequently, and while the parties were arranging for the production of the play in question, the plaintiff's interest in it was the subject of conversation between them, in which the defendant told the plaintiff that the play had cost a great deal of money, without, however, mentioning the amount. The conversation ended in a request by the defendant that the plaintiff make some proposition for a reduction of his interest; and, after further talk, the plaintiff offered to waive his claim to the profits of the play in Boston and New York. The defendant, without accepting the proposition, closed the conversation by saying that the whole matter might be left to his father when he arrived from Europe, and that, as he was a fair man, he would do what was right about it. It is true that the defendant denied this conversation, but the referee evidently accepted the plaintiff's version of it, since he took the plaintiff at his word, and refused to require the defendant to account for the large profits of the play in the two cities mentioned. What subsequently occurred goes far to support the views of the referee in this respect. It appears that the defendant's father and partner, on the 18th of October following, having just arrived from Europe, had an interview with the plaintiff concerning his interest in the play. The father then told the plaintiff that the play belonged to him individually, and not to the defendant or to the firm composed of father and son. The defendant himself subsequently confirmed this statement. Of course, if this was the truth, the play did not come within the terms of the arrangement testified to by the plaintiff as having been made on the 25th of April; and for some time thereafter the plaintiff, by his acts and words, seemed to have accepted the statement as true, and to have acquiesced in the claim that the play did not come within

the arrangement under which he claims he was to have an equal interest. But the statement was not true, as subsequently appeared, when the plaintiff obtained access to the written agreement made in London with Mrs. Burnett. That disclosed the fact beyond all doubt that the American rights to the play had been obtained by the firm of which the defendant was the managing representative in this country, and hence came within the terms of the arrangement of April 25th, to which the plaintiff testified. The conduct of the defendant and his father with respect to the scope and nature of the agreement under which the right to produce the play had been procured naturally suggested this inquiry, which is quite pertinent to the case. If it were true that the plaintiff had then made claim to share in the profits of the play as a partner, when there was no basis in truth for such a claim, then, certainly, the defendant and his father knew it, and it was not necessary to invent a falsehood to meet it. They could and naturally would have met the claim by a prompt denial that any such arrangement had been made as the plaintiff now claims, and as he then claimed in some form. Intelligent business men, such as the defendant and his father certainly are, do not, as a general thing, rely upon a falsehood as an excuse for not carrying out a contract which they never made, when they have a better excuse in the truth. The fact that under such circumstances the defendant met the plaintiff's claim by an excuse that had no basis in truth might well have created a doubt in the mind of the referee as to the integrity of his defense.

It is proper now to notice the leading arguments in behalf of the defendant upon the question of fact involved in the case. They evidently made a strong impression upon the learned court below, although rejected by the referee.

1. While the defendant was in London negotiating for the play in question, the plaintiff, on the 8th of June, 1888, addressed a letter to him, in which, after referring to other matters, not important to notice, this inquiry is made: "What arrangement have you made regarding Little Lord Fauntleroy? And, if we produce it at the Broadway, do I get a chance for a bit of it? If this is an impertinent question, you need not answer it." The question was not answered, and it is urged by the learned counsel for the defendant with great persistence, throughout the case, that this paragraph amounts to an admission on the part of the plaintiff that the alleged agreement of April 25, 1887, was never made. It must be borne in mind that, when the plaintiff wrote this letter, he had no knowledge of the terms or conditions upon which the play had been obtained, or the party to whom the right to use it had been transferred. This is shown by the question itself. If the defendant or his firm had procured it as agents for the owner, or if the defendant's father individ-

ually had acquired it, as was subsequently asserted, then it would not come within the arrangement which the plaintiff claims was made on the 25th of April, and plaintiff would have no interest in the profits. The referee construed this letter as an inquiry by the plaintiff concerning the nature of the agreement under which the defendant and his father had procured the right to use the play here. Whether the plaintiff, upon his own theory, would be entitled to share in the profits depended entirely upon the fact that the defendant or his father's firm had "purchased" it, within the meaning of that term, as applied to such transactions. It was for the purpose of getting light on that point that the inquiry was made, according to the view that the referee took of the case. This construction is certainly quite as reasonable and probable as the one urged by the defendant, and, under all the circumstances, it would be quite impossible for any appellate court to say that in this respect the referee committed an error.

2. It appears that the plaintiff and the defendant were sued as partners upon one of the contracts made by them with an actress who had been engaged to participate in the play. The complaint in the action alleged a partnership, and the answer, which was verified by both defendants, denied the allegation. But it was shown that the defendant had retained the attorneys to interpose the defense, and that the pleading drawn by them was taken by a clerk, who was also a notary, to the plaintiff, while ill at his house, and, upon being assured that the defendant had signed it, plaintiff concluded that it was all right, and he then signed the verification without appreciating the real scope and effect of the denial. How far the plaintiff's signature to that paper under such circumstances was to be considered as a contradiction of his version of what took place in the private room on the 25th of April was a question for the referee. He arrived at the conclusion from all the circumstances attending the signature that it did not impeach his testimony in this case, and it was not, we think, open for an appellate court, upon review of his decision, to say that he committed an error in that respect.

3. It is urged by the learned counsel for the defendant that the agreement of April 25th, as claimed by the plaintiff, is so absurd and unconscionable that it cannot be imputed to any reasonable or prudent man. This assertion will not bear a very close examination. It is no more improbable that there was an agreement to divide the profits of this play than it would be to suppose that there was a like agreement to share the profits of the other plays mentioned, in which such an arrangement not only existed, but was carried out. Whether an agreement is wise or unwise is not always to be determined by the results, but by the lights which the parties have when they enter into it. On the 25th of April, 1887, it was not known and

could not be foreseen that the play in question could be procured at all. Much less could the defendant have anticipated the phenomenal financial success that attended its production. It is only by a process of looking backward at a series of fortunate events, that could not be foreseen when the alleged partnership agreement was made, that any color can be given to the assertion that the agreement imputed to the defendant was so recklessly imprudent as to be incredible. And even then it is difficult to see what ground there is for imputing to the defendant any lack of good judgment or business capacity in making the agreement found by the referee as he has interpreted and enforced it. Perhaps this agreement will be better tested by looking at the benefits which the defendant derived from the contract, even under the decision of the referee. He or his firm got all the profits of the play in Boston and New York, amounting, it is said, to over \$30,000, since the referee refused to relieve the plaintiff from his offer to waive any claim to this part of the fund. This certainly was a most favorable ruling for the defendant. He received \$10,000 more in percentages on the collection of the royalties under the contract with Mrs. Burnett, which he was doubtless entitled to. Under the judgment of the referee, he is allowed to retain over \$60,000 more, representing one-half the net profits of exploiting the play in the country, outside New York and Boston. A contract that has yielded over \$100,000 in cash to the defendant, or his firm, over and above all expenses, besides one-quarter of the net profits of the Broadway Theater, cannot very well be called a wild or imprudent business venture. The net profits derived from exploiting the play in the country, outside the two cities named, were over \$120,000, and the referee has awarded half that sum to the plaintiff. The contention that this result deprives the defendant of every dollar of the profits of the play is equally unfounded. That argument is based upon the fact that, under his partnership with his father, he is entitled to only half the profits of that business, and it is assumed that the \$60,000 which he receives under the judgment must go to his father. How the defendant and his father will divide between themselves we cannot know, and it is not very material. It is quite clear, however, that the defendant had power to make the agreement of April 25th, and to use the plays which his firm owned or controlled in carrying it out; and, if it was made, his firm, as such, would be entitled, not to all, but to half, the net profits.

4. The defendant also produced witnesses who testified to the plaintiff's admissions or declarations to the effect that he had no interest in the play outside the Broadway Theater, and proof was given of various acts of the plaintiff, such as allowing the defendant to receive and retain the whole proceeds of the business, which it is claimed are inconsistent with the existence of the partnership

agreement. It is quite significant that these declarations and acts were after the 18th of October, 1888, when the plaintiff was led to believe by the statements of the defendant and his father that the play was acquired in such a way that he was not entitled to share in the profits. After that date, the plaintiff's conduct for a time would indicate that he had abandoned all claim to any interest in the play; but, on discovery of the contract with Mrs. Burnett, the claim was revived and pressed until the commencement of this action.

It is said that the circumstance that the alleged agreement of April 25th was not reduced to writing, when it appears that all the other partnership transactions were, goes far to discredit the plaintiff. But it is not true that there was any written partnership agreement concerning the other plays referred to where the profits were actually divided. In each case there was a receipt by the plaintiff to the defendant for a specific sum of money stated to be in full of his half of the profits in a designated play. The same written evidence of the partnership would doubtless be forthcoming in respect to the play in question had there been an actual division of profits, as there was in the cases referred to. There were some other facts and circumstances urged on both sides as bearing on the disputed fact, but it is not necessary to consider them. It is quite sufficient to say that if they were all presented, and set off, one against the other, the great weight and preponderance of proof would not be in the defendant's favor.

From this review, we are convinced that the findings of the referee were not so decidedly against the weight of evidence as to warrant the court in reversing his conclusions. It is evident from his opinion, which appears in the record, that the case was carefully considered. It was his duty to weigh the evidence, to determine the credibility of witnesses, to give construction to various letters and documents, acts and declarations of the parties; and when, through these processes, facts are once determined with reasonable fairness and regard for the evidence, they must, under our system of jurisprudence, be deemed to be settled for all purposes of the litigation.

The order of the court below states that the reversal was upon the law and the facts, but in the opinion no question of law is discussed or even mentioned. It is, nevertheless, true, as the learned counsel for the defendant contends, that he is entitled to sustain the reversal in this case upon any question of law disclosed by the record. This renders it necessary to notice some legal propositions that appear in the briefs of counsel, and were discussed at the argument. These questions are presented by exceptions that have been carefully considered. Many of them relate to the form of the action, while others were taken to rulings upon the trial

under which evidence was admitted or excluded.

The verbal agreement of partnership found by the referee was valid. It cannot be attacked for want of consideration, or as lacking in definiteness and certainty. It was carried out by the parties, though in the end the defendant assumed the entire management, and excluded the plaintiff from sharing in the benefits. The objection that the agreement was void under the statute of frauds, as one not to be performed within one year, is not well taken. No such defense was pleaded. *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Matthews v. Matthews*, 154 N. Y. 288, 48 N. E. 531. It is, at least, quite doubtful whether the statute of frauds has any application whatever to oral partnership agreements. *Coleman v. Eyre*, 45 N. Y. 39; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280; *Traphagen v. Burt*, 67 N. Y. 30. Certainly not when the agreement has been wholly or partially executed. But, if it has, the only effect it could have upon the agreement found by the referee was to convert it into a partnership at will. *Wahl v. Barnum*, supra. Such a partnership exists until something is done to dissolve it. *Lindl. Partn.* 571. The plaintiff was not obliged to bring an action for dissolution. A partner in a going concern may bring an action in equity to call his co-partner to account, and to compel him to act in conformity with the agreement; and an accounting may be had without dissolution, to enable him to obtain his share of the partnership profits, from the benefits of which he has been excluded. *Traphagen v. Burt*, supra; *Lindl. Partn.* 478, 492, 494, 495; *Fairthorne v. Weston*, 3 Hare, 387; *Richards v. Davies*, 2 Russ. & M. 347; *Somerby v. Buntin*, 118 Mass. 279; *Leavitt v. Investment Co.*, 4 C. C. A. 425, 54 Fed. 439. The action is not for specific performance of a verbal uncertain agreement, but for an accounting concerning the profits of a transaction which has been executed, though it may be that the defendant excluded the plaintiff from participating in the execution.

The defendant's father and partner, Samuel French, was not a necessary party to the action. The defendant and the plaintiff, as individuals, were the only parties to the partnership agreement found by the referee. The secret or undisclosed arrangement between the defendant and his father, as members of another firm, could not affect the rights of the parties to this action. *Burnett v. Snyder*, 81 N. Y. 550; *Id.*, 76 N. Y. 349; *Lindl. Partn.* 460.

The division of profits was properly made according to the terms of the agreement between the parties to the action, and without regard to the interest which the defendant had in his father's firm upon an accounting between themselves. There is not, we think, any substantial merit in the suggestion of the learned counsel for the defendant that the

agreement found was a fraud upon the Broadway Theater or any of its shareholders, or that the plaintiff is concluded by any estoppel, or that a tender or offer in his complaint to pay the expenses of procuring and exploiting the play was an indispensable prerequisite to his right to maintain the action. The defendant's rights, in these respects, have been very fully protected in the accounting and judgment.

This was an equity case, and the disputed fact in issue was of such a character that the referee was warranted in admitting every act or declaration of the parties preceding or following the alleged agreement of April 25th that could throw any light upon what really took place on that occasion. Considerable latitude of inquiry must be allowed upon the trial of such an issue. After examining the exceptions to the admission or exclusion of evidence, we are satisfied that none of them present any question of sufficient importance to justify the direction of a new trial. So much of the order of the general term as reverses the judgment in favor of the plaintiff, and directs a new trial, should be reversed, and the judgment entered on the report of the referee affirmed, with costs to the plaintiff in all courts. All concur, except PARKER, C. J., not sitting. Ordered accordingly.

(157 N. Y. 289)

**EAMES VACUUM BRAKE CO. v.
PROSSER et al.**

(Court of Appeals of New York. Nov. 22, 1898.)

**PRINCIPAL AND AGENT—ANNULMENT OF CONTRACT
—COMMISSIONS—ACCORD AND SATIS-
FACTION—TRIAL.**

1. A finding of the general term on conflicting evidence is conclusive.

2. A manufacturing company contracted with defendants as agents to sell its product on commission. Defendants subsequently leased the plant and went into possession, when certain stockholders sued to set aside the lease. The suit was settled, and a new agreement made, canceling the former contract, and providing for the collection by defendants of outstanding accounts, and that all unexecuted orders were to be filled through defendants, as sales agents, as before. There was no reference to commissions in the new contract. *Held*, that defendants were not entitled to commissions, since they were neither expressly nor impliedly reserved in the contract of rescission.

3. Defendants were engaged in collecting money as agents of plaintiff, and from time to time made remittances, deducting commissions. Plaintiff accepted the remittances, but objected to the retention of commissions, of which he notified defendants, and continued to so object as accounts were rendered in which commissions were charged. He subsequently sued for such commissions. *Held*, that there was no accord and satisfaction precluding a recovery.

Appeal from supreme court, general term, Fourth department.

Action by the Eames Vacuum Brake Company against Thomas Prosser and another. From a judgment of the general term (34 N. Y. Supp. 398) affirming a judgment on a re-

port of a referee in favor of plaintiff, defendants appeal. **Affirmed.**

Watson M. Rogers and John Lansing, for appellants. Elon R. Brown, for respondent.

HAIGHT, J. The plaintiff, a corporation, is engaged in the manufacture of air brakes. In 1877 it entered into a contract with the defendants whereby it appointed them sole agents throughout the United States and Canada for the sale of all the brakes made by the company; the defendants to receive for their services 10 per cent. of the net receipts, to be deducted on the receipt of the price paid to them on such sales. In June, 1882, the defendants leased from the plaintiff, in the absence of the president of the company, all its property, real and personal, including its plant for the manufacture of brakes, and entered into the possession thereof. Soon afterwards Frederick W. Eames, the president, and Martha S. Eames, as stockholders in the company, brought an action against the defendants to set aside the lease as ultra vires. This action resulted in a judgment of ouster against the defendants. An appeal was then taken to the general term, and during the pendency of that appeal, and on the 23d day of May, 1883, the parties entered into a written agreement in and by which the suit was settled, the contract of 1877 canceled, and all of the property of the company obtained by the defendants through the lease retransferred to the company, including all stock and materials manufactured and in process of manufacture, and all orders received for goods not filled in full, together with orders which might be thereafter received by the defendants, growing out of their connection with the business. This agreement was in consideration that the plaintiff "pay to the said Prossers for their advances in said business and for said property as follows: The said company to give to the said Prossers its note, dated May 19, 1883, on interest at four months, to be satisfactorily indorsed, for the amount due thereon on account of advances, being hereby agreed and fixed at \$25,452.98; said Prossers to hold said note, collect the outstanding accounts, and those for orders unfilled at this date, and, as fast as collections made, to apply on said note till paid, and when note is paid the balance collected of said accounts to be paid, and those not collected be transferred to the company, and the said company to pay to the said Prossers \$10,000 in cash; said note and cash to be given and paid in fifteen days from this date; and, upon such note and cash being given and paid, the transfers, assignments, and delivery of above property to be given by the said Prossers as aforesaid; the said Prossers to use all due diligence in collecting said accounts. All orders up to this date unexecuted to be filled through the said Prossers, as sales agents, as before." The \$25,452.98 note was given and the \$10,000 cash was paid

by the plaintiff in accordance with the provisions of the agreement; and the Prossers collected from the outstanding accounts, and from the accounts on orders which were unexecuted at the time of the settlement, more than sufficient to pay the \$25,452.98 note, and assigned and transferred to the plaintiff the property of the company; but in the collections made by them they retained 10 per cent. as commissions, claiming that they were still entitled thereto under the contract of 1877. This action was brought to recover the amount of such commissions.

The answer alleged that the defendants' right to retain commissions was expressly reserved by the contract of May 23, 1883; that there had been an account stated, which operated as a settlement between the parties; that there was a mistake in the contract of May 23, 1883, in not expressly reserving the commissions; and judgment, among other things, was asked that the contract be reformed in that particular, and the complaint dismissed. The case was, by consent of parties, referred to a referee, and upon the trial there was a sharp contest over the issue raised with reference to there being a mutual mistake in the contract. Evidence was given on behalf of the defendants to the effect that the understanding was that they were to have commissions, and equally as positive evidence was given on behalf of the plaintiff that commissions were not to be allowed; that the settlement was a complete settlement as of the date of the instrument, for which the defendants were paid a bonus of \$10,000; and that the accounts and unfilled orders were left in the hands of the defendants for the purpose of enabling them to make collections and satisfy their \$25,452.98 note. The names of several prominent and well-known lawyers appear among the list of witnesses sworn upon this issue. The referee found the facts in favor of the plaintiff, and awarded judgment for the amount of the commissions, and that judgment has been affirmed in the general term. The finding of the referee upon that issue, having been made upon a conflict in the testimony, and having been affirmed in the general term, is final and conclusive upon the parties, and leaves nothing upon that issue which this court has the power to review.

It is now contended, however, that the contract of May 23, 1883, when properly construed, reserves to the defendants the commissions, and that no reformation of the contract was necessary. This contention is based upon the concluding sentence in the contract: "All orders up to this date unexecuted to be filled through the said Prossers, as sales agents, as before." Prior to this, and under the contract of 1877, the Prossers made sales as agents, collected the moneys due upon sales made, and retained therefrom their commissions, remitting the balance to the plaintiff; and the argument is that the provision of the contract for orders to be filled through

the Prossers, as sales agents, as before, entitled them to retain their commissions as before. It will be observed, however, that nothing is said in the contract about the commissions. It treats only of filling unexecuted orders, and provides that these orders shall be filled by the Prossers, as agents, as before. It has reference to the manner, and the persons by whom, unexecuted orders are to be filled, and remains silent with reference to the rights of the parties thereunder. In the case of *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, Andrews, J., in delivering the opinion of the court, says: "Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily be referred to the agreement of rescission; and in general no such claim can be made, unless expressly or impliedly reserved upon the rescission." Adopting this language as correctly stating the rule, it is evident that the agreement of rescission does not in this case expressly reserve to the defendants the commissions. Does it impliedly reserve them? In determining this question we may properly take into consideration the surrounding circumstances under which the parties were acting, and the contents of the instrument of which the clause in question forms a part. Referring to these circumstances, we find the parties to have been engaged in a sharp litigation, and then in the act of effecting a settlement. The plaintiff was to pay the defendants, within four months, the amount of the advances made by them, which amounted to \$25,452.98. This amount was secured by a note, and as collateral security for the payment of the note the Prossers were to hold the outstanding accounts, fill the uncompleted orders, collect the accounts, and apply the same in payment of their note. In addition to this, the plaintiff was to pay the defendants \$10,000 in cash. The defendants agreed, in consideration therefor, to surrender the stock of the plaintiff corporation, which they had theretofore held as collateral security for advances made to the company, to cancel and surrender its agreement of 1877, and to transfer and assign over to the plaintiff all stock and materials manufactured and in process of manufacture, including all not disposed of, which were transferred and delivered to them by the company under the lease, and which had been purchased or manufactured in the business since, and also to transfer and assign to the company all orders received for goods and not filled in full, together with all orders which may be hereafter received by them, growing out of their connection with the business. It is thus plain, from the express wording of the instrument, that the unfilled orders became, and were intended to become, the property of the plaintiff, upon the execution of the contract; and, in the absence of any provision showing a reservation of commissions as a consideration for the transfer of the unfilled

orders, we think it must be assumed that these orders were transferred to the plaintiff as a part of the consideration for which the \$10,000 in cash was paid. We agree with the court below that there is nothing in the provisions of the contract, or in the circumstances surrounding the parties at the time it was executed, from which it can be said that the referee erred in holding that the commissions were not impliedly reserved in the contract of rescission. Should we treat the contract as ambiguous, and resort to the parol testimony for the purpose of ascertaining the meaning of the parties? The result would be the same, for we should then meet the issue of mutual mistake, which has been tried and determined; and in which it has been found as a fact, upon controverted testimony, that it was not the intention or understanding that the defendants should have commissions upon these orders.

Upon the issue of accord and satisfaction the referee has found that the moneys remitted to the plaintiff by the defendants, as proved upon the trial, were moneys which the defendants had received as the plaintiff's agents, and that there was no account stated between plaintiff and the defendants as to items in controversy in this action. It appears from the evidence that after the settlement was entered into the defendants from time to time rendered statements to the plaintiff, showing the amount of collections made by them and applied upon the note; and in such statements sales agents' commissions of 10 per cent. were deducted. No money or checks were transmitted to the plaintiff with these statements; none was due, for the note had not at this time been paid in full. It thus ran along until the 3d of August, when the plaintiff wrote the defendants, raising objection to the correctness of their statements in charging 10 per cent. commissions, and on the 3d of September they again objected to the statement rendered in which commissions had been charged. On the 19th of September, 1883, the defendants rendered a general statement, including the monthly statements theretofore rendered, in which they showed that the amount of their collections had been sufficient to pay the note in full, leaving a balance in their hands of \$5,976.82, and concluded with the words, "Check to balance." This statement and check appear to have been received by the plaintiff on the 22d of September, 1883; and on that date the plaintiff, through its secretary, writes the defendants as follows: "Yours of the 20th, with statement and check, received. We object, as heretofore, to the ten per cent. commission you claim and deduct. We credit on account of your check for \$5,976.82." The note having been paid in full under the terms of the contract, all of the accounts then remaining were to be transferred and assigned to the plaintiff; but, for some reason not clearly disclosed, the defendants appear to have made some small collections

thereafter, rendering statements therefor, and on each statement remitting by check the balance, after deducting commissions. This continued until the 28th day of December, when the final transfer of accounts appears to have been made. In all of the letters transmitting checks, they commence with the phrase, "Inclosed please find check for." Then follows the name of the account, with the items collected, less the 10 per cent. commission. In one only do we find any qualification, and that is in the statement of October 4, 1883, in which, after the words, "Inclosed please find check," follows the statement, "being in full for following bills against Fitchburg R. R., August 10, 15, 18th." The plaintiff from time to time objected to these statements on the ground that commissions were deducted. Does this amount to an account stated, in such a manner as to be treated in law as a settlement between the parties? The referee, as we have seen, has found that it was not, and his finding has been approved by the general term. It is contended, however, that the cases of *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, and *Nassoly v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, in effect hold that the facts to which we have referred constitute an account stated, in which the plaintiff is deemed to have acquiesced. In the case of *Fuller v. Kemp* a physician had rendered a bill for professional services of \$670. The defendant, on the receipt of the bill, wrote the plaintiff, questioning the justice of his charge, and inclosing a check for \$400, which he stated was to be in full satisfaction of the plaintiff's claim. The plaintiff retained and collected the check, and then again sent a bill, charging the same amount as before, and crediting thereon \$400. The defendant thereupon wrote him, stating that the check was sent him in full satisfaction; that he did not recognize the plaintiff's right to retain it and repudiate the condition,—and requested him either to return the money, or to retain it upon the condition named. To this letter the plaintiff made no reply, but subsequently brought an action to recover the balance. In that case it was held that there was an accord and satisfaction; that upon the receipt of the last letter the plaintiff had the alternative of a restoration of the money, or the extinguishment of the debt; that by its retention his claim became canceled. In *Nassoly v. Tomlinson* the defendant wrote the plaintiff, inclosing a check for \$300, as his commission on the sale of real estate. He concluded his letter with the request that the plaintiff sign and return the inclosed voucher, which was a receipt in full for his commissions. To this the plaintiff answered: "I do not know what you mean by sending me a check for \$300. I want my 5 per cent. commission on the \$30,000." No reply was made by the defendant to this letter, although one was requested. Subsequently the plaintiff saw the defendant, and asked him what

he meant by sending a check for \$300, and told him he wanted 5 per cent. commission, and that that was the understanding between them. The defendant then told him that he would not give one cent more, that he was only entitled to the \$300, and that his check had paid that. The plaintiff retained the check for seven months, and then drew the money on it, and wrote the defendant, inclosing a receipt for \$300, as part payment for his services, and insisted on his being paid the balance claimed by him. The defendant answered back, acknowledging the receipt of the letter, and stating that he should consider the payment in full for all commissions. Plaintiff did not return or offer to return the money paid to him, but subsequently brought an action to recover the balance which he claimed to be his due. This court held that the retention of the check was an accord and satisfaction, following the case of *Fuller v. Kemp*. In those cases the doctrine of accord and satisfaction was carried to the extreme limit, and it is not our purpose to further extend the rule. In those cases there were disputed claims, and the checks were deemed to have been offered in each instance as a settlement, and under such circumstances that the plaintiff could not well accept and retain the money without being deemed to have acquiesced in the settlement proposed. In the case under consideration we have no such tender of checks as a settlement between the parties. The one case (that of October 4th) in which the words "settlement in full" appear has reference to being in full of the Fitchburg account for the days named, and not to a settlement between the plaintiff and defendants of the controversy between them. It is true that an account stated is conclusive upon the parties to it, unless impeached for fraud or mistake; but the debtor and creditor must mutually agree as to the allowance or disallowance of their respective claims, and as to the balance struck upon the final adjustment of the accounts and demands on both sides. Their minds must meet in making the agreement, the same as in other agreements. It need not be by direct and express assent, but such assent may be implied from the circumstances. If one party presents his account to the other, and the latter makes no objection, it may be inferred that he is satisfied with and assents to it, as correct. If an account be made up and transmitted by one party to the other, and the latter keeps it for a considerable time without making any objection, he is deemed to have acquiesced in it; but there must be proof in some form of an express or implied assent to the account rendered by one party to another, before the latter can be held to be so far concluded that he can impeach it only for fraud or mistake. *Stenton v. Jerome*, 54 N. Y. 480; *Lockwood v. Thorne*, 11 N. Y. 170, 18 N. Y. 285; *Young v. Hill*, 67 N. Y. 162; *Quincey v. White*, 63 N. Y. 377. Ordinarily the retention of a

check inclosed in a letter which refers to the amount as the balance due on accounts between the parties will not be held to be an accord and satisfaction, so as to bar an action for the balance due. *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98; *Day v. McLea*, 22 Q. B. Div. 610. It is only in cases where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered by an acceptance and a retention of the check. *Nassoly v. Tomlinson*, supra; *Fuller v. Kemp*, supra. In this case the defendants were engaged in collecting money for the plaintiff. Their character was that of agents. From time to time they remitted balances to the plaintiff. It was the plaintiff's money. It objected early to the retention of commissions by the defendants, and continued such objections through several months, to nearly every account rendered in which commissions were charged. We think the court below properly held that no accord and satisfaction was established. The judgment should be affirmed, with costs. All concur, except O'BRIEN and VANN, JJ., not voting, and MARTIN, J., not sitting. Judgment affirmed.

(157 N. Y. 281)

CANDA v. TOTTEN.

(Court of Appeals of New York. Nov. 22, 1898.)

STATUTE OF FRAUDS—PAROL CONTRACT—SPECIFIC PERFORMANCE.

Defendant verbally promised the owner of a dower interest in land about to be judicially sold that he would bid it in, and reconvey it to her. After the sale, he accepted from her the amount of the bid, and deposited it with his other moneys, and permitted her to pay taxes, insurance, and interest, and to make repairs, but afterwards refused to reconvey. *Held*, that there was such a part performance as took the contract out of the statute of frauds; and hence equity would compel him to reconvey, under 2 Rev. St. (1st Ed.) p. 135, § 10, authorizing enforcement of parol contracts partly performed.

Appeal from supreme court, general term, Second department.

Bill by Lizzie J. Canda against John Totten. From a decree of the general term (33 N. Y. Supp. 962) reversing a judgment for plaintiff, she appeals. Reversed.

George V. Brower, for appellant. Julius H. Seymour, for respondent.

PARKER, C. J. As the reversal of the special term was upon the law, and not upon the facts, we are to inquire whether, under the most favorable view of the evidence upon which the special term based its judgment, it can be supported. Our conclusion is that the reversal was error, evidently due to the fact that the appellate tribunal did not so thoroughly appreciate as did the special term

some portions of the evidence. The former court treated the case as if the plaintiff, having no interest in certain real estate about to be sold at public auction, made an arrangement with the defendant by which he agreed to purchase the property, pay for it, and subsequently convey it to plaintiff upon the receipt of the amount paid by him, which agreement the defendant refused to carry out after his purchase of the property. If that were a correct statement of the facts of this case, then the assertion that *Ryan v. Dox*, 37 N. Y. 307, "is so unlike the present one as to be incapable of application here," would have some support; for in that case the plaintiff did own the fee of the property which was sold under a judgment of foreclosure, while this plaintiff's interest consisted of an inchoate right of dower. But we proceed to an examination of the pregnant facts which this record contains; for, when that is done, the law of the case will not be found to be difficult.

The plaintiff's husband, John M. Canda, made a general assignment for the benefit of creditors, by which instrument there passed to the assignee the title to certain pieces of real estate, each of which was incumbered by mortgage, and subject to the inchoate right of dower of this plaintiff. This real estate was in due course advertised for sale by the assignee at a public auction to be held on the 15th day of February, 1894; and the plaintiff, after consultation with her husband, concluded that, if some of the property thus to be sold should go at a low price, then it would be advisable for her to purchase it. They concluded that some third person had better do the bidding, and the defendant came promptly to the mind of Mr. Canda as the best person to intrust with the matter, because of their intimate personal relations, to which was added the fact that the defendant had been under business obligations to Mr. Canda, which were of exceedingly great value to him. And so it happened naturally that shortly afterwards Mr. Canda, at the request of the plaintiff, called upon his old friend, this defendant, and (quoting his own language) "told him the assignee was going to sell some property in Brooklyn. I didn't think it would fetch very much, it was embarrassed,—my wife's right of dower, mortgages, etc.; and she, if it didn't bring too much, had concluded to buy it. We had been cogitating, thinking how it had better be done, and concluded that we would ask him to buy it for her." In reply, defendant "said he would do anything of the kind he could for me; that he considered that I had benefited him a great deal; that, when he was not worth a cent in the world, I befriended him, trusted him. * * * Five days before the sale, Mr. Canda again called on the defendant to talk the matter over, and, upon being asked if he would buy the property for Mrs. Canda, said 'he would do so; and he says, 'I have got the money to put in it,'"

to which Mr. Canda replied, "You won't have to put any money into it for a day or two, and Mrs. Canda will manage to raise the money. You won't be out any money." One other meeting was had between the parties, on the day of the sale, at which time the defendant was furnished with estimates of the prices which Mrs. Canda was willing to pay for the property; and with the promise to buy the property for the plaintiff, if it could be bought at the prices fixed by her, or less, he started for the place of sale, accompanied by the plaintiff's son. He had never seen the property, but promptly made bids upon the pieces selected by the plaintiff for purchase, with the result that the full price of the properties over and above the incumbrances was only \$620. He paid down the percentage required, and signed the terms of sale, which provided that the balance of the purchase price should be paid and the deeds delivered at the assignee's office on the 27th day of February. On that day the plaintiff's son, in her behalf, went to the assignee's office, with \$620 in his possession, which he intended to be used in paying the balance of the purchase price, and reimbursing the defendant for the percentage he had advanced on the day of the sale; but the defendant had been there shortly before him, had taken the deeds in his own name, and gone away. The day following, the plaintiff's husband went to the defendant's office, and handed him an envelope containing \$620; and he testified that "Mr. Totten opened the envelope and counted the money." "He says: 'There is not enough here, Mr. Canda.' I says, 'Why not? It is the amount of the bid.' 'Well,' he says, 'I have paid for the record,—for recording the deed,—and I have been to some expense for car fare, lunches, going to Brooklyn, and so forth, \$7 for recording the deeds, and some other little expenses.' And I took \$10 then out of my pocket, * * * and I handed it to him. I says, 'Will that cover all expenses?' He says, 'Yes,' and he took it." The Court: "Q. He kept the money? A. Yes, sir; he kept the money." The defendant admits that he took the money and deposited it with other moneys in his regular bank account on that day. It is true that the defendant, while testifying, attempted to make it appear that, while he took the money and deposited it in the bank, he protested against taking it, and said that he did not want it. But the trial justice apparently did not believe him, for in his memorandum of decision he said, "Mr. Totten's recollection as to some matters was so confused and contradictory that I cannot resist the impression that the idea of claiming the property for himself was an afterthought." We quite agree with this conservative statement of the trial justice; but, even if we were of quite a different opinion, it would be our duty to accept as true the evidence favorable to the plaintiff, in whose favor judgment was rendered, without any attempt to find the facts.

In such a case the rule is the same as that which governs the court in reviewing a judgment entered upon the verdict of a jury, which is that the jury must be deemed to have found to be true the evidence that is most favorable to the prevailing party. When Mr. Canda gave the defendant the amount of the purchase price, he said to him, "I will have a deed prepared, and give it to you;" to which the defendant replied, "Very well." Two or three days later, Mr. Canda took the deed he had prepared to the defendant's office, and, sitting down at a desk, he asked the defendant what consideration he should put in the deed; to which inquiry defendant replied: "I suppose, the amount bidden,—the amount of the purchase;" and almost immediately afterwards he got in his wagon to go away, saying: "I can't see my wife to-day. I can't fix it to-day. I have got to go." It is unnecessary to give a detailed account of the efforts of plaintiff and her agent to get the defendant to execute the deed. It is sufficient to say he did not execute and deliver the deed, and finally, and before the commencement of this action, absolutely refused to carry out his agreement, although he had received and retained the plaintiff's money, in an amount a little exceeding the purchase price which she had paid to him in full performance of her part of the agreement. It should also be noted that, after the property had been struck down to the defendant at the assignee's sale, the plaintiff paid interest on one or more mortgages, paid taxes and insurance, and made repairs to the buildings; and, she received the rents collected until some time in May following. While there was no note or memorandum of the agreement in writing signed by the parties, as required by the provisions of the statute of frauds, there was performance of the agreement on the part of the plaintiff, and acceptance thereof by the defendant; and this fact operated to take the case out of the statute.

The last section of the title of the Revised Statutes relating to fraudulent conveyances and contracts relating to land provides, "Nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements." 2 Rev. St. (1st Ed.) p. 135, § 10. Thus, the legislature declared its intention not to interfere with that well-recognized head of equity which decrees specific performance of a contract within the provisions of the statute of frauds, when the oral agreement has been partly carried into execution. And the ground upon which courts of equity have been accustomed to grant relief by way of specific performance to parties to an oral agreement who have performed in part is that otherwise one party would be enabled to practice a fraud upon the other, and thus it would sometimes happen that a statute intended to prevent frauds would operate to secure to one party the

fruits of fraud. 2 Story, Eq. Jur. § 759; Fonbl. Eq. bk. 1, p. 181, c. 3, § 8; Browne, St. Frauds, § 438; Ryan v. Dox, 34 N. Y. 307, and cases cited. In Ryan's Case it was decided that one who by agreement purchases land at a foreclosure sale, for the benefit of the owner of the equity of redemption, at a price greatly below the value, cannot set up the statute of frauds against the party for whom he purchased; for the law will hold him to be a trustee *ex maleficio*. But the ground of equity that was invoked was that equity will not permit the statute of frauds to be made an instrument of fraud. It is contended that this decision justified the judgment of the special term, even though full performance on the part of the plaintiff, and acceptance thereof by the defendant, had not been proved, inasmuch as this plaintiff had on inchoate right of dower, which constituted a valuable interest in the lands, and which it was to her advantage to protect against possible foreclosure of mortgages which might result should the property be purchased for a nominal sum by persons who should elect to appropriate the rents to their personal use, rather than use them in paying interest and taxes and keeping the property in repair. It is unnecessary to decide that question, for the plaintiff fully performed her part of the agreement and the defendant accepted it; and, in addition, upon the faith of the agreement she made repairs, paid taxes, insurance, and interest on mortgages. No case like this one in its facts can be found where a court of equity has refused to decree specific performance, or one in which a doubt has been expressed as to the duty of the court in a like situation. In Levy v. Brush, 45 N. Y. 589, relied upon in the court below, the court refused specific performance to a plaintiff when the defendant had made an agreement by which the latter was to buy in his own name, and enter into a contract for the purchase of lands, and pay from his own funds the necessary amount for that purpose, for the joint benefit of both; plaintiff to reimburse him for one-half of the money so paid; the deed to be taken in the names of both. The court, in holding that plaintiff was not entitled to the assistance of equity, called attention to the fact that plaintiff had no existing interest in the property at the time of the making of the agreement, nor had he done any act in part performance, or parted with anything under the contract. Said the court, "Where the party seeking performance has partly performed, or has, as in the case of Ryan v. Dox, parted with valuable property upon the faith of the contract, the case is different." In the other cases relied upon (Lathrop v. Hoyt, 7 Barb. 59, Bauman v. Holzhausen, 26 Hun. 505, and Wheeler v. Reynolds, 66 N. Y. 229), the element of performance by one of the parties to the contract, and acceptance by the other, was wholly wanting, and for that reason they are not in point. The judgment of the gen-

eral term should be reversed, and that of the special term affirmed, with costs. All concur. Judgment reversed, etc.

(157 N. Y. 244)

HANNIGAN v. LEHIGH & H. R. RY. CO.
(Court of Appeals of New York. Nov. 22, 1898.)

BRAKEMAN—INJURIES FROM COUPLING—ASSUMPTION OF RISK—REVIEW OF EVIDENCE.

1. The meeting of the drawheads being an ordinary incident of coupling cars, injury to a brakeman, while making a coupling, from such meeting, is a risk he assumed.

2. An injury to a brakeman coupling cars, from the drawheads coming together, cannot be held to be the result of omission to place deadwoods on the cars; practically all the evidence being that the function of deadwoods is not to prevent such meeting, and there being but a mere scintilla of evidence to the contrary.

3. Recovery for injury in coupling cars cannot be had on evidence that the coupling appliances were broken, there being no evidence that the injury resulted therefrom.

Appeal from supreme court, general term, Second department.

Action by Richard Hannigan against the Lehigh & Hudson River Railway Company. From a judgment of the general term (36 N. Y. Supp. 293), affirming a judgment on a verdict for plaintiff, defendant appeals. Reversed.

This action was to recover for personal injuries alleged to have been caused by the defendant's negligence. The allegations of the complaint were that the defendant furnished for the use of the plaintiff a freight car with broken, defective, unusual, unsafe, and dangerous coupling appliances, in that such appliances were mismatched, uneven, and entirely useless and inadequate for the purposes for which they were placed in use by the defendant, and that it negligently and carelessly permitted, used, and maintained the same. The answer contained a general denial. At the close of the plaintiff's evidence, the defendant moved for a nonsuit upon the grounds—"First, that the accident which caused the plaintiff's injury was, under the circumstances of this case, a risk which he assumed as an employé of this defendant, and for which the defendant is not liable; second, that there is no evidence of negligence on the part of the defendant which caused the accident to the plaintiff on this occasion; third, that no negligence or omission of duty on the part of the defendant has been shown." That motion was denied, and the defendant excepted. When the evidence was finally closed, the defendant again renewed its motion for a nonsuit upon the grounds already stated, and also upon the further ground that the violation of the rule requiring the use of coupling sticks was contributory negligence on the part of the plaintiff, and prevents a recovery by him. That motion was also denied, and the defendant excepted. At the time of the accident the plaintiff was a brakeman and had been

in the employ of the defendant about three months. His work was upon freight trains running between Phillipsburg and Maybrook. The accident occurred at about 7 o'clock on the morning of December 5, 1893, at Hudson Junction. The train arrived there at about that hour. The plaintiff uncoupled the engine and tender from the head car of the train, so that it might take a fresh supply of water from the tank or crane at that place. The engine was then run back to the train, and while coupling the tender to the car the plaintiff's hand was caught between the drawheads and injured. There were no deadwoods upon the car to which the tender was being coupled. The plaintiff gave evidence to the effect that if there had been double deadwoods upon the car to which the tender was coupled his injury would not have occurred, and that cars in common use ordinarily have double deadwoods. Still, it is manifest, from all the evidence in the case, that the purpose of deadwoods is not to prevent the drawheads from coming together, and that in many, if not most, cases the drawheads come in contact before the bumpers meet. The plaintiff upon his cross-examination testified: "These drawheads are between the bumpers on the car and the engine. They extend from either end of the car. They are attached to a bar that runs back under the sill of the car. At the end of these drawheads there is a sort of a spring, so that when the drawheads strike there is a spring to the car that way that relieves it. That is what is called slacking the train. In the case of cars, when you are called upon to couple them, the drawheads and bumpers come together at the same time about. They will strike, and this spring will give, and then the bumpers will come together. As a general thing, the bumpers will generally come together first, but they just strike so as to give an opportunity to the brakeman to insert the link." Upon examination by his own counsel he further testified: "The bumpers generally strike first on some of the cars; sometimes the drawheads and bumpers strike about together. When the bumpers strike first, the drawheads cannot come together at all." The plaintiff's witness Drake also testified: "In coupling cars there is some cars that the drawheads come together first and others the bumpers comes together first. In cars where the drawheads come together first, sometimes the bumpers touch afterwards; the most of them will. If the cars are struck pretty hard, the bumpers will come together. When they are struck hard, the drawheads strike first, and then the bumpers come together with great force, and when they come down slowly the drawheads strike and the bumpers do not, if they don't strike very hard. They may strike very light, though. If they strike very light, it depends upon what cars they are whether the drawheads touch when the connection is made and the bumpers do not strike at all. There is a great difference in cars, and there is a differ-

ence in drawheads, and a difference in the size of bumpers, and there is also a difference in the length of drawheads. It is a fact that some of them project further from the front of the car than others. There is a variation of a couple of inches, I should think. I cannot tell how far they ordinarily project in front of the bumper. In some cases they go further. I would not say two or three inches; not that far. It is very seldom that you see one two inches. I never noticed whether they project two or three inches in front of the bumpers. I can't tell whether they do come that far or not. It is a fact when the drawheads are struck they are pushed back under the car, if there are no bumpers there. Whether there are bumpers there or not, they go back, and they can be thrown forward." Therefore it is apparent from the evidence of the plaintiff, as well as that of the defendant, that the coming together of the drawheads is an ordinary incident of coupling cars, whether there are deadwoods on the cars or not. Indeed, the proof shows that the cars of various railroads are not equipped with deadwoods at all.

John G. Milburn, for appellant. Lewis E. Carr, for respondent.

MARTIN, J. (after stating the facts). The first proposition contended for by the plaintiff is that it was the duty of the defendant to furnish cars equipped with deadwoods which would prevent the drawheads from coming in contact when a coupling was being made. It is apparent from the evidence in this case that the purpose of deadwoods is not to prevent the drawheads from coming together, but they are placed upon cars for quite a different purpose. The single question presented upon this appeal is whether it is the duty of a railroad company to so equip its cars and trains that the drawheads thereon shall not come in contact when cars are being coupled. This court has several times considered the purpose of drawheads, and held that it was negligence for a railroad company to use cars where the drawheads would not come in contact. *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344; *Goodrich v. Railroad Co.*, 116 N. Y. 398, 22 N. E. 397. In the case at bar it has been held that it was negligence to use a car where the drawheads would meet. We think the evidence shows quite clearly that the meeting of the drawheads is an ordinary incident of coupling cars, and a condition to be expected when a coupling is made, and was therefore one of the ordinary risks of the service in which the plaintiff was engaged. His employment was necessarily hazardous, and when he entered it he assumed all the risks and perils of the service and those that were known to him or were apparent to ordinary observation. That one of the risks which he assumed was the danger of injury from the meeting of drawheads, when

coupling cars, there can, under the evidence, be no doubt. Indeed, it is a matter of common knowledge that drawheads to cars are liable to, and ordinarily do, come in contact when cars are being coupled, and that a risk of injury therefrom exists whenever a brakeman is performing that service. Therefore, under the evidence, it is obvious that the plaintiff's injury arose from a cause which was included in the risks which he assumed.

But it is said that the defendant was negligent in using a car upon which there were no deadwoods. If that were assumed, still the plaintiff could not recover unless he proved that their absence was the cause of his injury. When we look at the record, we find that practically all the evidence in the case is to the effect that the function of deadwoods is not to prevent drawheads from coming together, and, at most, there is but a mere scintilla of evidence to the contrary. Under these circumstances, this court would not be justified in holding that the plaintiff's injury was the result of the defendant's omission to place deadwoods upon the car in question. As was said by this court in *Hudson v. Railroad Co.*, 145 N. Y. 408, 412, 40 N. E. 8, 9: "Where the evidence which appears to be in conflict is nothing more than a mere scintilla, * * * this court will still exercise jurisdiction to review and reverse, if justice requires." Applying that rule, it is evident that the absence of deadwoods on the defendant's car was not the proximate cause of the plaintiff's injury, and hence he could not properly recover upon that ground.

It is true, as claimed by the plaintiff, that he testified upon the trial that the drawhead in the car was loose and broken, and that "the spring was out of the drawhead,—out of the car." This was the only evidence in the case which tended to sustain the allegations of the complaint that the coupling appliances were broken or defective. But we find no evidence in the record to show, or which even tends to show, that the plaintiff's injury in any way resulted from that cause.

It is, at least, problematical if the plaintiff sufficiently established his freedom from contributory negligence to justify the submission of the case to the jury. It appears, from his own testimony, that it was "perfectly light" when he uncoupled the tender from the car; that he saw the drawhead and could see the link. It must, therefore, have been sufficiently light when he undertook to recouple them to see the absence of the deadwood if he had looked; so that, if its absence was the cause of his injury, he could, by the use of ordinary prudence and reasonable care, have discovered it, and was negligent in not doing so. But it is doubtful if that question is before us, as there is no exception which clearly raises it.

But, independently of the question of contributory negligence, we are of the opinion that the court erred in denying the plaintiff's

motion for a nonsuit, and that for that reason the judgment should be reversed. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed, etc.

(187 N. Y. 198)

FOLINSBEE v. SAWYER.

(Court of Appeals of New York. Nov. 22, 1898.)

BROKERS—SALES OF REALTY—ACTION FOR COMMISSIONS—EVIDENCE—CONCLUSIVE—NESS—ADMISSIBILITY.

1. A written agreement by prospective purchasers with the owner of land to purchase it for a stated price is not sufficient proof, in an action by a real-estate broker for his commission, that he procured purchasers, since that agreement is conclusive only between the parties to it.

2. In an action for a real-estate broker's commissions, parol evidence that a written agreement of prospective purchasers with the owner was not finally binding, and that after it was revoked plaintiff sought to procure new purchasers, is admissible on behalf of such owner to rebut the effect of such agreement in evidence.

Appeal from superior court of Buffalo, general term.

Action by Harrison D. Folinsbee against George P. Sawyer. A judgment for defendant and a denial of a new trial were reversed (28 N. Y. Supp. 698), and from a judgment for plaintiff on the second trial defendant appeals. Reversed.

Ansley Wilcox, for appellant. Norris Morey, for respondent.

O'BRIEN, J. The plaintiff sought to recover a considerable sum of money as his compensation for the sale of certain real estate which the defendant owned and desired to sell. It is alleged that the defendant retained the plaintiff to procure a purchaser for the property, and that in pursuance of this employment he did procure parties who were willing to purchase on the defendant's terms, and thus the stipulated commissions were earned and became due to the plaintiff. It appears that on the 8th day of November, 1890, the defendant gave to the plaintiff and one John H. Smith a written option for 60 days, in which he agreed to sell the property to them for \$175,000. This writing was in the form of a letter addressed by the defendant to the plaintiff and Smith, in which the terms of the sale were specified, and concluded with these words: "The above is intended to be a resumé of conversation between us to-day, and in general it means that you have the option of taking the property at price named, details to be settled later in conformity to above understanding." The parties, however, seem to have abandoned the option contract, and, on the 18th day of December following, the defendant, Smith, and one Weill indorsed upon it and signed the following: "John H.

Smith and Henry Weill hereby agree to purchase the within-described property at the within-mentioned terms and price, with the only exception that said price is changed to one hundred and fifty-five thousand dollars, and interest at five per cent." The plaintiff claims that he procured the two parties who, with the defendant, signed this indorsement, and who were willing to purchase on defendant's terms, and he put in evidence the writing—that is to say, the option letter and this indorsement—as proof of this fact. The defendant alleges that the indorsement referred to was not intended as a complete and binding agreement on the part of the purchasers, but certain details were left open for further negotiations and settlement, and that the parties so professing to purchase never, in fact, agreed to his terms or completed the purchase, and finally refused to perform. The issue of fact, therefore, was whether the plaintiff did, as he alleges, ever procure parties ready and willing to purchase the land on the defendant's terms.

The learned counsel for the plaintiff insists that the rule of law in such cases is that when a broker employed to negotiate a sale of real estate brings to the owner or his employer a responsible purchaser, willing to buy on the terms prescribed, he has earned his commissions. That may be true, but the plaintiff in this case was bound to prove these facts before he could recover. The only proof that he gave was the indorsement signed by the parties already mentioned. Whatever else may be said about that paper, it certainly was not a contract between the parties to this action. It was signed by the defendant and the two parties who, it is said, were willing to purchase, but the plaintiff was not a party to it in any legal sense. The statements in it did not bind him. He was not concluded by it, and he could have resorted to parol proof to make out his case. The rule of evidence that makes a written contract conclusive proof of what the parties have agreed to, thus merging in it all prior parol negotiations, and which rejects parol proof to vary or contradict the writing or its legal import, applies only in controversies between the parties to the instrument. *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Coleman v. Bank*, 53 N. Y. 388; *Dempsey v. Kipp*, 61 N. Y. 462; *Brown v. Thurber*, 77 N. Y. 613; *Sprague v. Hosmer*, 82 N. Y. 466; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 592; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316. The disputed fact was whether the plaintiff had procured a purchaser or purchasers for the land, ready and willing to comply with the defendant's terms. The legal import of the indorsement upon the defendant's letter containing the option was that the parties signing the same had made an executory agreement of purchase and sale upon the terms and conditions mentioned in that letter *mutatis mutandis*. But it was

open to either party to this action to prove or disprove the fact independent of the writing. Since the indorsement did not conclude the plaintiff, who was not a party to it, neither did it conclude the defendant, who was. The paper was, doubtless, competent evidence in the case, but it did not necessarily prove the fact which the plaintiff had alleged. It did not conclusively show that there had been a meeting of minds upon a sale or upon the terms of sale. Hence it was open to either party to give oral proof of the purpose of the paper, the intention of the parties, or of any conditions or qualifications that accompanied the execution and delivery. In other words, the defendant had the right to go behind the paper, and show, by oral proof, that it was not what it purported to be on its face, but, on the contrary, a mere tentative and incomplete agreement.

The case was evidently tried upon the theory that the indorsement in question was conclusive proof of the fact in issue; that is, of the performance on the part of the plaintiff. The court charged the jury that the two papers,—that is to say, the option letter and the indorsement subsequently made thereon,—in and of themselves, were sufficient evidence of the fact that a purchaser had been produced by the plaintiff satisfactory to the defendant. The defendant's counsel excepted to this part of the charge. There was no question submitted to the jury except the question whether there had been a delivery of the paper, and under the charge, if they found that there had been a delivery, they were necessarily bound to find the disputed fact in favor of the plaintiff, as they did. The court ruled that, if the paper had been delivered, the plaintiff was entitled to recover, and excluded all proof of the acts and negotiations of the parties preceding and at the time of the signing of the indorsement, and to this ruling the defendant's counsel excepted. We think the ruling was erroneous, since it gave to the paper all the legal effect of an agreement between the parties to the action, and concluded the defendant, when it is obvious it could not have concluded the plaintiff. The fact that the plaintiff found it to his interest, and therefore elected, to prove his case by the papers, did not affect the defendant's rights. He could still give parol proof touching the fact in issue in the same way, and to the same extent, as if the plaintiff himself had resorted to that form of proof.

Well, one of the parties to the paper, testified that he signed the indorsement conditionally, reserving the right to cancel his signature before 10 o'clock the next day, if he elected to do so, and at the same time declared that he did not consider it a binding contract, being too vague and indefinite; that he did cancel his signature the next morning before 10 o'clock. In pursuance of this agreement. The defendant's counsel

then offered to prove that immediately following this cancellation, or attempt at cancellation, on the 19th of December, the plaintiff undertook to negotiate an entirely new and distinct sale of the land for the defendant to other persons, and carried on such negotiations for two months thereafter. The court excluded the proof, and the defendant's counsel excepted. We think that the acts and conduct of the plaintiff in this respect were admissible. They tended to show that the plaintiff, like Well, did not understand that a complete and binding agreement of purchase and sale had been consummated by the indorsement on the option letter. In other words, his subsequent acts were not consistent with his claim at the trial that the indorsement represented a complete or binding contract of sale. It was only upon the principle that the written words of the indorsement concluded the defendant as to the fact in issue that the court could have excluded proof of the conduct, acts, or declarations of the plaintiff at or subsequent to the execution of the paper; and, since no such effect could be given to it in this action, it must follow that the ruling was error. For these reasons the judgment should be reversed, and a new trial granted, costs to abide the event. All concur. Judgment reversed, etc.

(187 N. Y. 236)

LOWENTHAL v. LOWENTHAL

(Court of Appeals of New York. Nov. 22, 1898.)

REVIEW—FINDING OF JURY—CONFLICTING EVIDENCE—HARMLESS ERROR—SUIT FOR DIVORCE—ADULTERY—PROOF OF CONNIVANCE—TRIAL—ENTRY OF JUDGMENT.

1. The court of appeals is bound by the finding of a jury on conflicting evidence, affirmed by a general term.

2. No error can be predicated on the admission of evidence favorable to appellant.

3. Admission of evidence, in an action for divorce for adultery, of the reputation of a certain locality as a resort of persons for immoral purposes, if incompetent, was harmless error, where it was not shown that defendant visited the locality.

4. Code Civ. Proc. § 1757, requiring the plaintiff in divorce to prove the material allegations of the complaint, if defendant makes default; and rule 73 of the supreme court, providing that, when the action is on the ground of adultery, unless it is averred in the complaint that it was committed without the consent or procurement of the plaintiff, and that plaintiff has not voluntarily cohabited with defendant since the discovery thereof, judgment shall not be rendered for the relief demanded until plaintiff proves such facts by affidavit,—do not require plaintiff, where defendant contests the action, to furnish proof of such facts, when not alleged in the complaint.

5. Where the sole issue was adultery, in an action for divorce, and it was, on defendant's demand, submitted to a jury, under Code Civ. Proc. § 1757, requiring it where either party demands it, the court may, on an affirmative finding, which is conclusive under section 970, unless set aside, order a judgment for the relief demanded, without making findings or conclusions, or filing a decision stating the grounds

on which the issues were decided, as required by Code Civ. Proc. § 1022.

6. Where the issue of adultery is left to a jury, as required by Code Civ. Proc. § 1757, where either party demands it, in a divorce case, and other issues were tried in equity, the jury's finding should be returned to the special term, it being conclusive on that court; and a decision should then be filed as to all the issues, as Code Civ. Proc. § 1022, provides.

Appeal from supreme court, general term, Fifth department.

Action by George Lowenthal against Maria E. Lowenthal for an absolute divorce. From a judgment of the general term (36 N. Y. Supp. 1053) affirming a judgment of the special term entered on the verdict of a jury, and from an order of the general term setting aside one of the findings of the jury, and ordering judgment, and also affirming an order denying a motion for a new trial, defendant appeals. Affirmed.

Quincy Van Voorhis, for appellant. David Hays, for respondent.

BARTLETT, J. The plaintiff has recovered a judgment of absolute divorce against the defendant, and on this appeal it is attacked upon several grounds.

It is first urged that there is no evidence to support the affirmative finding of the jury upon the issue of adultery. The learned general term have found against this contention, upon conflicting evidence, and this court is bound by their decision.

It is further insisted that the trial judge erred in admitting proof on the part of the plaintiff that the river bank adjacent to the west end of the Old Hooker road had a reputation as being a rendezvous of persons for immoral purposes. The act of adultery charged in the complaint and found by the jury was committed in the city of Rochester, at or near a fence on the north side of the Old Hooker road, near the high bank of the Genesee river, between the hours of 5 and 7 o'clock on the first or second Saturday evening in November, 1890. The Old Hooker road extends from St. Paul street to the river; and the plaintiff, having introduced evidence tending to prove the act of adultery under the circumstances referred to, the defendant placed a witness upon the stand, who was allowed to testify to an alleged state of facts calculated to cast more or less of doubt or improbability upon the plaintiff's case. Among other things, he stated there was an electric light in St. Paul street, directly opposite the Hooker road, that there were elm trees along the Hooker road, that the leaves were off the trees at the time in question, that the branches were a certain height above the ground, and that the electric light would illuminate the Hooker road for a considerable distance. The plaintiff's counsel, when cross-examining this witness, asked him two questions, which were answered over the objections and exceptions of defendant, as follows: "Q. Did that road during that time have a

reputation in that vicinity? A. It never had that reputation to my knowledge." It is to be observed that the question is exceedingly indefinite, but, if it is to be assumed it sought to show that this road was frequented by men and women habitually for immoral purposes, the answer was in the negative, and wholly in the defendant's favor. The other question was then propounded: "Q. I will ask you the same question with reference to the land lying adjacent to the road, and towards the river,—as to whether it had a reputation as being a rendezvous for persons for immoral purposes? A. I would have to answer that, yes." If this last question be regarded as incompetent and immaterial, on the ground that it relates to land lying outside of the road, defendant was not prejudiced, as no proof was offered that she had visited the adjacent premises. We are of opinion that the questions do not disclose error that should reverse the judgment. We expressly refrain from expressing any opinion as to the right to prove the reputation of a general locality as a trysting place for immoral purposes.

The remaining points on this appeal relate to the practice adopted by the trial judge.

The Code of Civil Procedure provides that, if the answer in an action for divorce puts in issue the allegation of adultery, the court must, upon the application of either party, or it may of its own motion, make an order directing the trial by jury of that issue. Section 1757. The defendant asked for a jury trial under this section, and the counsel for plaintiff subsequently submitted to the court 14 questions to be submitted to the jury, and it was so ordered. The first 12 questions charged the defendant with 12 distinct acts of adultery. The thirteenth question dealt with the subject of plaintiff's connivance, and the fourteenth with the subject of plaintiff's condonation. In his charge the trial judge instructed the jury that the only question for them to consider was the first one, which related to the act of adultery alleged to have been committed in the Old Hooker road, and, if they were satisfied by a fair preponderance of evidence that it was proved, then the question was to be answered "Yes," and all the other 13 questions were to be answered "No." The jury followed these instructions. After the verdict was rendered it was discovered that through inadvertence a mistake had been made in framing the thirteenth question. It should have read, "Were such acts of adultery, or any of them, committed with the consent, connivance, privity, or procurement of the plaintiff?" The mistake consisted in using the word "without" instead of "with," and the negative answer to the question, under the instructions of the court, was a formal finding of connivance on the part of the plaintiff. The plaintiff thereupon moved that the answer of the jury to the thirteenth interrogatory be set aside and disregarded, on the grounds that the question therein contained was not embraced in the issues raised

by the pleadings, and that it was answered in the negative by direction of the court through inadvertence and contrary to the intention of the court and jury; also, on the further ground that there was no evidence at the trial to support a negative answer to this question; and that the plaintiff have judgment for the relief demanded in the complaint. The court granted an order setting aside the answer to the thirteenth interrogatory, and directed judgment to be entered. The appellant insists that two distinct errors in practice were committed by granting this order.

It is first argued that there was a mistake in the substance of the verdict, and not merely in the manner or form of rendering it, which put it beyond the power of the court to correct upon motion. The soundness of this proposition depends upon the issues submitted to the jury under the pleadings. The answer is a general denial, and the only issue raised by the pleadings was that of adultery. This court has recently held that the allegations of the complaint, in an action for divorce, that the adultery charged was without the connivance of plaintiff, and that he has not voluntarily cohabited with the defendant since discovery of the fact, are inserted to avoid the necessity for an affidavit, under rule 73 of the supreme court, in case of defendant's default, and that, in the event of the action being litigated, connivance, condonation, and other matters set forth in rule 73 and section 1758 of the Code must each be pleaded as an affirmative defense. *McCarthy v. McCarthy*, 143 N. Y. 235, 38 N. E. 288. In the case at bar neither the general denial of the answer, nor the interrogatories framed for the jury, raised any issue other than that of adultery. The defendant neither pleaded connivance as an affirmative defense, nor did she offer proof on such issue. It therefore follows that the trial judge properly granted the motion to strike out the answer of the jury to the thirteenth interrogatory.

This brings us to the remaining question of practice,—whether the trial judge had the power, this being a suit in equity, to order a judgment for the relief demanded in the complaint, instead of making findings and conclusions, or filing a decision stating the grounds upon which the issues were decided, as required by section 1022 of the Code. The general term seems to have held that defendant's appeal from the judgment, instead of making a motion for alleged irregularity in respect to the order for judgment, amounts to a waiver. The learned court, however, uses this language: "The plaintiff's attorney may deem it necessary to obtain from the trial court a decision, and file it, with a view to completely perfect the judgment; and whether or not the defendant may or not thereupon file exceptions, and take another appeal from the judgment, it is not now necessary here to inquire." We are of opinion that the trial judge was authorized to order

judgment as he did, and that no decision under section 1022 was necessary or permissible, where the sole issue presented to the jury was that of adultery, and a jury trial had been demanded by defendant. Section 1757, to which reference has already been made, provides that the court must send the issue of adultery to a jury upon the application of either party. This issue is not framed in equity and sent to a jury to enlighten the conscience of the court, but is one where the party demanding it is entitled, by express provision of law, to a trial by jury, whose finding is conclusive, unless the verdict is set aside or a new trial is granted. Code Civ. Proc. § 970. A suit for divorce being in equity, there doubtless have been cases where the answer set up affirmative defenses, and the only issue sent to a jury was that of adultery. If in such a case the other issues were tried in equity, it would be the proper practice to return the finding of the jury on the issue of adultery to the special term, it being conclusive on that court, and a decision should then be filed as to all the issues under section 1022 of the Code.

We have considered the other points discussed by the appellant, but find no reversible error. The judgment and orders appealed from should be affirmed, without costs. All concur. Judgment and orders affirmed.

(157 N. Y. 166)

HIRSHFELD v. FITZGERALD et al.

(Court of Appeals of New York. Nov. 22, 1898.)

APPEAL—REVIEW—QUESTION OF FACT—BANKS—ACTION AGAINST STOCKHOLDERS—DISMISSAL—ACTION BY RECEIVER.

1. Although the court of appeals has no power to review a question of fact on appeal from the supreme court, yet it may determine whether a question of fact is involved, even though the supreme court, in its order, may recite that it was upon the law and the facts.

2. An action cannot be continued by plaintiff after he has assigned his interest, under Code Civ. Proc. § 756, providing that "in case of a transfer of interest * * * the action may be continued by * * * the original party, unless the court directs the person to whom the interest is transferred * * * to be substituted in the action or joined with the original party as the case requires," when the assignee demands that the action be discontinued.

3. A creditor of an insolvent bank, who brings an action against the stockholders in behalf of himself and all other creditors who may wish to join with him, may settle his claim, and dismiss the action, at any time before judgment, where no other creditors come in and become parties, although the creditors are not required to come in until after the entry of an interlocutory judgment, and although Laws 1892, c. 689, § 52, provides that the stockholders of every banking corporation shall be individually responsible "equally and ratably and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock," etc.

4. Where a creditor of an insolvent bank under an agreement with the receivers that they would bear half the expenses, sues the stockholders, joining the receivers as defend-

sants, and the claim is afterwards assigned and settled, and the assignee seeks to dismiss the action, the receivers cannot carry it on, as, under Laws 1892, c. 688, § 55, providing that "no action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation and an execution therein has been returned unsatisfied," the receivers could not have brought the action.

Gray and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by Jacob Hirschfeld against Lawrence J. Fitzgerald and others. From a judgment of the appellate division, First department (50 N. Y. Supp. 676), reversing a judgment dismissing the complaint, the defendants appeal. Reversed, and judgment of the trial court affirmed.

William B. Putney, Franklin Pierce, Joseph Fetterich, John A. Straley, and Albert Stickney, for appellants. Samuel Untermeyer, for respondent.

HAIGHT, J. This action was brought by the plaintiff, as a creditor of the Madison Square Bank, in behalf of himself and all other creditors of the bank similarly situated who may choose to come in and share the benefits and expenses of the action, against the defendants, as stockholders of the bank, to enforce an alleged liability under section 52 of the banking law of 1892. The Madison Square Bank was organized in 1882 as a banking association, and carried on its business in the city of New York until about the 8th day of August, 1893, when it suspended payment, and an action was brought by the attorney general for its dissolution, which resulted in a final judgment entered on the 24th day of November, 1893, whereby the banking association was dissolved, and the defendants Miles M. O'Brien and James G. Cannon were appointed permanent receivers. It appears that this action was brought by the plaintiff at the solicitation of the receivers, who agreed with him to pay all the expenses of the action, including counsel fees. The complaint alleges that prior to the commencement of the action the plaintiff requested the receivers to institute an action against the other defendants for the enforcement of their liability as stockholders under the act, and that the receivers, alleging that no cause of action existed in their favor against the stockholders, refused to bring an action, and that they were consequently made defendants herein, but no personal judgment was demanded against them.

Before the trial of this action, certain of the defendants, stockholders of the bank, entered into negotiations with the plaintiff for the purchase of his claim, which resulted in his assigning the same to one Robert Clirehugh, who thereupon stipulated, as the owner of the claim, with the attorneys for the defendants, who were stockholders, that the action may be discontinued, without costs, and

that an order may be entered to that effect; and also stipulating for a substitution of attorneys in the place of the attorney who had brought the action in behalf of Hirschfeld. The court having refused to allow a substitution of attorneys, or a discontinuance of the action, Clirehugh executed releases to the defendants who had joined in and contributed to the purchase of the plaintiff's claim. Thereupon, upon leave of the court, supplemental answers were served by a number of the defendants, setting up the sale and assignment by Hirschfeld to Clirehugh, and the releases made by him. Upon the trial which followed, these facts appearing, together with the fact that no other creditor had come in and been made a party to the action, the court held and decided that the plaintiff, Hirschfeld, was not a creditor of the bank, and was not entitled to recover a judgment for any sum of money against the stockholders as such creditor; that the action was not prosecuted by the real party in interest for any claim due from the bank, and that there was no party before the court entitled to recover any judgment in the action as for a debt due from the bank. Judgment was ordered dismissing the complaint upon the merits. From the judgment entered upon this decision the plaintiff and the receivers appealed to the appellate division, which court reversed the judgment, and ordered a new trial.

The first question which we are called upon to determine is as to whether we have jurisdiction to review the order of the appellate division. In the body of the order reversing the judgment entered upon the decision of the special term the appellate division certifies that the reversal was upon the law and upon the facts. If it is true that the reversal was upon the facts as well as the law, then this court has no jurisdiction to review the order, for, under the constitution and the Code, our power is now limited to the review of questions of law, except where the judgment is of death. Upon the claim being made that there was no controverted question of fact in the case upon which a reversal upon the facts could be based, we allowed the argument of the case to stand over in order that the attention of the appellate division might be called to the matter, and that court have an opportunity to amend the order, if it so desired. That court, as we now understand, has refused to change its order, and we are, therefore, required to look into the case for the purpose of determining whether there are controverted facts or inferences to be drawn from conceded facts upon which a reversal upon the facts could be based. We have discovered none, and none which were material were called to our attention by counsel upon the argument.

In *Otten v. Railroad Co.*, 150 N. Y. 395, 401, 44 N. E. 1035, Vann, J., in delivering the opinion of this court, says: "An appellate court cannot invest itself with jurisdiction to reverse a lawful judgment free from legal

error by the mere assertion that it reverses upon the facts, when the record shows that there are no questions of fact upon which to base a reversal. It cannot create a question of fact by declaring that there is one, nor, by assuming to reverse on the facts, reverse a determination that does not involve a question of fact. * * * Unless there was a material question of fact, the reversal was an unlawful exercise of judicial power, and constituted an error that may be corrected by this court." This opinion was concurred in by all the judges of the court, with one exception, and we regard it as controlling on the question under consideration. We have no power to review the facts, but we have the power to determine whether a question of fact is involved in the case, and, if there is none, we have jurisdiction to review the law.

The appellate division appears to have been of the opinion that an action could be properly maintained in the name of Hirschfeld, the plaintiff, after he had sold and transferred his claim to Clirehugh, and after Clirehugh had executed releases to a number of the defendants, and sought to discontinue the action. Section 756 of the Code of Civil Procedure provides that: "In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires." Under this provision of the Code, it has been repeatedly held that the action may be maintained in the name of the original plaintiff, notwithstanding that he has, subsequent to the bringing of the action, assigned his claim to another party. It has also been held that the bringing in of the party to whom the cause of action has been assigned is discretionary with the court, but, in continuing the action in the name of the original assignor, he is deemed to act for and on behalf of his assignee, and to represent his interest in the litigation. In no case to which our attention has been called has the plaintiff been allowed to continue the action after he has assigned his cause of action in opposition to the wishes and interests of his assignee. If his assignee sees fit to settle, or demand that the action be discontinued, the provisions of this section furnish no authority for the further continuation of the action, or shield for the plaintiff, who, under such circumstances, should continue to prosecute it. The case of *McGeen v. Railroad Co.*, 133 N. Y. 9, 30 N. E. 647, is not in conflict with these views. In that case an action had been brought to restrain the operation and maintenance of the defendant's elevated railroad on the street in front of plaintiff's premises, and to recover damages. After issue was joined, the plaintiff conveyed his premises to another party, but expressly reserved all damages caused, or to be caused, by the present, past, or future maintenance and operation of

the railroad, together with the fee and easements in the street. In that case it was held that the plaintiff had the right to continue the action to recover his fee and rental damages. Had he not retained the fee and rental damages, but had included them in the conveyance, and the purchaser had then settled with the railroad company, a very different question would have been presented.

It is now contended that the action brought by the plaintiff was representative, and on behalf of all the creditors of the bank, and that in bringing the action he became a quasi trustee for the other creditors, and that he could not settle or discontinue the action. This question is of great importance, and should receive careful thought and study; for, if the appellants are correct in their contention, stockholders in an action of this character have only to buy out or settle with the plaintiff to defeat a recovery against them. The courts, however, are not responsible for the statute. Our duty is to construe, and not to make, it. We think it must be conceded that the remedy contemplated by the statute was a representative action prosecuted by a creditor on behalf of himself and all other creditors similarly situated who should come into the action and share its expenses. By the provisions of the statute the stockholders of every banking corporation shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. Laws 1892, c. 689, § 52. It was evidently not intended by the provisions of this statute that one creditor should be preferred and paid, to the detriment of other creditors, but that the stockholders should be responsible, equally and ratably, for all of the debts of the corporation to the extent of their capital stock at par value. In other words, they were to contribute equally and ratably for the payment of the whole indebtedness. The object of this statute was undoubtedly to furnish additional security to creditors, and is for the benefit of them all, and should be enforced by or on behalf of all. In the case of *Terry v. Little*, 101 U. S. 216, Chief Justice Waite, in considering a somewhat similar statute, says: "A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution. As the liability of the stockholder is not to any individual creditor, but for contribution to a fund, out of which all creditors are to be paid alike, the appropriate remedy is by suit to enforce the contribution, and not by one creditor alone to appropriate to his own use that which belongs to others equally with himself." In *Marshall v. Sherman*, 148 N. Y. 21, 22, 42 N. E. 422, Judge O'Brien, in delivering the opinion of the court, says: "It is quite well established that in a case like this an action at law by a single creditor against a single

stockholder for the recovery of a specific sum of money cannot be maintained in our courts under our statutes declaring the liability of stockholders. In such cases the liability must be enforced in equity in a suit brought by or in behalf of all the creditors against all the stockholders, wherein the amount of the liability and all the equities can be ascertained and adjusted. * * * The liability of the stockholders is a fund to which all the creditors are entitled to resort after the corporate property has been applied upon the debts." Other authorities to the same effect might be cited, but we do not regard it necessary, in view of the recent utterance alluded to in our own court.

Does the plaintiff, in bringing a representative action, become a trustee for the other creditors? We think not; at least to such an extent as to require him to carry on the litigation for their interests in opposition to his own, or after he has settled his claim. It is true that the capital stock of a corporation is a trust fund for the security of the creditors, and the amount recoverable from the stockholders under the statute in addition to the capital stock may be treated as a like security; but, as we have shown, the creditor is not permitted to bring an action in his own behalf alone for a contribution by the stockholders, for in that way he would obtain a preference for himself. He must bring the action for himself and on behalf, not of all the creditors, but on behalf of those who choose to come in and share the benefits and expenses of the litigation. His relation with the other creditors is one that the law creates. He assumes to prosecute on their behalf only in so far as his personal interests require. He makes no agreement with them, and they do not accept him as a trustee to represent them or bind them by his action. They have the right to come in at any time, and, as soon as they do, they may take part in the management of the action. True, it was not necessary for them to come in, and be made parties, prior to the entering of an interlocutory judgment. When such a judgment is entered it is effectual for all of the creditors, for the court then gives them an opportunity to come in, prove their claims, and share in the recovery. If, however, they neglect to come in and be made parties at such time, they will be barred, and not permitted to share in the distribution of the fund. *Hallett v. Hallett*, 2 Paige, 19; *Kerr v. Blodgett*, 48 N. Y. 66; *Brinckerhoff v. Bostwick*, 99 N. Y. 194, 1 N. E. 663. In the latter case, *Earl, J.*, in speaking of the necessity of creditors becoming parties before interlocutory judgment, says: "There was no purpose in their becoming nominal plaintiffs except that they might have some control of the action, and thus be present to protect and secure their rights, and to prevent a discontinuance of the action by the original plaintiff." In the same case the judge further remarks: "It could not have been commenced by one stockholder for him-

self alone. It is true that at any time before judgment the original plaintiff, before the others were made parties, could have discontinued the suit, or could have settled his individual damages with the defendants, and have executed a release, which would have been effectual as to him. But, if he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached thereto. The bringing of the action by the original plaintiff did not prevent the other stockholders from bringing similar actions. But the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed."

In the case of *Innes v. Lansing*, 7 Paige, 583, it was held by the chancellor that: "Where a creditor files a bill in behalf of himself and all others who shall come in and prove their debts under the decree, and contribute to the expenses of the suit, he may discontinue his suit at any time before there has been a decree therein for the benefit of himself and the other creditors. And the defendant, at any time before such decree, has the right to have the bill dismissed, upon paying what is due to the complainant, with interest and costs." It was also further held that: "The filing of a bill by one creditor, in behalf of himself and others, will not prevent another creditor from filing a similar bill, previous to a decree in the first suit. But, as soon as a decree is obtained in either suit, for the benefit of all the creditors, the proceedings in all other suits may be stayed." This practice has been repeatedly followed in the courts of our state. *Tremain v. Insurance Co.*, 11 Hun, 286; *Derby v. Yale*, 13 Hun, 273, and other cases, in which it was distinctly held that, where an action is brought by a creditor in behalf of himself and others similarly situated who shall come in and contribute to the expenses of the action, no one but the plaintiff acquires a vested interest in the action, or is bound thereby, until a judgment has been entered; and that the plaintiff may discontinue the action at any time before judgment, without the consent of the other creditors. The same practice obtains in England. In the case of *Scarth v. Chadwick*, 14 Jur. 300, 19 Law J. Ch. 327, the vice chancellor says: "As I understand it, the plaintiff has filed a bill in such a manner as that he is dominus litis, and there is nothing upon the face of the bill, as far as I can make out, which shows that he might not, if he pleases, dismiss the bill immediately. The bill contains a charge that the shareholders are so numerous that it would be impossible to make them all parties, and, in fact, that the plaintiff is ignorant of their names and addresses. The last reason, perhaps, makes it unnecessary to consider the first; but still it is a suit over which he has complete dominion, and it is a suit in which,

as I understand, he is not entitled to a decree of course, as in a creditor's suit, but it is a bill which, if a decree is made, may turn out for the benefit of others besides himself. But upon the face of the bill the plaintiff is the only person with whom the defendants can deal, and then they make an application to stop it. I do not see why the defendants are not at liberty to make a common application in this as in another suit." In the case of *Handford v. Storie*, 2 Sim. & S. 196, the vice chancellor says: "It is said that Mr. Storie, having instituted this suit for the benefit of himself and all others, the debenture holders, was not at liberty upon general principles to dismiss his bill from motives of advantage to himself. I know of no such general principle. A plaintiff who sues on behalf of himself and all other persons of the same class as he, acts upon his own mere motion, and at his own expense, retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure. After a decree he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. The reason of the distinction is that before decree no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own, and that, after a decree, no second suit is permitted." In *Pemberton v. Topham*, 1 Beav. 316, it was held that in a creditors' suit instituted by the plaintiff on behalf of himself and all other creditors the defendant is entitled, on motion at any time before decree, to have the bill dismissed on payment of the demand of the plaintiff and his costs as between party and party. There are numerous other cases of the same import holding substantially the same doctrine. They have been collected in a note under section 748 of Cook, Stock, Stockh. & Corp. Law, who states the rule as follows: "It is a principle of equity practice, when a person brings a suit in behalf of himself and such others as may wish to come in, who are similarly situated, that the complaining stockholder controls the case, and may continue, compromise, abandon, or discontinue it at his pleasure."

The case of *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 336, we do not regard as in conflict with our own or the English authorities. In that case one of the creditors had filed a petition to be brought in and made a party, before an attempt was made to dismiss the action. He had a right to come in, and have an order entered to that effect, and the order, when entered, would relate back to the time of the filing of his petition. The court in that case merely held that the action could not be dismissed thereafter without his consent, or an opportunity given him for a hearing.

The case of *Atlas Bank v. Nahant Bank*, 23 Pick. 490, does not appear to be in point, but it must be conceded that the clause appearing in the opinion to the effect that "the

plaintiffs, having once instituted the proceeding as a statute remedy for themselves and others, they go on afterwards for the benefit of all parties concerned, and the original complainants have no power to discontinue," is in apparent conflict with the cases to which we have alluded. We think, however, that in this state there is no escape from the claim made by the appellants that where an action is brought by a plaintiff on behalf of himself and others similarly situated who come in and share in the expenses, he has the right to control the action, and may continue, compromise, abandon, or discontinue it at pleasure until a creditor similarly situated has procured an order to be made a party to the action, or has served a notice of motion to be brought in, or until interlocutory judgment is entered.

It is now contended that the receivers are parties to the action, that they represent the creditors, and that the action may properly be carried on by them, and that they had the right to appeal from the judgment rendered by the trial court. They were made parties defendant, and, we think, properly. In order to maintain the action, it was necessary for the plaintiff to show that he was a creditor of the corporation, that the corporation was insolvent, and that a contribution from the stockholders was necessary in order to discharge the liabilities of the bank. It thus is apparent that before final judgment could be entered an accounting on the part of the receivers was necessary in order to ascertain and determine the amount to be collected from the stockholders. For this purpose they were properly made parties. We do not understand, however, that the action could have been prosecuted by them as receivers. The statute to which we have alluded is expressly limited by the provisions of the stock corporation law (Laws 1892, c. 688). By referring to section 55 of that law we find the following limitations: "No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due," etc. It will thus be seen that the action must be brought by a creditor who has first recovered a judgment, and has had an execution thereon returned unsatisfied. The remedy is purely statutory, and no right of action was, by this statute, given to the receivers. It is true that by an amendment of the statute in 1897 receivers may now maintain the action, but at the time this action was brought no such right existed.

The action can only be maintained by a creditor, and that for the amount of his claim duly established according to law. In this case we have held that the bringing of an action by the attorney general to dissolve the association, and the procuring of an injunction restraining creditors from bringing actions, rendered compliance with this part of the statute impossible and, therefore, excusable. *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817. But all of the other provisions of the statute apply, and must be complied with. Under these provisions the action must be maintained by a creditor in behalf of himself and those similarly situated, and in the final judgment entered the amount owing by the corporation, over and above the assets in the hands of the receivers, must be ascertained and determined, to the end that each creditor who has come in and proved his claim may have a judgment for the balance his due. None of the money passes into the hands of the receivers, and their only part in the litigation is to account for the assets of the corporation that have come into their hands as receivers. We therefore fail to see how they have any standing in court to prosecute the action, or to appeal from any judgment that may be entered in the action, unless it may be from such parts of the judgment as affect their interests upon their accounting. If we are correct in this view, their agreement with *Hirshfeld* to prosecute the action was unauthorized, and was no part of their duty as receivers, and can have no force upon the questions pending before us. In the case of *Farnsworth v. Wood*, 91 N. Y. 308, *Rapallo, J.*, in speaking of the rights of creditors to maintain actions against the stockholders of a corporation under the statute, says: "The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, nor rights of action vested in it; nor is there any provision of the statute which transfers these rights of action from the creditors to the receiver."

As we have seen, the plaintiff sold and assigned his claim before any of the creditors had come in, or had served a notice of motion to be brought in, as parties. At the time of the trial he was not a creditor. The person to whom he had sold his claim had stipulated a discontinuance of the action, and had executed a release to many of the defendants. The plaintiff's assignee, therefore, could not and did not wish to continue the action; and the defending stockholders, having settled with him, had the right to have the action discontinued. We must confess that we regret the result reached, but, under the numerous authorities in this state and England, to which we have alluded, we think we are compelled to conclude that the complaint was properly dismissed by the trial court. The order of the appellate division should be reversed, and the judgment entered upon the decision of the trial court

affirmed, with costs in all courts. All concur, except *GRAY* and *VANN, JJ.*, dissenting. Order reversed, etc.

(157 N. Y. 363)

PEOPLE ex rel. JONES v. FEITNER et al.,
Board of Taxes, Etc.

(Court of Appeals of New York. Nov. 29,
1898.)

TAXATION—EXEMPTIONS—PROPERTY PURCHASED
WITH PENSION MONIES.

Prior to Laws 1897, c. 348, which is not retroactive in its effect, real property owned by the wife or widow of a pensioner, though purchased with the proceeds of a pension, was not exempt from taxation.

Appeal from supreme court, appellate division, Second department.

Application by the people, on the relation of *Harriet L. Jones*, for a writ of mandamus against *Thomas L. Feitner* and others, composing the board of taxes and assessments of the city of New York. From a judgment of the supreme court (52 N. Y. Supp. 622) reversing an order granting the writ, relator appeals. Affirmed.

George W. McKenzie, for appellant. *Almet F. Jenks* and *R. Percy Chittenden*, for respondents.

PER CURIAM. The only question it is necessary to determine in this case is whether the relator was entitled to the exemption claimed. We think she was not. As the law stood when the assessments complained of were made, pension money, or real property purchased with it, was exempt from execution; and as this court held in *Bank v. Carpenter*, 119 N. Y. 550, 23 N. E. 1108, it was likewise exempt from assessment and taxation. But that exemption was personal to the pensioner, and did not extend to property owned by another, even though it were his wife. It is true the law is now otherwise (Laws 1897, c. 348), but that statute has no retroactive effect, and hence has no application here. This case was properly disposed of by the appellate division, and the order appealed from should be affirmed, without costs. All concur, except *GRAY, J.*, absent. Order affirmed.

(157 N. Y. 301)

WARD v. PETRIE et al.

(Court of Appeals of New York. Nov. 22,
1898.)

SUPPLEMENTARY PROCEEDINGS—FRAUD ON CREDITOR—RIGHT OF RECEIVER TO SUE—PLEADING—CAPACITY TO SUE—WAIVER.

1. Code Civ. Proc. § 2464, providing for the appointment of a "receiver of the property of the judgment debtor," does not invest the receiver with a right of action against the judgment debtor and his fraudulent transferee of chattels for conspiring thus to defeat the judgment creditor, where the transfer of the chattels was complete before the judgment was entered, for that right of action accrues, if at all,

to the judgment creditor, and not the judgment debtor.

2. Laws 1894, c. 740, amending Laws 1868, c. 314, and authorizing receivers to resist all acts done or transfers made in fraud of creditors, does not empower a receiver to maintain an action of tort against the debtor and his transferee for conspiring to wrongfully transfer the debtor's property in anticipation of the rendition of judgment.

3. Where the facts were insufficient to enable a receiver to maintain an action, that objection is not waived by an omission to demur or answer to his legal capacity to sue, because those are distinct vices.

Appeal from supreme court, general term. Fourth department.

Action by Peter A. Ward, as receiver, against Norman Petrie and another. A judgment for plaintiff was affirmed in the general term (36 N. Y. Supp. 940), and defendants appeal. Reversed.

On the 16th of August, 1893, one Jesse Reed commenced an action in the supreme court against the defendant Norman Petrie to recover the sum of \$600 for work performed by said Reed as a farm laborer upon the farm of said Petrie. Issue having been joined in said action, it was tried on the 15th of February, 1894, and after 5 o'clock in the afternoon, when it was too late to enter judgment on that day, a verdict was rendered in favor of the plaintiff therein for the sum of \$634.50. The next day, at 10 minutes after 10, judgment was entered upon the verdict in the county clerk's office of Jefferson county for the sum of \$712.56 damages and costs. An execution was at once issued to the sheriff of said county, in which the judgment debtor then resided, and it was returned unsatisfied on the 21st of February, 1894. On February 23, 1894, proceedings supplementary to execution based upon said judgment were instituted in the usual form, and resulted in the appointment of plaintiff as receiver therein by an order dated March 10, 1894, followed by the filing of the proper receiver's bond on the 17th of March, 1894. The order requiring the judgment debtor to appear for examination was served upon him February 24, 1894. This action was commenced in the county court of Jefferson county about May 1, 1894. It is alleged in the complaint, and evidence was given tending to show, that at about 7 o'clock in the morning of February 16, 1894, said Norman Petrie executed and delivered to his sister, Flora Petrie, a chattel mortgage upon a large quantity of personal property to him belonging, situated upon his farm in the town of Orleans, county of Jefferson; that said mortgage was at once duly filed in the proper office, but the same was colorable merely, and was given without consideration, pursuant to a conspiracy entered into between the defendants to cheat and defraud the creditors of the said Norman Petrie, and especially the said Jesse Reed, and to prevent the collection of said judgment to be entered on the verdict in his favor; that pursuant to said conspiracy

the said Flora took possession of the mortgaged property, and advertised the same for sale on the 19th of March, 1894, when she bid in substantially the whole thereof, and is now in possession claiming to be the owner, with knowledge at all times of the fraudulent intent of the said Norman in the execution and delivery of the mortgage. The complaint closes in these words: "That, by reason of such conspiracy, and the acts of defendants in pursuance thereof, the trust estate and rights of plaintiff have been damaged in the sum of \$800; * * * wherefore the plaintiff demands judgment for the sum of \$800, besides costs." There was no allegation of title to the property in the plaintiff, or of a conversion thereof by the defendants. The defendants served separate answers, putting at issue the more important allegations in the complaint; and upon the trial they raised, by appropriate objections, motions, and exceptions, the question whether the complaint stated a cause of action, and, if so, whether the county court had jurisdiction thereof. It appeared upon the trial that on February 20, 1894, four days before the order in supplementary proceedings was served, the defendants executed and acknowledged an instrument under seal, whereby, after reciting that Norman Petrie owned said farm, and that it was incumbered by three mortgages, the third, amounting to about \$2,750, being owned by the said Flora, it was agreed "that said Norman do, and hereby does, transfer to the said Flora Petrie the possession of said farm; that said Flora Petrie agrees to, and hereby does, take possession of said farm, to receive and hold possession thereof as mortgagee in possession." On the same day Flora Petrie took possession of the real estate, and at the same time she also took possession of the personal property under the chattel mortgage, which contained the usual danger clause, and she was in possession thereof before the supplementary proceedings were instituted. The chattel mortgage purports to have been given mainly as collateral and further security to said third mortgage on the real estate. The jury rendered a verdict in favor of the plaintiff, as receiver, against both defendants, for the sum of \$795.28. Judgment was entered accordingly, and from the judgment of the general term affirming the same an appeal was taken by the defendants to this court.

Wayland F. Ford, for appellants. Watson M. Rogers, for respondent.

VANN, J. (after stating the facts). This action is an excursion by a receiver into a new field. It is an action at law, brought by the plaintiff, as receiver in supplementary proceedings, to recover damages from the judgment debtor and another for a fraudulent conspiracy to prevent the collection of the judgment creditor's debt, which, although in existence, was not in judgment at the time the conspiracy was formed and executed. As

the authority of the plaintiff to maintain such an action is challenged, it becomes necessary to examine the statute authorizing his appointment and governing his powers. The Code of Civil Procedure, by section 2464, authorizes the appointment of "a receiver of the property of the judgment debtor." Section 2468 provides that "the property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him," subject to certain exceptions not now material. When the receiver's title to personal property has thus become vested, "it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, . . . so as to include the personal property of the judgment debtor, at the time of the service of the order." *Id.* § 2469. If it appears from due proof that the judgment debtor has in his possession, or under his control, money or personal property belonging to him, or that a third person has possession or control of the same, and the right of the judgment debtor is not substantially disputed, an order may be made by the judge in charge of the proceeding, in his discretion, for the payment of the money or the delivery of the property to the sheriff, or to a receiver if one has been appointed. *Id.* § 2447. The receiver is subject to the control of the court out of which the execution was issued (section 2471), and his duties, subject to such control, are to take possession of the tangible property of the judgment debtor, not exempt by law, and convert it into money to the best advantage; to collect the intangible assets, and out of the proceeds to pay fees and expenses, and apply the balance upon the debt of the judgment creditor, returning the remainder, if any, to the judgment debtor. He represents the judgment debtor, and can bring any action relating to property rights that he might bring, because he has his title. He also represents the judgment creditor in equity to the extent necessary to bring actions in the nature of a creditors' bill to set aside fraudulent transfers, for "he comes in by the act of the law, and not by the act of the party." *Porter v. Williams*, 9 N. Y. 142, 149; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Mandeville v. Avery*, 124 N. Y. 376, 385, 26 N. E. 951. He is trustee for the judgment creditor to receive, and to remove obstacles by equitable procedure so that he may receive, the property of the judgment debtor, and apply the proceeds on the debt, which is the foundation of his authority. He takes the legal title to all the personal property of the debtor, whether in his own hands or in the hands of others, as of the date of the service of the order in supplementary proceedings, but not so as to affect the title of a purchaser in good faith, or the payment of a debt in good faith. *Code Civ. Proc.* § 2469; *McCorkle v. Herrman*, 117 N. Y. 297, 302, 22 N. E. 948. The title to property, however, transferred by the judgment debtor in fraud of creditors,

prior to the service of the order for examination upon him, is good as against the receiver until he has caused the transfer to be set aside by a decree in equity. *Bostwick v. Menck*, 40 N. Y. 383. Until then he has an equitable right, but no title. While the title of a fraudulent transferee is not good as against the sheriff armed with an execution against the property of the judgment debtor, as he may levy upon the property, sell it, and run the risk of being able to prove the fraudulent nature of the transaction when he is sued, it is good as against the receiver, who has no legal process, until the transfer is formally set aside. The receiver can maintain an action against the judgment debtor in conversion, where the debtor has converted property after it became vested in the receiver (*Gardner v. Smith*, 29 Barb. 68); but it has been held that he cannot maintain replevin to recover articles of personal property which were transferred by the debtor, in fraud of his creditors, prior to the appointment of the receiver (*Pettibone v. Drakeford*, 37 Hun, 628). In *Metcalf v. Del Valle*, 64 Hun, 245, 19 N. Y. Supp. 16, it was held that the title of a receiver in supplementary proceedings extended only to the property which the judgment debtor had when the receiver was appointed, and that it did not include property which the judgment debtor had fraudulently transferred prior to such appointment. When the case reached this court, it was affirmed on the authority of *Bostwick v. Menck*, *supra*. So an administrator does not take legal title to chattels fraudulently assigned by his intestate, and can only avoid the transfer by proceeding in equity under the statute authorizing it. *Osborne v. Moss*, 7 Johns. 161; *Brownell v. Curtis*, 10 Paige, 210.

If the plaintiff can maintain this action at law, it must be because the title to the cause of action vested in him by virtue of his appointment as "receiver of the property of the judgment debtor." *Code Civ. Proc.* § 2464. What does a receiver in supplementary proceedings receive? He receives simply "the property of the judgment debtor," according to the express command of the statute. The title to the property of the judgment debtor is vested in him, and he is entitled to "receive" all of it, except such as is exempt from execution. The property belonging to and in the possession of the judgment debtor he is entitled to take without legal process, and, if the judgment debtor resists, to apply to the court for an order compelling him to deliver it. In addition to this, however, he has an equitable right to property fraudulently transferred by the judgment debtor, and can reinstate the title in him by a suit in equity, and then receive it. If such property is voluntarily surrendered by the transferee upon demand, he is entitled to take it, and dispose of it the same as if it had never been transferred. If it is not voluntarily surrendered, he cannot take it by force, but by virtue of

the statute he is entitled to maintain an action in equity to set aside the fraudulent transfer, so that he may receive the property, which in equity and good conscience belongs to the judgment debtor. Such an action, however, cannot be maintained in a county court for the want of jurisdiction of an equitable action of that kind. Code Civ. Proc. § 340. There is no statute and no rule of law that entitles him to "receive" anything that does not belong to the judgment debtor, who, in the case before us, had parted with title, possession, and the right of possession before the receiver was appointed. He is not entitled to receive any right of action belonging to the judgment creditor, although he is authorized to bring an action to set aside fraudulent transfers, the same as the judgment creditor himself might have done. We find no case holding that he represents the judgment creditor to the extent of bringing an action at law, even if the judgment creditor might have brought one, to recover damages for a fraudulent conspiracy to prevent the collection of his debt, carried into effect before the proceedings were commenced which resulted in the appointment of the receiver. He is the receiver of the property of the judgment debtor, not of the judgment creditor, and such a right of action is the property of the latter, not of the former. He represents the creditor only with reference to the property of the debtor, who cannot have a cause of action against himself. The defendants did nothing to affect the title of the receiver after his appointment, for the fraudulent transfer was complete, even as to possession, before supplementary proceedings were commenced. What they did would be ineffectual as against his equitable right to the property transferred when asserted in the proper manner, for he could follow the property in equity, at least until it reached the hands of a bona fide purchaser. *Id.* § 1871. So far, however, as the action of the defendants gave a right of action at law to any one, it was to the judgment creditor only, and that right did not pass to the plaintiff on his appointment, nor did he represent the creditor with reference to it. The judgment creditor could not assert that right through the plaintiff, who could receive under the statute the property of the judgment debtor only. The receiver could not receive a right of action for a tort that accrued, if at all, before the judgment was recovered upon which his title was founded.

Whether the judgment creditor could maintain an action at law to recover damages on account of the fraudulent transfer made before he recovered judgment or had any lien, legal or equitable, it is not necessary to decide. The following cases are relied upon by the plaintiff as justifying such an action: *Yates v. Joyce*, 11 Johns. 136; *Van Pelt v. McGraw*, 4 N. Y. 110; *Quinby v. Strauss*, 90 N. Y. 664; *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401. On the other hand, the defendants insist that such an action cannot

be maintained, because their acts, when done, did not injure any security of the creditor, for he had none at the time, and in support of this position they cite the following: *Braem v. Bank* (Sup.) 6 N. Y. Supp. 846, affirmed 127 N. Y. 508, 28 N. E. 597; *Adler v. Fenton*, 65 U. S. 407; *Hutchins v. Hutchins*, 7 Hill, 104; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353, 31 N. Y. Supp. 25. We do not think it necessary to decide the question in this case, because, as we have already held, such a right of action could only be asserted, if at all, by the creditor or himself, in his own name, and not through a receiver.

It is, however, insisted that this action is authorized by chapter 314 of the Laws of 1858, as amended by chapter 740 of the Laws of 1894. It has been held that the class of receivers referred to in this act are those who are vested as such with all the property of the insolvent for the benefit of all the creditors, and not to a receiver appointed in supplementary proceedings for the benefit of a single creditor only. *Pettibone v. Drakeford*, supra. This, if not so held, was plainly intimated, in *Underwood v. Sutcliffe*, 77 N. Y. 58, 62. But, whether this is so or not, we do not think that said statute authorizes any receiver, however appointed, to maintain such an action as the one under consideration. This action does not attempt to follow the property, and recover it, or the value thereof, so that the receiver may apply the proceeds upon the debt in question. It is not an action to replevy the property, or to recover damages for the conversion thereof, or to set aside the fraudulent mortgage. It treats the property as a mere incident to the cause of action, and is founded on the theory of a fraudulent conspiracy to prevent the collection of a debt held at the time by a simple contract creditor. The statute under consideration enables a receiver or other trustee of an estate to follow specific property transferred in fraud of the rights of creditors, and makes the persons receiving such property liable in the proper action for the same or its value. This liability is not imposed upon the one making the fraudulent transfer, but upon the transferee alone, and hence it is evident that this action, which seeks to make both liable, the one as much as the other, was not brought under that statute. The property transferred is not the subject of the action, but the conspiracy to defraud, and the transfer pursuant thereto. The result of the action, if successful, would not affect the property, for the plaintiff could not take it, nor sell it, nor do anything with it that he could not have done if the action had not been brought.

The plaintiff claims that, as the defendants did not raise the question of his capacity to sue by demurrer or answer, under sections 488 and 490 of the Code of Civil Procedure, they thereby waived the right to claim that the receiver cannot maintain this action. There is a difference between capacity to sue, which is

the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy, or lunacy, or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal capacity to sue as such, and hence could bring the defendants into court by the service of a summons upon them, even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and hence could not lawfully cause the defendants to be brought into court, even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon. The Code of Procedure contained provisions similar in all respects now material to the sections above cited from the Code of Civil Procedure, and, referring to those provisions in *Bank v. Magee*, 20 N. Y. 355, 359, this court, through Judge Denio, said: "Certain persons—as infants, idiots, lunatics, and married women—cannot sue except by guardians, next friends, committees, or, in the case of married women, by joining their husbands in certain cases. This, I think, was what the provision refers to," etc. We think that the plaintiff had capacity to sue, but that his complaint stated no cause of action of which the county court had jurisdiction. The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event. All concur, except O'BRIEN, J., not voting, and MARTIN, J., not sitting. Judgment reversed, etc.

(157 N. Y. 116)

**PEOPLE ex rel. TYROLER v. WARDEN OF
CITY PRISON OF CITY OF
NEW YORK.**

(Court of Appeals of New York. Nov. 22,
1898.)

**CONSTITUTIONAL LAW—POLICE POWER—LIBERTY—
CARRIERS—COMPETITION—TICKET
BROKERAGE—FRAUD.**

1. The sale of a valid passenger ticket by a broker is not a fraud, on either the transportation company or the traveler, calling for protective legislation in the exercise of the police power, as attempted by Laws 1897, c. 506.

2. Laws 1897, c. 506, § 1, prohibiting the sale of passenger tickets by persons not agents of the carrier, and section 2, authorizing an agent of any transportation company to purchase from the agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is agent, so as to enable such passenger to travel to the place from which his ticket shall read, conflicts with Const. art. 1, § 6, providing that no person shall be deprived of liberty without due process of law.

3. Such act is not valid as a police regulation of carriers as quasi public corporations.

4. Nor is such act valid as a police regulation of the manner in which the business of ticket brokerage may be conducted.

5. In determining whether a law attempted to be justified as being within the police power is in violation of the constitution, the courts must ascertain whether the health, morals,

safety, and welfare of the public justified its enactment.

6. The fact that some dishonest persons have been engaged in the ticket-brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, does not justify the legislature in depriving every citizen of the liberty to further engage in such business, as attempted by Laws 1897, c. 506.

7. The fact that a railroad, by a sale to a ticket broker of a block of tickets at less than the usual price, is enabled to take travel from its competitors, does not justify the legislature in prohibiting the sale of passenger tickets by other than agents of transportation companies, as attempted by Laws 1897, c. 506, on the ground that such legislation is for the public good.

Bartlett, Martin, and Gray, JJ., dissenting.

Appeal from supreme court, appellate division, first department.

Habeas corpus by the people, on the relation of George Tyroler, against the warden of the city prison of the city of New York. From an order of the appellate division (50 N. Y. Supp. 56) affirming an order dismissing the writ and remanding relator to custody, he appeals. Reversed.

The relator is a citizen of the state of New York and of the United States, and immediately prior to his arrest, and for several years before that time, had been engaged in the city of New York in the business of selling, and offering for sale, and procuring, tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains. He is charged with having received the sum of \$6.30 as a consideration for a passage or conveyance upon a ferryboat, train, and vessel from the city of New York to the city of Norfolk, Va., and for the procurement of a ticket giving the absolute right of passage and conveyance upon such ferryboat, train, and vessel, he not being at the time an authorized agent of the owners or consignees of such vessel, or of the company running such train. It is not pretended that the relator did not come into the possession of the tickets lawfully, and by purchase from the transportation companies issuing them. The relator sued out a writ of habeas corpus, and demanded his discharge from the custody of the defendant, on the ground that the act of 1897 (chapter 506) violated certain provisions of the constitution of the state of New York and the constitution of the United States, and was therefore void. The special term made its order dismissing the writ, and remanded the relator. The appellate division affirmed that order.

Samuel Untermyer, for appellant. Asa Bird Gardiner and James D. McClelland, for respondent.

PARKER, C. J. (after stating the facts). The statute that appellant insists is in derogation of the limitation placed upon the legislative power by the people, through the constitution of the state, reads as follows:

"Section 1. The Penal Code is hereby amended by inserting therein a new section, to be known as section six hundred and fifteen, to read as follows: § 615. Sale of Passage Tickets on Vessels and Railroads Forbidden, Except by Agents Specially Authorized. No person shall issue or sell, or offer to sell, any passage ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or stateroom in any vessel, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train, except as allowed by sections six hundred and sixteen and six hundred and twenty-two; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel or railway for which he is authorized to act as agent, and the city, town or village together with the street and street number, in which his office is kept, for the sale of tickets.

"Sec. 2. Section six hundred and sixteen of the Penal Code is hereby amended so as to read as follows: § 616. Sale by Authorized Agents Restricted. No person, except as allowed in section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or stateroom on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell, or offer to sell, any such ticket, instrument, berth or stateroom, or ask, take or receive any consideration for any such passage, conveyance, berth or stateroom, except at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Laws 1897, c. 506.

The remaining portion of the section relates to the redemption of tickets purchased from an authorized agent of a railway company, under certain contingencies, and within cer-

tain periods of time, and is not in any wise involved in this appeal.

Having observed how the statute reads, it will be well next to analyze it, and see if we can find out what was intended to be accomplished, and is in fact accomplished, by the phraseology of the statute, in order that we may ascertain whether the statute is in contravention of any of the rights secured by the constitution to the citizen. It will be observed, in the first place, that it does not prohibit the sale of tickets absolutely, nor does it limit to the particular transportation company over whose route he desires to be conveyed the right to sell tickets to the traveler. It may be said, in passing, that the last assertion is in conflict with the position taken by the learned judge who wrote the opinion of the appellate division; for he assumes that, as only persons appointed agents can sell, the effect of the provision is that a corporation "shall only sell through its agents, and is merely a declaration that the corporation itself was to sell its tickets."

The first section and the first part of the second section do restrict the sale of passage tickets to agents specially authorized by transportation companies, and, if there was nothing else in the statute upon the subject, it would bear the construction put upon it, that its only effect is to confine the right to sell passage tickets of a corporation to that corporation itself, which can act only through agents; but between the opening and the closing sentences of the second section may be found the following: "Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Thus we see that the moment a man becomes the agent of a transportation company he is by that designation authorized to buy tickets of any other transportation company in the United States or the world, and may sell such tickets to any person who applies for them. In the sale of tickets of the various transportation companies, other than those of the company of which he is an agent, he necessarily acts as a broker. He can buy the tickets and sell them again, making a profit that may perhaps depend more or less on the degree of competition between railroads in various parts of the country. Clearly, the agent of a transportation company, in the purchase and sale of tickets of foreign corporations, is not engaged in selling the passage tickets of the transportation company appointing him. It is not the sale of the tickets of his principal alone that the agent is thus engaged in; but when a transportation company appoints an agent to sell its tickets, then the state, by this statute,

steps in and attempts to clothe him with the power which it takes from all other citizens to deal in the tickets of as many other transportation companies as he may be able to make satisfactory arrangements with.

This leads us to note another interesting feature of this remarkable statute. The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It has happened before that for the protection of the people the lawmaking power has provided for an examination for the purpose of ascertaining whether applicants possessed suitable qualifications as to character, intelligence, and financial responsibility to fill certain positions of trust, or to engage in a business which might prove dangerous to the people in the hands of a person either incompetent or of bad character; but in no instance has it conferred a general and unlimited power of appointment upon a class of persons or corporations wholly unconnected with the state government. It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets, and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor, within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from non law-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agents selected, other than that, in the purchase of tickets, he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony. The act itself is silent as to the motive of its enactment by the legislature, and it contains no suggestion as to the public interests which its purpose is to subserve.

Ticket brokerage as a business has been in existence for many years. It is a matter of common knowledge that at great agencies, such as Cook's and Gaze's, tickets can be purchased over a great portion of the transportation routes of the world. Intending travelers in great numbers have gone to those agencies for advice as to choice of routes to be taken in contemplated journeys and to purchase the tickets for the trip, whether it should require days or weeks or months to make it. The

traveling public in large numbers have come to make use of the facilities afforded by such agencies, of which there are now very many. And Cook's and Gaze's are among the agencies that must go out of business in this state if this statute can live, unless some transportation company shall deem it wise to clothe them with the authority to act as its agents.

It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused, or alleged to be unused, passage tickets, as to call for legislation of a protective character, of which this statute is the outcome. The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments in legislation are the result. But usually, in case of wrongs, penalties have been provided. It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? "In the title of the act," answers counsel, and with that answer he has to be content; for while the act is entitled, "Frauds in the sale of passage tickets," the body of the statute does not contain any reference to forged, altered, used, or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent, or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can be no doubt that the legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another, upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person? It is said that the prohibition of such a sale tends to protect the traveler from being defrauded. If it is a sale of a valid ticket, no fraud can possibly result; and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code.

Only one prop remains which it is pretended can support the weight of this statute, and that is that the penal laws not having proved sufficiently efficacious to wholly prevent fraud, an emergency is presented which

justifies the taking away from the general public the right to engage in the business of ticket selling. It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade, and profession. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oil in measurements, and in tobacco in quality, it has not hitherto, we venture to say, been thought the proper remedy to make it a felony for persons to hereafter engage in such business, unless they shall have been duly appointed as agents by the corporations manufacturing or producing the product.

Still another motive for this enactment is suggested, and that is that its real purpose is to enable transportation companies to compel others with which they may enter into pooling arrangements to preserve their agreement from secret violation, which is frequently the outcome under the present ticket brokerage system, which offers an avenue by which the weaker corporation to such an agreement can dispose of its tickets at a price lower than that agreed upon.

This subject received judicial attention in *Railway Co. v. McConnell*, 82 Fed. 65, and *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, where statutes having apparently the same object in view as this one were under consideration, as will appear from the following extract from the opinion: "It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear."

Counsel argue that the helpfulness of the ticket broker in securing to the traveling public the benefits of such competition was of such a fraudulent character as to wholly justify the legislation, and appeal to the decisions quoted from in support of such contention. But we pass for the present the subject of motive, to be again referred to when we come to consider whether, under the police power, the legislation can be justified. Whatever the legislature's motive, the fact is, that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage, but the act does declare that if any person, other than an

agent of a transportation company, undertakes to engage in the passenger ticket brokerage business he shall be guilty of a felony; in other words, that it is unlawful for all citizens of New York to engage in the buying and selling of passage tickets unless empowered to do so by the written appointment of a transportation company.

Much has been said in argument with reference to this statute in a more agreeable vein, placing the statute in a somewhat more attractive form, but it is as well to go beneath the surface, and get at the truth, which is that the statute was intended to and does in fact vest the control of the sale of passage tickets within this state, not only of transportation companies doing business in this state, but throughout the world, exclusively in the hands of such companies. The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business. Public policy is still declared to favor a business which recognizes the propriety of the middleman between the passenger and the transportation company, but the right to engage in it is denied to the general public. The question, then, is whether the organic law prohibits legislation of this character.

Before referring to the provisions of the constitution that it is confidently asserted condemn such legislation, it may not be out of place to note that the granting of monopolies or exclusive privileges to corporations or persons has been regarded as an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, from the times of the reigns of Elizabeth and James. The statute of 21 Jac., abolishing monopolies, has been from the time of its enactment regarded as a statutory landmark of English liberty, and that nation has jealously preserved it. It was a part of that inheritance which our fathers brought with them and incorporated into the organic law, to the end that the lawmaking power should be restrained from interference with it.

In this connection, the language employed by Mr. Justice Field in *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 756, 757, 4 Sup. Ct. 652, 660, is most instructive. "As, in our intercourse with our fellow men, certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident [that is, so plain that their truth is recognized upon their mere statement], that all men are endowed [not by edicts of emperors, or decrees of parliament, or acts of congress, but] by their Creator with certain inalienable rights [that is, rights

which cannot be bartered away, or given away, or taken away, except in punishment of crime], and that among these are life, liberty, and the pursuit of happiness, and to secure these [not grant them, but secure them] governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birth-right. * * * In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws."

From the opinion of Mr. Justice Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 6 Sup. Ct. 1064, 1071, the following is taken: "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men'; for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

These principles have also been incorporated into the organic law of this state. Article 1, § 1, of the state constitution reads as follows: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Article 1, § 6, of the

state constitution provides that "no person shall * * * be deprived of life, liberty, or property without due process of law."

The word "liberty," as employed in the provision of the constitution quoted, was considered by this court in *Re Jacobs*, 98 N. Y. 98, in a masterful opinion by Judge Earl. He said (pages 106, 107): "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. 'Liberty,' in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, this court declared unconstitutional a statute that prohibited the manufacture and sale of any substitute for butter or cheese produced from pure unadulterated milk or cream. Judge Rapallo, speaking for the court, said: "Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

In *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, a statute was declared to be unconstitutional which prohibited the sale of any article of food, or offering or attempting to do so, upon any representation or inducement that anything else would be delivered as a prize, premium, or reward to the purchaser. Judge Peckham, in delivering the opinion of the court, after considering the statute, said (page 399, 109 N. Y., and page 343, 17 N. E.): "A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation."

Argument certainly is not needed, in the

light of these decisions, to support the assertion that the "liberty" of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is therefore in contravention of the state constitution, and is void unless its enactment by the legislature constituted a valid exercise of the police power. That power is very broad and comprehensive, and has not as yet been fully described, or its extent plainly limited, but it is exercised to promote the health, comfort, safety, and welfare of society. In each of the last three cases cited it was invoked by counsel to sustain a statute, and it received very careful consideration at the hands of this court. It was held that the power, however broad and extensive, is not above the constitution, in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation; and, while it is the general province of the legislature to determine what laws and regulations are needed to protect the public health, comfort, and safety, courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power.

The doctrine of these cases was very recently considered and reasserted by this court in *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, and its further discussion at this time would be a work of supererogation. Under the law of this state, therefore, it is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the constitution, for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment. In passing, it may be observed that while it is undoubtedly the rule that railroads, steamboats, warehouses, and other associations of that nature, impressed with a public duty and intended to perform certain quasi public functions, may be the subject of legislative control and regulation so long as the legislature does not transcend the limit of state or federal constitution, still that rule is without application to the features of the statute before the court on this review. This inquiry involves such portion of the statute only as undertakes to prohibit citizens of the state from engaging in the brokerage business in passage tickets. That portion of the statute certainly places no burden upon transpor-

tation companies, nor does it in any way regulate the manner in which transportation companies shall conduct their business or any part of it. The legislature has no jurisdiction to regulate the methods of business of foreign transportation companies, nor can it prevent them from selling their passage tickets in this state, but by this act it does undertake to prevent any citizen of this state from purchasing the passage tickets of foreign companies for sale to others, unless such citizen shall have been regularly appointed an agent by some transportation company. The right hitherto exercised by citizens to deal in passage tickets over transportation routes without, as well as within, this state, is sought to be cut off.

Again, it may be conceded that it is within the power of the legislature to regulate the manner in which certain kinds of business may be conducted; that it may require one seeking to engage in a given pursuit to secure from the state, or one of its agents, a license; that it may require one pursuing any particular occupation to pay a tax for the privilege of conducting his business; and that, as a condition to the right of carrying on a business that, in the hands of incompetent persons, may be productive of injury to others, the legislature may require that before engaging therein one must satisfy the public authorities that he is competent and morally qualified to conduct it. But none of these methods was adopted. No attempt is made to exclude persons of bad character from engaging in the business, nor are the public authorities given the right to determine, by examination or otherwise, the character of the person to be engaged in it; but the transportation companies alone are invested with the power to allow whomsoever they will to engage in the business.

Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the legislature can deprive every citizen engaged therein of the "liberty" to further conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business, and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted, to the convenience of the public and the profit of the persons engaged in it, is beyond legislative power.

If the law were otherwise, no trade, business, or profession could escape destruction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged, it is said; so have notes, checks, and bank bills. Railroad companies are no more

bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But, because of that fact, honest men cannot be prevented from engaging in their chosen occupations.

Again, it is said that ticket brokers enable the railroads to engage in unfair competition. This is accomplished by the sale to the broker by a competing railroad, at much less than the regular rates, of a block of tickets that the broker is enabled to sell to his customers, and this to a certain extent takes travel from its competitors. An opinion is cited in which the court in another jurisdiction denounces the ticket scalper for engaging in a business of this character, and pronounces such business fraudulent alike in its conception and operation; but we pass this opinion without other comment than to say that, whatever may be regarded as the law in other jurisdictions, in this one it is well established that the public welfare is best subserved by the encouragement of competition (*People v. Sheldon*, 139 N. Y. 263, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790); and hence this so-called reason furnishes no support to the claim that this legislation was for the public good.

I have now called attention to all the arguments that have been advanced in support of the claim that the provisions of the statute under consideration are so evidently intended for the public good as to constitute a valid exercise of the police power by the legislature, and those arguments seem so wholly without merit as to suggest that they constitute a mere pretext put forward to uphold legislation hostile to the liberty of the citizen, as that word is used in the constitution. If the views expressed be well founded, it follows that it is the duty of the court to declare that portion of the statute we have considered to be in contravention of the constitution and void. The order should be reversed, and the prisoner discharged.

BARTLETT, J. (dissenting). This appeal is based upon the alleged unconstitutionality of chapter 506 of the Laws of 1897, entitled "An act to amend the Penal Code, relative to the sale of passenger tickets." Chapter 12 of title 15 of the Penal Code, amended by this statute, is entitled "Fraud in the sale of passage tickets." The relator insists that the act of 1897 violates article 1, § 1, of the state constitution, which provides that no member of the state shall be disfranchised or deprived of his rights or privileges unless by the law of the land and the judgment of his peers; also article 1, § 6, of the state constitution,

providing that no person shall be deprived of life, liberty, or property without due process of law; also the fourteenth amendment of the constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; also article 3, § 1, of the state constitution, vesting the legislative power of the state in a senate and assembly; also article 1, § 3, subd. 3, of the constitution of the United States, providing that congress shall have power to regulate commerce among the several states. The learned counsel for the relator and appellant asks us to consider, in the light of these constitutional prohibitions, the act of 1897, which makes, as he insists, the pursuit of a business which for 40 years prior to September 1, 1897, was legitimate and lawful, a felony.

The business referred to is described in the relator's petition for the writ of habeas corpus as "selling and offering for sale, and procuring, tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains." It should be observed that the act of 1897 is merely an amendment of a chapter of the Penal Code containing some 12 sections, and inserts therein one new section and amends another. It is not, in a general sense, new legislation, but ingrafts some additional provisions upon statutory enactments that have existed, in one form or another, for 40 years or more. A short review of this legislation, which is not referred to in the briefs of counsel or the opinion below, may be profitable at this time.

Chapter 470, Laws 1857, is entitled "An act to prevent frauds in the sale of tickets to passengers upon railroads, steamboats and steamships," and provides that no person, other than the agents or employes of the carriers named, duly appointed by them for that purpose, by a proper authority in writing, shall offer for sale, or sell, within this state, any tickets, etc. A violation of this act is made a misdemeanor, punishable by a fine of not less than \$100, or by imprisonment not less than three months, or by both such fine and imprisonment.

Chapter 103, Laws 1860, is entitled "An act to prevent frauds in the sale of tickets upon steamboats, steamships and other vessels," and is confined to the sale of tickets upon various vessels, and, while longer and more comprehensive than the act of 1857, is similar in its restrictive provisions, and makes the penalty for violation imprisonment in a state prison for a term of not more than two years, or by imprisonment in a county jail not less than six months.

Chapter 820, Laws 1868, amends the act of 1857.

Chapter 201, Laws 1876, is entitled "An act to prevent frauds in the sale of staterooms,

berths and tickets upon steamboats, and steamships, and other vessels," and is in harmony with the previous legislation upon the general subject.

While these laws remained upon the statute book, and in 1881, the Penal Code was adopted (chapter 676, Laws 1881), which in title 15, c. 12, contained practically the same provisions as the laws of 1857 and 1860.

Chapter 384, Laws 1882, amended the Penal Code by repealing section 615, being the opening section of said chapter 12, but the remaining sections were retained, which forbade the sale of tickets by persons other than authorized agents of companies.

Chapter 593, Laws 1886, repealed chapter 470, Laws 1857; sections 1-7, 9, 11, c. 103, Laws 1860; and chapter 201, Laws 1876.

Chapter 662, Laws 1892, amended sections 618 and 621 of the Penal Code, relating to this subject, by increasing the penalty for the violation of the statute to a maximum imprisonment of two years, and declaring that offices kept for the purpose of selling tickets in violation of any provisions of the chapter are to be deemed disorderly houses. This seems to have been the last legislation upon this general subject until chapter 506 of the Laws of 1897, the act now under consideration, which enacted a new section, 615 of the Penal Code, in place of the old section repealed by chapter 384 of the Laws of 1882, and also amended section 616.

While the argument based upon practical construction is not conclusive, it is entitled to great weight. When we are confronted, as in this case, by a declared public policy of the state which has existed for more than a generation, its illegality must be made very clearly to appear before the court will hold it to be in violation of constitutional provisions, and consequently void. It may be stated, in this connection, that similar legislation exists in several other states, and has been uniformly sustained by the courts. *Burdick v. People*, 149 Ill. 600, 36 N. E. 948; *State v. Corbett*, 57 Minn. 343, 59 N. W. 317; *Com. v. Wilson*, 14 Phila. 384.

The only question presented for our decision at this time may be thus stated: Is it competent for the legislature, in the exercise of the police power and in regulating the sale of passage tickets by common carriers, to prohibit sales by ticket brokers, unless they are duly authorized to make such sales by the owners or charterers of the vessel, or by the company running the railway train upon which passage tickets are offered for sale? We are not now called upon to determine the privileges enjoyed by, or obligations imposed upon, common carriers by this legislation; nor are we to decide whether the individual who has purchased a ticket in good faith, with the intention of using the same, has been deprived of his property without due process of law, when prohibited from selling his unused ticket, and compelled to resort to a more or less imperfect scheme of redemption by the in-

dividuals or corporations issuing it. The relator is in no way concerned with these questions, and his appeal must stand or fall upon the proper construction of the law relating to the sale of passage tickets by ticket brokers. The statute might be void as to the passenger holding an unused ticket, and valid as to the ticket broker. The court should express no opinion on this point. We are not only confined to the single question pointed out, but we have nothing to do with those questions of fact that were presented with great ability by the learned counsel for the appellant, as they have no place in the record. We have to deal with the legal question of legislative power only, and are not judicially informed as to the facts that induced the legislature to act, save as they may be inferred from that which appears upon the face of the legislation the validity of which is now challenged.

The acts prior to the Penal Code aver in their titles that they were enacted to prevent frauds in the sale of tickets to passengers upon railways and vessels, and the chapter of the Penal Code that has taken the place of these earlier statutes is entitled, "Fraud in the Sale of Tickets." It may, therefore, be fairly and reasonably inferred from these declarations on the face of the statutes that the legislature was moved to act in order to prevent frauds upon passengers and common carriers. As this record presents only the constitutionality of the act in question upon its face, we are not advised judicially of the evils which many years of legislation have sought to remedy. So we come to the question whether it is competent for the legislature, in the exercise of the police power, in order to prevent frauds in the sales of passage tickets by land and water, to confine their sale to the individuals and corporations issuing them, or their duly-authorized agents. In other words, has the relator such an inalienable right to deal in these tickets by purchase and sale that to deprive him of it is to strip him of his liberty, rights, privileges, and property without the judgment of his peers and due process of law?

The appellant insists that to confine the sale of tickets to the common carriers, or their agents, not only works these results as to him, but is to discriminate against every citizen and build up a monopoly. We are cited in a learned brief to many cases in the supreme court of the United States, our own court, and other courts, to sustain this position. The reasonable limits of this discussion will not permit a review of these authorities, but I am of opinion they have no application to the case at bar. It has been often remarked by judicial writers that it is difficult and undesirable to define the limits of the police power. It has been said to be "the general power of a government to preserve and promote the public welfare, even at the expense of private rights." 18 Am. & Eng. Enc. Law, p. 740. Judge Cooley, in his *Constitutional Limitations* (4th Ed., 719), says: "The limit of the police power in these cases must be this: The regulations must have

reference to the comfort, safety, and welfare of society." The supreme court of Illinois, in *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 194, referring to the police power, said: "It may be assumed it is a power co-extensive with self-protection, and is not inaptly termed 'the law of paramount necessity.' * * * It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." The supreme court of the United States (*In re Rahrer*, 140 U. S. 554, 11 Sup. Ct. 865) pointed out that it is within the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity. It was, as it seems to me, a reasonable and proper exercise of the police power by the legislature, when seeking to put an end to frauds in the sale of passage tickets, to require carriers, who are usually created by legislation, to sell their own tickets either directly or through duly-authorized agents. It is always the fact that the exercise of the police power by the legislature leads to loss and inconvenience in the cases of many individuals. It is the inevitable result, and must be endured, unless personal and property rights are invaded to such an extent that constitutional provisions are violated. The relator insists that he is deprived of his property without due process of law. We do not have here presented, as before intimated, the question which might arise in the case of the purchaser of a ticket in good faith, intending to use the same, who, being unexpectedly prevented from so doing, desires to sell it. This relator has no such special property in the ticket as the supposed case discloses, but is a mere dealer or speculator in these symbols or tokens. The relator claims the same right to traffic in passage tickets as he would have to buy and sell cotton, grain, or any other article of personal property that can be seen and handled.

The nature of a passage ticket has been repeatedly considered by this court. In *Hilbard v. Railroad Co.*, 15 N. Y. 455, 466, the plaintiff was ejected from the train because he refused to show his ticket. The plaintiff recovered damages below, but this court reversed, and in its opinion said: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and when it is redelivered to the company it becomes a voucher, in its hands, against the office or agent who issued it, in the adjustment of its accounts." It thus appears that

the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger, the ticket being the property of the carrier, while the passenger is entitled to retain it in his possession until the completion of his journey. In *Quimby v. Vanderbilt*, 17 N. Y. 306, this court held that passage tickets are generally to be regarded as tokens, rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement. In *Rawson v. Railroad Co.*, 48 N. Y. 212, the court held that a ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher, adopted for convenience, to show that the passenger has paid his fare from one place to another.

I am of opinion that neither the act of 1897, nor the statute it amends, deprives the relator of his property without due process of law. The relator has no such vested right as a ticket broker to traffic in the purchase and sale of these symbols or tokens, which are the property of the carrier, as has the merchant dealing in goods, wares, and merchandise. If the legislature deemed this interference in the business of the common carrier relating to the sale of passage tickets as leading to great frauds and abuses, it was competent for that body to put an end to it, even if, as may be possible in the relator's case, ticket brokers were unfavorably affected who were in no way responsible for the evils sought to be remedied. This is not the case of the legislature saying to the merchant: "You shall no longer buy and sell and get gain; you must henceforth abstain from dealing in those articles of merchandise the handling of which, by land and sea, constitutes the commerce of the world." This is the case of the legislature saying to the citizen: "You must not interfere with the due and orderly conduct of business between the common carrier and the passenger in the sale and purchase of the symbol or token used for the purpose, as it leads to frauds upon, not only the common carrier and the first-class passenger, but the emigrant as well (see Pen. Code, § 626); and, in the exercise of the police power to protect the traveling public, we enact that the passage ticket of the common carrier shall be sold only by it or its agents." In sustaining this exercise of the police power, it is not necessary to refer in detail to the legislation regulating the conduct of business in various ways, in order to prevent fraud and promote the welfare of society, which has been uniformly sustained in this and other states.

It is further insisted on behalf of the relator that the act of 1897 is unconstitutional, because it amounts to a regulation of commerce among the several states by the legislature of this state. It is difficult to understand how any such result is accomplished by this legislation. It has often been said that legislation by a state may, in a great variety of ways, affect commerce and persons engaged in it without constituting a regulation of it.

within the meaning of the constitution of the United States. *Kidd v. Pearson*, 128 U. S. 1, 23, 9 Sup. Ct. 6; *Hall v. De Cuir*, 95 U. S. 485, 487, 488; *Sherlock v. Alling*, 93 U. S. 99, 103; *State Tax on Railway Gross Receipts*, 15 Wall. 294; *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 155; *Pound v. Turk*, 95 U. S. 459. The act of 1897 does, indeed, affect ticket brokers who were, in a sense, engaged in interstate commerce, but it cannot properly be said that it was an effort on the part of the legislature of this state to regulate commerce, within the meaning of the federal constitution. The traveling public is at liberty to freely come and go as heretofore, and the fact that they are prohibited from dealing with the unauthorized ticket broker offers no obstacle to interstate commerce. The act of 1897 deals with the ticket broker as a resident of this state, carrying on his business here, and there is no attempt to usurp the powers of congress to regulate interstate commerce.

It is finally argued on behalf of relator that the legislation offends the constitution of this state, because it is practically an abdication of governmental functions in favor of private individuals and corporations. The statement of the argument is that the legislature has left it to private agencies to determine who shall and who shall not be permitted to carry on the business of selling tickets. This argument refutes itself. The legislature, in the constitutional exercise of the police power, has said to the common carrier, "You must select and duly commission the agents who are to sell your passage tickets, and no one else can engage in that business." This is certainly not an abdication of governmental functions, but a wise and proper exercise of them, as I view the situation. I have carefully considered the elaborate argument presented in the appellant's brief, but see no reason to disagree with the conclusions reached by the learned appellate division. The order appealed from should be affirmed.

MARTIN, J. (dissenting). Recognizing the justice of recent criticisms upon the increase of long and argumentative dissenting opinions in this court, still the importance of the principle announced in the decision of this case demands a statement of the reasons which prevent my concurring with the majority. The case involves the validity of a statute which continues a protection to the public and to transportation companies against fraud in the sale of passage tickets which has existed in this state, in substantially the same form, for more than 40 years. Therefore the present statute cannot be held unconstitutional without practically determining that for all that time the affairs of this state in that respect have been controlled by statutes which were invalid, as being in excess of the powers of the legislature to enact. The passage and continuance upon the statute books of this and similar statutes for so many years

show that during that time a legislative policy has prevailed in this state which has been sanctioned by numerous legislative acts. It has never been questioned by the courts, and has been acquiesced in by the departments of the state government. This constitutes such a practical construction of the constitutional provisions invoked by the appellant as to justify this court in holding the statute to be within the police power of the state, especially as similar statutes had been in force for many years when the present constitution was adopted. *People v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co.*, 92 N. Y. 328, 337; *In re Washington St. A. & P. R. Co.*, 115 N. Y. 442, 447, 22 N. E. 856; *People v. Murray*, 149 N. Y. 307, 376, 44 N. E. 146.

The real inquiry here presented is whether the legislature may provide that steamboat and railroad tickets shall not be sold by irresponsible or unknown persons, thus exposing travelers to fraud, and require them to be so sold that the companies issuing them shall be responsible to the traveler who purchases them. While the statute forbids persons other than the companies, or their duly-constituted agents, making such sales, still its purpose was to compel the companies to sell their own tickets, and thus become responsible. Manifestly, the method prescribed by this act was the only efficient one that could be adopted to secure the end sought. If the companies had merely been forbidden to permit such sales, their permission could never be established, and thus the purpose of the statute would be thwarted.

The single question presented is whether the legislature was authorized to enact a statute requiring railroad and steamboat companies, or, where the passage extends over more than one line, one of such companies, to sell the tickets for such passage by their duly-constituted agents, and forbidding such sales by persons not sustaining that relation, under penalty of imprisonment. If this act is in conflict with the fundamental law, it is for the reason that it affects the liberty of the citizen to engage in a legitimate employment or business in a lawful way, or because it is destructive of some property right which he lawfully possesses.

It has been asserted by counsel that the business of ticket brokerage has been a legitimate one in this state for more than 40 years. With that statement I am unable to agree. During that entire time a law has existed making the sale of railroad and steamboat tickets, by others than the companies or their properly authorized agents, a crime.

Nor do I understand how it can be properly said that railroad or steamboat tickets are "property," within the common acceptation of that term, when in the hands of others than passengers, as during all those years the statute has continuously declared that passage tickets should not become property in the hands of others, at least so as to in-

clude the ordinary right of sale. Their right of sale was limited to the company over whose route the traveler desired to pass, or, where the route was over several lines, to one of the companies over whose line the passenger intended to travel. The manifest purpose of this statute was to prevent fraud in the sale of passage tickets, and thus protect the purchaser and companies as well. I do not see how it can be correctly said that the legislature was silent as to the motive of passing these various acts. In each the title of the act disclosed that its purpose was to prevent fraud in the sale of passage tickets. The title of an act affords means of determining the legislative intent, and its help cannot be rejected as being extrinsic and extralegislative, as it bears upon its meaning and purpose. *Suth. St. Const. § 211; People v. Wood, 71 N. Y. 374.*

That the sale of tickets by brokers has long been a source of fraud, both upon the traveling public and the companies issuing them, is a matter of common knowledge, and of its existence there can be no doubt. Indeed, it is doubtful if the business would exist but for the profit derived from improper or fraudulent sales. The fraud of ticket brokers assumes various forms, such as changing tickets which are not transferable by the erasure of the name, the place of destination, or the date, and substituting others, and by otherwise changing the tickets, or by obliterating the dates so as to render their improper use possible. Moreover, the existence of such brokers incites the stealing of tickets, and encourages the employes of the companies in defrauding their employers by furnishing a market for stolen tickets and those not canceled by dishonest officers. That the sale of such tickets is a fraud upon both the carrier and the honest traveler cannot be successfully denied. Again, when a passenger loses his ticket, instead of its being restored to him, resort may at once be had to those agencies to realize upon it. Hardly a week passes when the public prints do not contain one or more accounts of the grossest fraud upon honest, but unwary, travelers, which would not occur but for their existence. Therefore the existence of ticket brokers is a continual menace to both passengers and carriers. It tends to encourage forgery, larceny, the receipt and sale of stolen and fraudulent tickets, the perpetration of frauds upon travelers, and is clearly a disadvantage to the honest traveler as well as to the carrier. Hence the necessity for this statute is obvious, and I think the legislature was wise in adopting it.

While every person has a right to pursue, in a legitimate manner, any lawful calling he may select, and the state can neither compel him to adopt any particular calling nor prohibit his engaging in any legitimate business, still it, in the exercise of its police power, is authorized to subject all occupations to such restraint as may be necessary

to prevent their becoming harmful to the public; and where an occupation threatens public injury, and its suppression is essential to the public welfare, the state may prevent its pursuit. *Wynehamer v. People, 13 N. Y. 378, 487; Metropolitan Board v. Barrie, 34 N. Y. 657.* The state has a right to reasonably control the manner in which public corporations shall transact their business, and to protect the public against fraud. This statute does nothing more. Its effect is to require railroad and steamboat companies to sell their own tickets in a manner that will render them responsible to the purchaser for any fraud or mistake that may be perpetrated or may occur. The property and business of these companies is clothed with a public interest which makes them of public consequence, affecting the community at large, and hence they may be controlled by any police regulation which is necessary to secure the public good. *People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682; People v. Boston & A. R. Co., 70 N. Y. 569; Munn v. Illinois, 94 U. S. 113.* It is therefore reasonable that the state may provide any preventive remedy necessary when the frequency of fraud or the difficulty in circumventing it is so great that no other means will prove efficacious. A regulation which is instituted for the purpose of preventing fraud or injury to the public, and which tends to furnish such protection, is clearly constitutional. This proposition is sustained by numerous authorities in this state and elsewhere, and is an important element of the police power, which is vested in the legislature.

It seems clear that the judgment in this case should be upheld upon the grounds:

(1) Railroad and steamboat tickets can in no proper sense be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession. *Hibbard v. Railroad Co., 15 N. Y. 455, 466; Quimby v. Vanderbilt, 17 N. Y. 306; Rawson v. Railroad Co., 48 N. Y. 212.*

(2) The sale of railroad and steamboat tickets by persons other than the companies or their agents, as a business, is not an employment in which they have any unqualified right to engage. A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary elements of property, and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most, it is but an evidence of the arrangement between the companies and their passengers, in which others have no lawful interest. No right to transfer is given, and, generally, none is intended. To hold that every person

has a constitutional right to interfere with the relations between passengers and carriers, which is superior to the control of the legislature, would result in extending the restraints imposed upon the lawmaking power much further than they have hitherto been supposed to exist, and would be an interference with the power vested in the legislative branch of the state government that is wholly unwarranted. Third persons have no constitutional right to interfere with the relations between the carrier and passenger by the purchase and sale, without its consent, of tickets issued by the former, and to establish such a right would be unauthorized by any existing principle of constitutional law. It is true the act recognizes the right of third persons to make sales of passage tickets, but that right is a limited one, and can be properly exercised only by an agent of one of the companies furnishing the traveler with the transportation for which the ticket is purchased. But it is to be observed that, as such sales are to be made by one of the companies furnishing the transportation, the company making it becomes responsible to the passengers and other carriers for any fraud perpetrated by its agent, and is in harmony with the general purpose of the act.

(3) In the exercise of its police power the state was authorized to prevent the pursuit of the occupation of ticket brokers upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud which attended it was so great that no other efficient means could be found.

(4) As railroad and steamboat companies are public corporations, or at least their business is of such public interest as makes it of public consequence, the legislature had power to control their business by any regulation which was necessary to secure the public good. *People v. King*, 110 N. Y. 418, 18 N. E. 245; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682; *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4; *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686; *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541; *Grannan v. Racing Ass'n*, 153 N. Y. 461, 47 N. E. 896. The regulation instituted by this statute was for the purpose of preventing fraud, and consequent injury, to the public. It tends to furnish such protection, and is clearly within the police power of the state. For these reasons I am of the opinion that the act under consideration is constitutional, and should be upheld.

Moreover, if this act is unconstitutional, many other statutes which have hitherto been regarded as valid and a part of the existing law of the state are also unconstitutional. This may be illustrated by reference to a few of the many statutes which fall within the principle of this decision. The taking of any conveyance of lands from any person not being in the possession thereof, while they are the subject of controversy or suit, is a crime. Pen. Code, § 129. It is a crime to buy or sell any title to lands, real or pretended, unless

the grantor or his predecessors in title have been in possession for the space of a year before such sale. Id. § 130. It is a crime to solicit life insurance without a certificate of authority, to issue a policy after a certificate to do business within the state has been revoked, to act for a foreign insurance company which has not designated the superintendent of insurance as an attorney upon whom process may be served, or to act for any foreign corporation not authorized to do business in this state. Id. §§ 577c, 577i, 577j, 593. It is also made a crime to manufacture or sell oleomargarine made in imitation of dairy butter (Laws 1885, c. 183); to exhibit a female child as a dancer or in a theatrical exhibition, or to consent thereto (Pen. Code, § 292); to exclude citizens, by reason of race, color, etc., from the equal enjoyment of any privilege furnished by owners of places of amusement (Id. § 383); to charge for elevating grain a price greater than that fixed by law (Laws 1888, c. 581); to engage in the trade or business of plumbing without registration (Laws 1892, c. 602); not to furnish water at one or more places on each floor in tenement houses in the city of New York occupied by families (Laws 1882, c. 410, as amended by chapter 84, Laws 1887); to sell milk which does not reach a prescribed standard, whether adulterated or pure (Laws 1884, c. 202); to sell vinegar which contains any artificial coloring, whether wholesome or otherwise (Laws 1889, c. 515); and for barbers to work on Sunday, except in the city of New York and the village of Saratoga Springs (Laws 1895, c. 823). If the statute under consideration invades the liberty or property of the individual, it is obvious that the statutes to which we have adverted are subject to the same criticism, and yet most, if not all, of them have been held to be constitutional, and their enactment to be within the police power of the state, as will be seen by examining the following, which are a few of the many cases bearing upon the subject: *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Dawley v. Brown*, 79 N. Y. 390; *People v. Clipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277; *People v. King*, 110 N. Y. 418, 18 N. E. 245; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682; *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4; *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686; *Health Department of City of New York v. Rector*, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833; *People v. Girard*, 145 N. Y. 105, 39 N. E. 823; *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541. Indeed, if the principle of this decision is to be regarded as the established law of this state, it renders invalid many, if not all, of the statutes creating offenses where the act made a crime was not such at common law. No such principle has any proper place in the jurisprudence of this state. In the language of Andrews, J.: "It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the

prohibited act was before the statute lawful, or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality." *People v. West*, 106 N. Y. 293, 296, 12 N. E. 610.

In considering this case, it should be remembered that a statute cannot be declared unconstitutional, unless it can be shown, beyond reasonable doubt, that it is in conflict with some particular provision of the organic law, nor until every reasonable mode of reconciliation with the constitution has been resorted to, and reconciliation has been found impossible. The presumption of constitutionality attaches to every statute passed by the legislature, and the burden of establishing its unconstitutionality rests upon, and must be borne by, the party asserting it. *People v. Board of Sup'rs*, 147 N. Y. 1, 41 N. E. 563. It is for the legislature to determine what laws and regulations are needed for the protection of the public, and, if its measures are calculated and appropriate to accomplish that end, the exercise of its discretion is not the subject of judicial review.

Applying to this case the principles already stated, it is obvious that the statute in question was within the police power of the state. Its necessity to the public welfare was for the legislature to determine, and, as it has a clear relation to that end, its propriety is not subject to review by this court. To hold that this act is unconstitutional would establish a principle which would impair or destroy nearly every statute that has for its purpose the prevention of fraud. It would practically annihilate the police power of the legislature, and make the courts administrators of that power instead of the body in which it is vested by the constitution. Besides, if the cases passing upon the validity of the statutes, to which we have called attention, were correctly decided, they establish a principle which, if applied in this case, requires us to hold that this act was a proper exercise of the police power by the legislature, and that it is consequently valid.

The result of this action is of slight importance in comparison with the principles promulgated as the law of this state. An arbitrary and unauthorized interference by the judiciary with the administrative affairs of the state is fraught with quite as much danger as would follow legislative interference with judicial affairs. Neither can occur without affecting the stability and efficiency of our state government. The legislative power of the state is vested in the senate and assembly. When courts seek to control the action of the legislature, or, in effect, to repeal its statutes, by holding them in conflict with some nonexistent or doubtful constitu-

tional limitation, their action ceases to be judicial, and becomes mere usurpation. I think the order should be affirmed.

PARKER, C. J., reads for reversal of order and discharge of prisoner; O'BRIEN, HAIGHT, and VANN, JJ., concur. BARTLETT and MARTIN, JJ., read for affirmance; and GRAY, J., concurs.

Order reversed, and prisoner ordered discharged.

(157 N. Y. 186)

PEOPLE v. DECKER.

(Court of Appeals of New York. Nov. 22, 1898.)

JURORS — COMPETENCY — TECHNICALITIES — CHALLENGES FOR CAUSE — HOMICIDE — PREMEDITATION — MOTIVE — EVIDENCE — NEW TRIAL — COURT OF APPEALS.

1. A juror, who stated on his voir dire that he could not decide a case according to the law and the evidence, where a white woman had married a colored man, and they had had trouble, as in the homicide at bar, is properly excused.

2. The court may, of its own motion, excuse a juror whose incompetency is brought out on his voir dire.

3. A conviction will not be reversed merely because a clearly incompetent juror was excused by the court of its own motion, conceding the court had no such power, since it is a technical error, not affecting the substantial rights of the parties, within Code Cr. Proc. § 542.

4. In a prosecution of a husband for killing his wife, a juror stated on his voir dire that, if the wife had been unfaithful, it would induce him to accept a lighter sentence, no matter what the other proof might be, and that under such circumstances he could not conscientiously take an oath to serve as a juror, and be governed by the law and evidence. The district attorney stated that he anticipated introducing evidence to show that defendant suspected his wife of infidelity. *Held*, that the juror was properly excused on a challenge for cause.

5. The substantial rights of a defendant are not affected so as to justify a reversal of his conviction, by admitting incompetent persons to sit on the jury, where defendant could have removed all such objectionable persons by peremptory challenges which he did not use.

6. In a prosecution of a husband for shooting his wife, evidence that several months before the homicide defendant and decedent had quarreled, and the former had said in the presence of witness, in referring to decedent, as he took hold of a revolver, that "he had her medicine if she did not do as he said," and that the revolver he then had was the one employed in the homicide, is admissible to show motive.

7. Such evidence is also admissible to show premeditation.

8. Defendant and his wife, the deceased, were heard quarreling in their rooms. Deceased ran downstairs, and defendant called to her to return. She went back, and shortly afterwards went away again. A short time thereafter defendant came downstairs, and three shots were heard near by. Defendant then returned, and told his sister-in-law that deceased was "dead down the road." Deceased was found some 400 feet from the house. Defendant had previously threatened to use the revolver with which decedent was killed, unless she did as he said. He admitted that he fired three shots at her, and that when the third was fired she fell. *Held* sufficient evidence of premeditation

to submit the question of murder in the first degree.

9. Evidence of threats of a husband to kill his wife, of frequent quarrels between them, and of his admission, after the homicide, that he had killed her, is sufficient evidence of a motive to sustain a conviction of murder.

10. Code Cr. Proc. § 528, providing that, when the judgment is of death, the court of appeals may order a new trial if satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception has been taken or not in the court below, does not confer authority to review error to which no exception is pointed out, unless the substantial rights of the accused can be seen to have been affected by it; and in determining whether a new trial shall be granted it is not for the court to review controverted questions of fact arising on conflicting evidence, since the court must not interfere with the verdict unless it reaches the conclusion that justice has not been done.

Appeal from supreme court, trial term.

Bailer Decker was convicted of murder in the first degree, and he appeals. Affirmed.

The defendant was a colored man, and the decedent was a white woman. They were husband and wife, and lived together as such in the upper story of a house on Beach street, in Tottenville, in the county of Richmond, N. Y. The lower part of the house was occupied by two colored families, living on different sides of the hallway. In the evening of May 24, 1898, which was the day preceding the tragedy, the defendant had been in a saloon from about 9 o'clock until half past 11, and remained near there for an hour longer in conversation with a man by the name of La Forge. He then started for home, about a mile distant, and reached there at 1 o'clock. His wife left the house where they resided at about midnight, and returned at about 3 o'clock in the morning of May 25th. She was admitted by a sister of the defendant, who occupied one of the apartments on the first floor. The defendant then came to the door of the stairway, opened it for her, and both went upstairs. Shortly after, quarrelling and loud talking were heard in their rooms, and the decedent ran downstairs. The defendant called to her to return and get her clothes. She went back, obtained a part of them, started down the stairs again, was then requested by the defendant to get all of her clothes, to which she replied that she had all she wanted, and left the house. Shortly after, the defendant came downstairs, and soon three shots were heard in the direction of the house of a Mrs. Parnell. The defendant then returned, went upstairs, remained a few moments, and then left a second time. As he was passing out of the house, he called to his sister-in-law, who occupied another of the apartments on the first floor, and said: "Good bye. She is dead down the road." A single shot was then heard, and the defendant was found across the road from the house, wounded, with a revolver lying near. On the roadside in front of Mrs. Parnell's house, which was 400 feet from where the defendant was lying, his wife was found, with a bullet wound on the right

side of her back. The autopsy disclosed that the cause of her death was hemorrhage of the lungs, occasioned by such wound. The defendant had previously threatened to use the revolver with which the decedent was finally killed, unless she did as he said. He frequently called her vile and abusive names, and he and his wife led an unhappy and quarrelsome life. The defendant admitted that he fired three shots at the decedent, and that when the third was fired she fell. Two bullets, one taken from the body of the decedent and the other from the body of the defendant were identified, and shown to be of the same caliber as the revolver which was proved to have been in the possession of the defendant.

On the morning of the homicide, and after it occurred, articles of clothing belonging to and worn by the decedent were found between the house and the place where her body lay. When found, there was upon the body of the decedent only a night gown, and one of her shoes or slippers was near. The distance from the house to the place where a portion of her clothing was found was 300 feet. From that point to the place where other of her clothing lay was 72 feet, and the distance from the latter point to the place where her body was discovered was 118 feet. Thus the total distance from the house to the point where her body was found was 490 feet.

William J. Powers, for appellant. George M. Pinney, Jr., for the People.

MARTIN, J. (after stating the facts). The defendant, in his brief, presents for determination upon this appeal questions as to the validity of several exceptions taken upon the trial, and asks for a new trial upon the further ground that manifest injustice has been done. Two of these questions relate to the impaneling of the jury. The defendant's claim is that two jurors were improperly excused by the court. John W. Bhair was summoned as a talesman, and upon examination as to his competency to serve he testified that the fact that the decedent was a white woman would have a decided influence upon him in arriving at a verdict, and that he could not decide the case according to the law and evidence where a white woman had married a colored man, and they had trouble. After giving this testimony, the court excused him. We think this evidence showed clearly that he would not have been a fair and impartial juror in the case, and that sufficient reason existed to justify the court in excusing him. But it is claimed that, as no challenge was interposed, it was error not to permit him to sit upon the trial. Section 358 of the Code of Criminal Procedure declares that the jury in a criminal case is to be formed as prescribed in the Code of Civil Procedure. When we turn to section 1166 of the latter Code, we find it provides that the first 12 persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must

be sworn, and constitute the jury to try the issue. Thus, a juror who is not indifferent between the parties, and approved by the court as being indifferent, cannot act as one of the jury. The approval or determination as to his indifference and competency, when the question arises, is to be passed upon by the court. While it is doubtless true that a court cannot capriciously set aside as incompetent jurors who are clearly competent, and thus limit the selection of the jury to the jurors who may be left (*Hildreth v. City of Troy*, 101 N. Y. 234, 4 N. E. 559), yet, where it is obvious from the proof given upon the question that the juror whose name is called is not competent or indifferent between the parties, we think, even in the absence of a formal challenge, the court may reject or excuse him. The juror Bhair was examined as to his qualifications to serve upon the jury in this case. His own testimony disclosed that he was not indifferent between the parties. While the record shows no formal challenge either by the prosecution or by the defense, it is manifest that both parties understood that the examination made was for the purpose of determining if he was competent and qualified to act. We think, under such circumstances, the court was justified in excusing him, although no specific challenge was interposed by either party. No objection to the ruling was taken upon the ground that no challenge had been interposed. If the objection had been made on that ground, there can be no doubt that the prosecution would have interposed a formal challenge. The juror was excused for reasons which were sufficient. To hold now that this general exception to the decision of the court entitles the defendant to a reversal of the judgment would be to give effect to a pure technicality, as it is not pretended that the rejection of this juror in any way affected the substantial rights of the defendant. The determination of the court as to his competency was, in no sense, incorrect, but a reversal is sought upon the mere technical ground that no formal challenge was interposed by the prosecution. To sustain the defendant's contention would be in direct contravention of the provisions of the Code of Criminal Procedure which declare that, after hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. Section 542. Therefore we are of the opinion that the judgment in this case should not be disturbed upon that ground.

Frederick Gluckter was also summoned, and upon an examination as to his competency as a juror he testified that, if the defendant killed his wife in a fit of jealousy, he would be lenient towards him for a lighter sentence; that, if she actually went with other men, it would induce him to accept a lighter sentence, no matter what the other proof might be; and that, under such circumstances, he could not conscientiously

take an oath to serve as a juror, and be governed entirely by the law and evidence. He also testified that, if no such fact was proved in the case, he could then do his full duty as a juror, follow all the instructions of the court, and decide the case fairly and impartially upon the evidence; but that, if such fact was proved, he did not think he could. The prosecution then challenged him for cause. The court inquired of the district attorney if, from his examination of the case, he anticipated the introduction of evidence tending to show that the man suspected his wife's infidelity, to which he replied that he did, and the court then remarked that the juror ought not to sit, as jealousy did not constitute any defense in such case. To this the juror said: "Some man may think his honor very much affected. I guess every man thinks so." The court replied, "I have already said to you that it does not constitute any defense in law;" and the juror said, "I have just explained here what my opinion is." The court then said: "Your opinion is not justified by any law of the land, or by any moral law. You are excused." To the exclusion of this juror the defendant took a general exception. We think this ruling was entirely justified, and that it constituted no error. It is manifest from the juror's own statement that, if the case assumed a condition that was liable to arise on the trial, he would not be controlled by the law and evidence. That a person entertaining such views should not be permitted to serve as a juror in a case where such a question might be involved is too plain to require discussion. Moreover, it is claimed and undisputed that when the impaneling of the jury was completed, the defendant still had a number of peremptory challenges, so that he might have challenged any juror upon the panel with whom he was not satisfied. No juror was permitted to sit to whom the defendant made any substantial objection. Under these circumstances we are unable to find anything in the rulings of the court upon this subject which affected the substantial rights of the defendant, or which would justify a reversal.

On the trial, Martha Parnell was called as a witness for the people, and was permitted, under objection, to testify that several months before the homicide the defendant and decedent quarreled; that in the presence of the witness the defendant took hold of a revolver that lay upon the table, and, referring to his wife, said, "He had her medicine if she did not do as he said," and that the revolver he then had was the one employed when the tragedy occurred. We think there is no doubt as to the competency of that evidence. It showed the relation existing between the parties, and tended to show motive as well as deliberation and premeditation. The evidence of former threats is always admissible. As was said by Judge Ingraham in *Jefferds v. People*, 5 Parker, Cr.

R. 522: "It is no objection to such evidence that a period of years had expired since the threats were made. On the contrary, long-continued animosity and ill will are better evidence of a state of mind which will ripen into deliberate murder than the hasty ebullition of passion. The theory of the law of murder is that it is made on premeditation, and the motives for such an act are not less powerful because they are the result of ill feelings entertained for years." We are clearly of the opinion that this evidence was admissible, and that the court committed no error in receiving it.

At the close of the people's case the defendant's counsel requested the court to withdraw from the consideration of the jury the question of murder in the first degree, for the reason that there was no proof of a deliberate and premeditated design to effect the death of the person killed. This request was refused, and the defendant's counsel excepted. We think the proof was sufficient to make the question of premeditation and deliberation a question of fact, and to require its submission to the jury. The premeditation and deliberation necessary to constitute the crime of murder in the first degree has frequently been under consideration by this court, and the rule, as established by its decisions, is stated by Judge Earl in *People v. Majone*, 91 N. Y. 211, as follows: "Under the statute, there must be, not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." The rule there stated has been recognized and affirmed in many other cases in this court, of which the following are a few: *Leighton v. People*, 88 N. Y. 117; *People v. Beckwith*, 103 N. Y. 361, 368, 8 N. E. 662; *People v. Conroy*, 97 N. Y. 62, 76; *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371; *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920; *People v. Constantino*, 153 N. Y. 24, 37, 47 N. E. 37. Applying this well-established rule to the facts and circumstances of this case, it is obvious that the evidence was sufficient to justify the jury in finding that the killing of the decedent was with premeditation and deliberation on the part of the defendant, and the court properly declined to withdraw that question from the consideration of the jury. These considerations also apply to the motion of the defendant to direct the jury to acquit, and to the exception to the court's refusal to grant a new trial after verdict.

The defendant also contends that there

was no sufficient evidence of motive upon the part of the defendant. We think otherwise. The evidence of the defendant's threats, of frequent quarrels between the parties, the admission of the defendant that he killed his wife, and the other facts and circumstances disclosed, render it manifest that the proof of motive was quite sufficient.

The only remaining ground upon which the defendant claims that he is entitled to a new trial is that manifest injustice has been done. Section 528 of the Code of Criminal Procedure provides: "When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." Laws 1895, c. 119. This section has been several times under consideration by this court, and it has been quite uniformly held that the power conferred by it in the review of capital cases is not called into exercise by the appearance of some error which no exception pointed out, unless the substantial rights of the accused can be seen to have been affected by it, and therefore justice demands a new trial; and that, in determining whether a new trial shall be granted under it, it is not the province of this court to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such a case, and that with its decision the court may not interfere unless it reaches the conclusion that justice has not been done. *People v. Cignarale*, 110 N. Y. 23, 26, 17 N. E. 135; *People v. Trezza*, 125 N. Y. 740, 26 N. E. 933; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *People v. Youngs*, 151 N. Y. 210, 222, 45 N. E. 460; *People v. Constantino*, 153 N. Y. 24, 35, 47 N. E. 37. Applying these rules to the facts in this case, it becomes obvious that a new trial should not be granted on that ground. The evidence can hardly be said to be even conflicting, but is of a character which justified, if it did not require, the verdict rendered. Therefore, after carefully examining all the evidence contained in the record, and the various exceptions to which our attention has been called, we have reached the conclusion that no sufficient grounds exist to justify a reversal of the conviction in this case. The judgment of conviction should be affirmed. All concur. Judgment affirmed.

(157 N. Y. 251)

PERRY v. ROGERS.

(Court of Appeals of New York. Nov. 22, 1898.)

INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT.

Plaintiff was cleaning off a ledge after a blast, so as to make it safe for the steam drill-

ers to resume their work. While prying out some loose fragments, an overhanging rock fell, injuring him. The master had furnished competent employes, a skillful foreman, and the necessary appliances. *Held*, that the negligence of the foreman in omitting to direct plaintiff to pry the overhanging rock first was the negligence of a fellow servant, inasmuch as it formed one of the incidental details of the work, which the master had a right to intrust to the foreman.

O'Brien, Bartlett, and Vann, JJ., dissenting.

Appeal from supreme court, general term, Second department.

Action by John Perry against John C. Rogers for personal injuries. From a judgment in favor of plaintiff, affirmed by the general term (38 N. Y. Supp. 208), defendant appeals. Reversed.

Thomas S. Moore, for appellant. F. W. Catlin, for respondent.

PARKER, C. J. We think this judgment must be reversed, because it does not appear that the injury sustained by the plaintiff was due in any degree whatever to the omission of the defendant to perform any duty which, as master, he owed to his servant, this plaintiff. The learned trial judge submitted the case to the jury upon the theory that there was some evidence tending to show that the defendant omitted to perform the duty the law charges upon all masters of furnishing a reasonably safe place in which the servant may work. But an examination of the evidence will show that it furnishes no support whatever to this view. Let us examine it. In July, 1894, the defendant, in pursuance of a contract with the city of New York, was engaged in cutting down a ledge of rock on the bank of the Harlem river, work necessary to be done in order to construct the speedway. At the time the defendant commenced the work this ledge of rock rose about 100 feet above the surface of the water, and the face of the rock was nearly at right angles with the river. The means employed in removing this rock were drilling and blasting. The work was commenced by drilling with steam drills a large number of holes 20 feet deep on the top of the bank, and about 8 or 10 feet from the edge. In these holes an explosive was placed, and the explosion resulted in shattering the rock, and throwing out most of the fragments for a space of about 30 feet in length, 20 feet in depth, and from 8 to 10 feet in width. The place thus cleared out was called a bench. Upon the seat of the bench, after an explosion, was left, necessarily, a large amount of stone, both fine and coarse, and about its sides and back would sometimes be left fragments of stone that had been partially, but not wholly, torn from their resting places by the force of the explosion. In order to provide a reasonably safe and convenient place for the steam drillers to prosecute their work requisite to the blasting out of a bench still lower down, it

became necessary to clean from off the bench created by the last blast the stone and dirt that had settled there after the explosion, and men were required to climb up on the bench, and so clean it off. Down at the bottom of the cliff there were some men, called "hand drillers," who were at work making openings for explosives at about the height above the river required for the foundation of the speedway. That was the principal work of this defendant, but he was also required, when called upon by the foreman, to do the work of a "mucker," a name given to those who shoveled off the stone and dirt that accumulated on the benches after explosions. On the 19th day of July, 1894, the plaintiff was directed by one Bundy, who was the foreman in charge of the men, to go up on the bench, which was then about 40 feet above the roadway, in company with Washington and Davis, for the purpose of cleaning it off. While the plaintiff was thus engaged, a large stone fell out of the wall, at a place six or seven feet above the seat of the bench, struck plaintiff's leg, and crushed it so badly that it had to be amputated between the knee and the ankle.

While there was evidence tending to show that the plaintiff was actually prying out smaller stones that constituted the foundation of the stone that fell upon him, and thus it was caused to fall by his own act, there was also evidence pointing in the other direction, and, therefore, we must assume that it fell without being touched by the plaintiff, and that the cause of the accident was a blast that took place some two or three days previously. At that time the master was not present. A man named Ryan was the superintendent of the whole work, and Wilbert Bundy was the foreman in charge at this point. Now, let us see what are the master's duties. He must provide a reasonably safe place in which the servant may prosecute his labors; not a "safe place," as the learned court said in charging the jury. The law is reasonable, and does not require impossibilities, and work along any part of the face of this precipice of 100 feet in height could not, in the very nature of things, be in a safe place. In addition to the dangers of the situation, there were those incident to the use of high explosives, which were required to throw out such large quantities of rock. The master could not provide a place other than the precipice itself in which to prosecute this work. The next step was to furnish proper appliances, and it is conceded that he did so. His third duty was to employ competent and skillful men to work with this plaintiff in the discharge of the hazardous employment in which all were engaged, and the competency of the other servants of the defendant is not at all questioned. The rules referred to are those that point out the duties a master owes to a servant such as this plaintiff was, and we readily see it has not been made to appear that the defendant failed to perform any

duty. But the learned trial court was of the opinion that the duty of the defendant to provide a reasonably safe place for his workmen was continuous, so that in every change in the surface of this great ledge of rock, whether occasioned by blasting out a bench or shoveling off the crushed and broken stones, the master's duty of providing a reasonably safe place for his workmen at once attached. But, although the particular act of omission or commission causing the injury may be that of a fellow servant, for whose negligent acts the master is not responsible in law, as the master's duty cannot be delegated, the respondent contends that the rule is, in effect, overborne in such a case as this. But it has not been understood to be the rule in this state that in the performance of work of this character the master, after making the place, in the first instance, reasonably safe for the prosecution of the work, has any duty to perform other than in the furnishing of safe appliances, and the employment of competent and skillful employes. Under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts, before this, have been made to deprive a defendant of the benefit of another equally well settled and just rule of the law of negligence,—that a party shall not be held responsible to a servant for an injury occasioned by the neglect of a competent co-employe. Such an attempt was made in the case of *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, but it was there held that the obligation of the master to provide a reasonably safe place and structure for his servants to work upon does not oblige him to keep the building they are engaged in erecting in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants. The facts of that case were briefly these: Carpenters in charge of a foreman, and bricklayers, all employed by the owner, through his superintendent, were engaged in the erection of a building with a cornice supported by sticks of timber passing through the wall (which was 13 inches thick) projecting 16 inches, to be bricked up at the sides. When the wall had been bricked on a level with, but not yet over, the timbers, the foreman of the carpenters directed two of them to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In so arranging the joist, a carpenter stepped on the projecting part of one of the timbers, which tipped over, whereby he fell and was hurt. A recovery was not allowed. In *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371, the plaintiff, an employe of the state, was engaged, with others, under the direction of W., the captain of the state boat, in taking clay from the bank, and loading it on the boat. W. so loosened the bank of overhanging earth that it fell upon the plaintiff while he was digging under it, and injured him. It

was held that the cause of the injury was the negligence of the captain, who was a co-servant, and therefore the state was not liable. In *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, the plaintiff's intestate, who was in the service of the defendant, although actually employed by the superintendent, was engaged in the making of repairs in the hold of a vessel. It became necessary to uncover a hatchway in the main deck, and the superintendent directed the foreman to have it done. As the hatches were heavy, two men were sent up to do the work, and a third approached with the intention of assisting, but the superintendent, without waiting for him, directed one of the employes to remove the hatchway. He lifted one end, and pulled the other from its resting place, when it was wrested from his hands, striking the plaintiff. The holding was that the master had not omitted the performance of any duty; that he had provided a skillful and competent man to superintend the work; a sufficient force, with all necessary means and appliances to perform it; and a safe place, free from inherent dangers, in which to carry it on; and that he was not chargeable with the consequences if the place for work was made dangerous only by the carelessness and neglect of a fellow servant, or for the negligent manner in which the servants used the tools and materials furnished them for their work. This case is clearly within the decision of this court in the case of *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. In that case the place of employment was a quarry under ground, from which rock was being taken to be used in the manufacture of cement. This rock was excavated by means of blasting, in the performance of which work holes were drilled in the rock, and subsequently explosives inserted. After a blast, it was found by the foreman in charge that one of the charges had not exploded. A further examination showed that the fuse was unconsumed, but he omitted to remove it, and put the plaintiff's intestate at work drilling, about 30 feet distant. Shortly afterwards the fuse caught fire, and the charge exploded, causing C.'s death. There the question was presented and decided whether the master was chargeable with neglect of duty, in that the quarry was not a safe place to work in at the moment of the explosion. It was held that the defendant discharged his duty when he furnished a quarry which was at that time as safe a place to work in as quarries generally are, and certainly free from the dangerous substance which subsequently caused the accident; and this court also held that, having performed this duty, and selected a competent and skillful foreman and co-employes, the master's duty had been performed, and he was not liable for the manner in which the persons so employed should themselves perform their work. The court pointed out that the manner of performance of each of the various details of the work, by

which, as a whole, it is conducted, rests necessarily upon the intelligence of the servants intrusted with it. Said the court: "It can't be that every time a blast was exploded, and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in fulfilling a duty to furnish a safe place to work in."

So, in this case, the master furnished everything that he was obliged to, including competent employes and a skillful foreman, and, if there was any negligence on the part of any one other than the plaintiff, it was that of the foreman in omitting to give the plaintiff notice to pry off the piece of rock that fell and hit him, instead of going to work directly under it. But in this omission he was not acting in place of the master. It was an ordinary detail of the work in which the plaintiff, the foreman, and the others were engaged. They were to clean off this bench, and make it a safe and convenient place for the steam drillers to work, and it necessarily included the removal from the sidewalls of loosened fragments of rock that threatened to fall. But this the plaintiff apparently did not think of doing, nor did it occur to the foreman that there was danger, or, if it did, he omitted to speak about it. In that omission he may have been negligent, but it was the negligence of a fellow servant, although in the performance of the work he was the plaintiff's foreman; for it was not the master's duty to tell the plaintiff to take down threatening fragments of stone, made dangerous by the plaintiff or his co-employes, before working under them, or to take them down for him. It formed one of the many details of the work incident to the removal of this rocky cliff, which the defendant had a right to intrust to a skillful foreman and competent workmen, after providing them with the necessary and proper machinery, appliances, and tools. The cases to which we have referred have been lately approved in *McCampbell v. Steamship Co.*, 144 N. Y. 552, 39 N. E. 637, and *Kimmer v. Weber*, 151 N. Y. 417-422, 45 N. E. 860. The judgment should be reversed, and a new trial granted; costs to abide event. All concur, except O'BRIEN, BARTLETT, and VANN, JJ., dissenting. Judgment reversed, etc.

(157 N. Y. 332)

PEOPLE v. COREY.

(Court of Appeals of New York. Nov. 22, 1898.)

MURDER—EVIDENCE—SUFFICIENCY—APPEAL—PREJUDICIAL ERROR—NEW TRIAL—MISRECITAL OF TESTIMONY—DYING DECLARATIONS—ADMISSIBILITY—INSTRUCTIONS.

1. Defendant and deceased quarreled while they were drunk. A pocketknife was on a shelf before the quarrel. After deceased was near the shelf, he knocked defendant against a

door about four feet from the shelf, and defendant was then seen to make motions at deceased as though he were stabbing him. Eight wounds such as could have been made by a pocketknife were found on his body. Before and after the quarrel, defendant declared that he intended to kill deceased. Held sufficient to sustain a conviction of murder in the first degree.

2. Where the presiding judge states his own recollection as to material facts in evidence, and is mistaken, and such statements are calculated to help the people and hurt the defendant, it is ground for reversal of a conviction.

3. A judge has no right to state to the jury his recollection of what a witness swore to on a former trial in a criminal case.

4. Code Cr. Proc. § 8, par. 3, providing that an accused is entitled "to be confronted with the witnesses against him in the presence of the court" does not render dying declarations inadmissible.

5. A charge, in relation to dying declarations, that "it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth," is erroneous, though the court also charged that such declarations are not to be given such weight as if deceased had testified while subject to cross-examination.

6. Where no instruction had been given to consider evidence that a prosecuting witness had stated that he was going to swear defendant "to hell," as affecting his credibility, it was error to reply to a request for such an instruction that the jury's attention had been called to all facts which they should consider concerning such witness' statements, though a general instruction as to credibility had been given.

7. Under Code Cr. Proc. § 528, authorizing the court of appeals to award a new trial, where justice requires it, whether any exception was taken or not, when the judgment is of death, the court will award a new trial in such a case where errors not excepted to are so grave and numerous as to satisfy the court that defendant has not had a fair trial.

Haight and Gray, JJ., dissenting.

Appeal from supreme court, trial term.

Michael Corey, alias Michael Kelley, was convicted of murder in the first degree; and he appeals from the judgment, and from an order denying his motion for a new trial. Reversed.

Upon a former appeal the judgment was reversed for various errors, none of which were repeated upon the second trial, which was before the same justice. 148 N. Y. 476, 42 N. E. 1066. The facts, so far as material, appear in the opinion.

Albert O. Briggs and John E. Smith, for appellant. M. H. Kiley, Dist. Atty., for the People.

VANN, J. The defendant was indicted for the murder of James George, an Indian, on the 27th of September, 1894, at the house of Orson Webb, in the town of Eaton, Madison county. This house was a shanty, 12 or 13 feet by 16, rudely built of boards nailed to four posts set in the ground, and covered with the same material. It had no cellar or foundation, and the rough plank floor had numerous apertures. There was but a single room, with no partitions, but one door, which was on the south side, and near the south-

west corner, and but one window, which was on the west side. The structure was situated in the woods, remote from a highway, and was reached by a path leading through a pasture. At the time of the affray an old stove stood opposite the door, and in the northwest corner was a cupboard made of rough boards. On the south side of the room, and about four feet east of the door, was a shelf, near which was a butcherknife belonging to James George, thrust in a crack; and on the shelf was a common pocketknife, with two blades, which belonged to one of Webb's children. A table, some chairs, and two or three old beds resting on the floor, without bedsteads, completed the furniture. The beds consisted of straw ticks covered with soiled and ragged bedclothing, and the room and all things in it, including the people, were described by a physician as extremely filthy. In this room Orson Webb, Sarah, his wife, his two daughters, Susan and Libbie, aged respectively 16 and 18, and four younger children, besides James George and the defendant (ten human beings in all), lived and slept. These persons, with Cora Bennett, a niece of Mrs. Webb, were present when the crime in question is alleged to have been committed.

The defendant was attached to Susan Webb, and had some feeling towards George on account of his attentions to her. Each had recently made threats against the other on her account, although they had slept together, and had worked together in peace that fall. The threats made by George, although less frequent, were not less significant than those made by the defendant; for, but three or four days before the tragedy, he said that, if the defendant did not keep away from his girl (Susie Webb), he would cut his heart out with the knife that he held in his hand at the time. About three hours before the affray the defendant accepted the invitation of George to eat supper with him, and the two men ate and talked together as friends. During the afternoon Webb and the defendant had been engaged in erecting a woodshed in the form of a lean-to, and banking up the shanty for winter. They had a jug of beer, which was consumed by them, with the help of Cora Bennett and Susan and Libbie Webb. After supper, Susan suggested that they have something more to drink, and gave her father a dollar to go and get it. He went nearly two miles and back, and returned about 8 o'clock in the evening with another jug of beer, containing a gallon, and two pints of whisky. During his absence, Susan obtained from the pocket of George's coat, upon his suggestion, a pint of alcohol, which, after being diluted with water, was drunk by George, the defendant, and the girls. Half of the beer and whisky procured by Webb was drunk by the same persons, aided by Mrs. Webb. While every person in the room except Webb and the younger children was more or less intoxicated, the defendant and George drank the most, and the latter was

the most affected. The party alternated in drinking beer and whisky, dancing during the interval to the music of Webb's violin; the two men being in their shirt sleeves. When Webb returned with the beer and whisky, Libbie was already asleep on one of the beds on the floor, and, as no explanation of the fact was given, it is not difficult to infer why she was overcome by sleep at that early hour. No partners were taken nor sets formed for the dance, which was described as a jig or skirt dance, and was performed by "jumping about and dancing around." After thus drinking and dancing for an hour or more, the orgies culminated in the transaction which is the subject of this appeal. Shortly after 9 o'clock Cora Bennett and Susan were sitting or lying on a bed on the south side of the room, and George was sitting beside them. The defendant was sitting in a chair on the west side of the room, south of the window, and Webb and his wife sat north of him. A lamp on the table furnished the only light. Webb testified that the defendant said to George, "Why can't you get up and sit in a chair, and not be sitting there on the floor?" and that George replied, "I am doing no hurt here," but finally got up and began to dance with the little girl, Mary. After dancing a short time he crossed over to the west side of the room, where the defendant was sitting, had some words with him, went to the shelf, and stood there with Susan, when the defendant, who was still seated, asked him, "What are you doing there, talking to that girl?" George replied, "Ain't I a right to talk to this little girl?" whereupon the defendant said, "No," jumped towards George, and struck at him; but George pushed him off, and the defendant "dodged down to get under his arm," which was raised, and struck him six or seven times in the side.

Mrs. Webb swore that during the evening the defendant told her that he did not like the Indian, and that he would have trouble with him; that later, after the two men had had some words, the defendant jumped up and struck at George, who "guarded his blow off and knocked him back up against the door, and he came back again; and I did not see what he had in his hand, but he made a motion seven or eight times at his side." Susan Webb stated that, when the defendant spoke to George about sitting on the bed with the girls, George started to get up, but, apprehending trouble, she took hold of his arm, told him to sit down and not have any fuss, whereupon he became quiet. Shortly after that, George went over to the other side of the room, and then came back to the shelf, while the defendant remained on the west side. The two men had some words, when the defendant arose from his chair and jumped towards George, who knocked him back against the door, whereupon she saw the defendant make motions towards George as if stabbing him. No other eyewitness of the affray was sworn, and the

failure to call Cora Bennett was not accounted for, except by the suggestion of the defendant's counsel, that she was confined in a penal institution. The butcherknife was not disturbed, and no one saw either of the men take the other knife from the shelf; but it was seen there just before George passed from the west side of the room to the shelf, and was not seen afterwards. The defendant was not seen by the shelf, after the knife was last seen upon it, until he jumped towards George and was knocked against the door. The evidence tended to show that the defendant's shirt and trousers were badly torn on the occasion. The next morning one of his eyes was somewhat swollen, and there was a cut over it from a quarter to a half an inch in length. No one saw the knife in the defendant's hands at any time, but after he had made repeated motions towards George, as if stabbing him, George sank to the floor; and the defendant kicked at him, and went out of doors. Webb, upon discovering that George had been stabbed, followed the defendant out and asked, "What did you do with the knife that you cut Jim with?" and the defendant replied, "I threw it back into the bushes. I only stabbed him with the little blade. It is only a flesh wound. He will get over it." He also said, according to Webb's statement, "When I fight with a man I calculate to whip that man, if I have to kill him." Webb returned to the house, and, upon examining George, found eight wounds, apparently made with the blade of a knife, upon the left side of his body. Six days later George died. The defendant, upon leaving the house, went to an adjoining farm, where he had worked, and stayed all night. The next day, when asked by an acquaintance where he got that cut over the eye, he replied that he got into a fight at Webb's the night before, and stabbed an Indian three or four times. He was then told that he had got himself into a scrape, whereupon he left for the city of New York, where he formerly resided. While there he wrote a letter to Susan Webb, in which he said: "Susie, I can't tell you how sorry I am for getting in that trouble and having to leave you; but you are as much to blame as I am, for, if you had not carried on the way you did that night, I would not have got a-fighting with that God-damned Indian; but never mind; it may be all for the best, Susie. After I had the trouble that night, I went down to Ira Spaulding's, and stayed there until morning and was going to go to work for him that day, but I was afraid Jim would get a warrant out for me; so I made up my mind the best thing I could do was to come to New York until it would blow over." * * * Remember, Susie, I love you with all my heart, and shall never forget the way you treated me; let it be good or bad, I cannot help but love you. Remember, also, that I told you that I would kill any one that ever tried to come between us,

and so, Susie, so help me God, I will; and that is why I cut Jim with that knife. I meant to kill him, and will, if he ever comes monkeying around again while I am there." Not long after, on being arrested, he asked if George was dead yet, and was told, "No," when he replied, "Well, if he ain't, he ought to be."

Eight incised wounds, such as could have been made by the large or the small blade of an ordinary pocketknife, were found on the body of George, only one of which was fatal, and that not necessarily so. The wound of deepest penetration was less than two inches in depth, so that either the small blade or slight force must have been used in making the wounds. Death resulted from blood poisoning caused by the formation of pus in the pleural cavity, which was not withdrawn, owing to the unsanitary condition of things in the Webb house, and the danger of operating without antiseptic precautions. George was a strong, healthy, well-developed man, somewhat given to quarrelling, especially when under the influence of liquor. Six witnesses, acquainted with his reputation, swore that it was that of a quarrelsome, fighting man. Four records of the court of special sessions were read in evidence, showing that he had been convicted for drinking and fighting. The defendant had a horrid disease, was not as strong as George, and was usually quiet and peaceable. On three occasions he had received somewhat severe injuries on the top of the head, one resulting in a fracture of the skull, which left scars and a depression, with tenderness under pressure. Several medical experts, answering a hypothetical question, testified that in their opinion he was insane at the time of the affray, but the weight of medical testimony was the other way. Several witnesses, including two justices of the peace, testified that the character of Orson Webb for truth and veracity was bad, and that they would not believe him under oath; but he was sustained by an equal number of witnesses, who apparently knew his reputation equally well. He was once convicted and suffered imprisonment for assault and battery, and was once convicted, upon his own confession, for petit larceny, but was not punished.

The character of the inmates of the Webb house, who were the only witnesses to give the history of the transaction, the condition of some of those witnesses when they saw the affray, the disposition of George to quarrel and fight when under the influence of liquor, the intoxication of both participants when the affray began, the fact that violence was used by each towards the other, the absence of any weapon when the trouble began, the nature of the weapon used, and the confusion in the minds of the eyewitnesses as to what actually took place, are important facts to be borne in mind in reviewing this case. The evidence warranted the jury in convicting the defendant of murder in the first degree,

as there was some time for deliberation; still, the facts already mentioned leave that essential feature without the support that it might have had, if the witnesses and participants had been persons of a different character and in a different condition. While the defendant was the aggressor when he sprang towards George and struck at him, there is no evidence that he then struck with a weapon, or with anything except his fist. The blow was promptly returned by George, who knocked the defendant against the door, and from that instant until the end of the affray the time was very short. While it was long enough for sufficient deliberation to stamp the crime as murder in the first degree, it does not follow that because there was time enough to deliberate there was in fact deliberation. The two drunken men exchanged blows, the defendant striking first, but the blow of the other man being the most effective. Up to this time there was no opportunity for the defendant to get hold of the knife, yet almost instantly he was plunging it into the side of his victim. Whether he snatched it from the shelf or from the hand of George, who had had an opportunity to get it, cannot with certainty be told. Whether it was open or shut when his hand first clasped it is not known. Whether the fatal wound was the first or the last inflicted is not disclosed. The solution of these questions would reflect much light upon the fundamental question of deliberation, yet they cannot be solved from the evidence before us. If it appears that a man charged with murder in the first degree armed himself with a deadly weapon before making the fatal assault, it points strongly towards "a deliberate and premeditated design to effect the death of the person killed"; but it is quite different if he first makes an assault with his fist, and during the struggle that follows seizes a weapon ready to his hand, and at once inflicts a mortal wound with it, for both the shortness of the time and the excitement of the occasion make it much less probable that he acted with deliberation, as it is known in the criminal law. Still, previous threats and subsequent declarations as to his intention have an important bearing upon what was passing through his mind just before he inflicted the fatal injury. As there was a conflict in the evidence, and opposing inferences might be drawn from the facts, we do not feel warranted in setting aside the verdict of the jury for error of fact; and we proceed to consider the alleged errors of law.

Mrs. Webb, during her cross-examination, testified that she thought the shirt worn by the defendant was badly torn on the occasion in question; that she had recently washed it, and it was not then torn; that she saw him wearing it during the evening, and did not see that it was torn, but after the affray she observed that both sleeves were torn, and that the shirt was torn in other places,

including the side and under the arms. She was then asked by the defendant's counsel: "You know it was torn right there in that quarrel,—in that fight? A. I think most of it was torn in that way. Q. Did you see this man George after he had struck Corey? Did you see where he grabbed him,—whether by the sleeves or by the bosom? (Objected to. Objection sustained.)" But the witness answered: "I didn't notice. Q. Did you observe? A. No, sir. (Objected to as incompetent and immaterial. Objection sustained.) Q. Did you observe whether he grabbed him or not? A. No, sir; I didn't. Q. You didn't observe? A. No, sir. * * * Q. You didn't observe just whether Mr. Corey grappled onto a hold of this man,—you didn't observe, did you? A. No, sir. * * * Q. You say you didn't observe whether he grabbed him or not? (Objected to.) A. No, sir; I didn't." The court then remarked to counsel, "If you are simply talking loud to drown it, she certainly said that he didn't grab him at all," and, turning to the witness, asked, "How do you understand it?" and she answered, "He asked if I knew whether he grabbed or not." The court then, turning to the jury, asked, "Did you hear her say that he didn't grab him at all? Did you hear that, any of you?" and a juror answered, "I heard that." Upon being further cross-examined, the witness testified that she saw George strike the defendant and knock him back against the door, or against the west side of the house, and subsequently she was asked: "Now, did somebody suggest to you that you keep back this idea that George struck Corey, and that before the former trial,—that you not tell of that? A. No; I think I told it here, didn't I? Q. Didn't some one tell you that you could keep that back? That is the fact about it, isn't it, Mrs. Webb? A. I believe there was a person said I wasn't obliged to swear to that, unless I had a mind to, if it wasn't called for. Q. That was before you were sworn the other time, was it? A. When I was down to the house. Q. Did you keep it back on the former trial? A. I don't know whether I swore to it at that time or not. I am swearing to it now. Q. Don't you know that you kept it back the other time, and didn't tell it? Don't you know you did? A. Yes. Q. You did it on that advice? A. He said, if it wasn't called for, I shouldn't mention it. The Court: What was it,—about his throwing up and pushing the Indian back against the door? Q. Pushing him and striking him? A. Striking him. Q. You kept it back the other time? A. I believe I did. I don't know whether I did or not." Thereupon the court addressing one of the counsel for the defendant, said: "Do you say, Mr. Briggs, that she kept it back entirely? I understand that the minutes show, and my recollection would be, that she did swear that George struck him." Shortly afterwards the court again interposed and said: "The court has taken

the position that she did swear to it upon the other trial. I think she is mistaken about it. I think she is mistaken about her swearing to it. I am not going to spend any time to hunt up that testimony. It is my recollection of it, and it is about enough of it for just this time." Except as stated, it did not appear, either by the minutes or in any other way, that the witness so testified upon the first trial. Thus, upon two occasions the learned justice presiding inadvertently stated his own recollection as to a material fact, and was mistaken both times. On the first occasion the judge stated that the witness had sworn one way, when she had in fact sworn another. Whether George grabbed the defendant after knocking him against the door just before the stabbing took place was important upon the question of deliberation, as it tended to show a struggle and a fight. There is a marked difference between stating that George did not grab the defendant at all, and that the witness did not see whether he grabbed him or not; for the former, if the witness was to be believed, took the element of a fight out of the case, to a great extent. The witness had repeatedly testified that she did not notice whether George grabbed the defendant or not, and she did not at any time testify that George did not grab him at all, yet the justice, with all the weight of his high character and impartial position, declared that her testimony was that "he didn't grab him at all." Upon appealing to the jury for confirmation, one of them stated, in substance, that he heard the witness testify that George did not grab the defendant at all. According to the record before us, both court and juror were mistaken, and it is not probable that any one of the other 11 jurors, under the circumstances, would think that the evidence of the witness was other than as the court and the twelfth juror had stated it. It was an unintentional but actual perversion of the witness' testimony, under circumstances calculated to help the people and hurt the defendant. The torn shirt indicated that George had seized the defendant, but the witness was, in effect, made to say that this did not take place. On the second occasion, when an erroneous statement from the bench went before the jury as evidence, the witness had virtually admitted that she was guilty of suppressing evidence on the former trial. This reflected on her candor, if she was correct, but not if the court was correct. His statement tended to relieve an important witness of a serious imputation affecting her credibility. It was not proper for the court to tell the jury what the witness had sworn to upon the previous trial, when there was no evidence that she had so sworn. Such a statement to the jury should be made only by a sworn witness. The trial judge had no right to state his recollection of what the witness had sworn to upon the former trial, for it was not legal

evidence of the fact. The statement of the court not only took the place of the testimony of the witness, but it was directly the reverse of what the witness had in fact testified to. It went to the jury without the sanction of an oath, yet came through such a channel as to have more effect than the statement of almost any witness under oath. It was to a certain extent a certificate of good character to a leading witness, who had shown that she did not deserve it. A newspaper paragraph would have been equally competent and less dangerous. We have recently held that, even on the trial of a civil action, a statement by the trial judge, made to the jury, of his personal recollection of what occurred at a previous trial in respect to a material fact, was reversible error, and that it was not cured by instructing the jury to dismiss the statement from their minds. *Brooks v. Railway Co.*, 156 N. Y. 244, 252, 50 N. E. 947. We repeat with greater emphasis in this action, because it involves life and death, the following language used by Judge O'Brien in that case, which involved only a right of property, viz.: "It will not detract in any degree from the high character of the learned judge to say that he did not at the moment fully appreciate the importance of his remarks, or the probable influence which would be given to them by the jury. He was about to submit to them a disputed question of fact upon the evidence, and he virtually threw into the scale against the defendant all the weight of his impartial position and unbiased recollection upon that very question. There was no longer any chance for the defendant to succeed, at least upon that issue." We think that the statements inadvertently made in the hurry of this long trial by the learned justice below are presumed to have been injurious to the defendant. Whether they in fact changed the result or not, we cannot say judicially that they did not affect it. He had the right to have none but legal evidence received against him, yet illegal evidence was received, of a character so material and important that we cannot say to what extent it may have influenced the verdict. Under all the circumstances, and especially in view of the somewhat close question of fact on the subject of deliberation, we think these errors, although not excepted to, are too serious to be disregarded.

The ante mortem statement of the deceased, made four days before he died, was read in evidence on behalf of the people, in which he declared, in substance, that the defendant attacked him without provocation or excuse, and inflicted the wounds in question upon him. The defendant's counsel objected to this evidence as incompetent, improper, and hearsay; and they now urge that dying declarations, although competent at common law, are no longer competent, because the Code of Criminal Procedure, in prescribing the rights of a defendant in a criminal action, provides

that he is entitled "to be confronted with the witnesses against him in the presence of the court," except in certain cases not now material. Code Cr. Proc. § 8, par. 8. We do not think the legislature intended to abolish the rule governing the admission of dying declarations, and such certainly has not been the understanding of the profession or the courts. We are not aware that this question has ever been raised before in this state, and yet the Criminal Code has been in force for nearly 20 years, and the Revised Statutes, which contain a similar provision, for nearly 70 years. 1 Rev. St. p. 94, § 14. The right of the accused to be confronted with the witnesses against him has always been a part of the bill of rights, and yet dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any living witness against him. It is upon this ground that the objection to the introduction of such declarations in evidence against a defendant, based on his constitutional right to be confronted with the witnesses against him, has been uniformly overruled in those jurisdictions where such constitutional provisions are in force. It is invariably held that the deceased is not a witness, within the meaning of such a provision or of the bill of rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the declaration. *Mattox v. United States*, 156 U. S. 237, 240, 15 Sup. Ct. 337; *Brown v. Commonwealth*, 73 Pa. St. 321, 326; *Campbell v. State*, 11 Ga. 353; *People v. Glenn*, 10 Cal. 32; *State v. Dickinson*, 41 Wis. 299, 302; *Robbins v. State*, 8 Ohio St. 131; 1 Bish. Cr. Proc. § 1208; *Greenl. Ev.* § 156; 1 McClain, Cr. Law, § 425.

The court, in its charge to the jury upon the subject of dying declarations, said to them that "it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth." The court cautioned the jury not to give as much weight to such evidence as if the same statement had been testified to by the deceased when in health and subject to cross-examination. He also left it to them to decide whether the deceased was without hope of recovery when he made the declarations, and told them that such declarations were to be taken with great caution, as they might be misunderstood, or might have been made in response to suggestive questions. The instruction, however, above quoted, was left substantially unchanged. In *People v. Kraft*, 91 Hun, 474, 476, 36 N. Y. Supp. 1034, affirmed 148 N. Y. 631, 43 N. E. 80, it was said by the supreme court that "it is not the experience of mankind that the apprehension of immediate death, from which there is no hope of escape, is always sufficient to induce persons so situated to speak the truth. Criminals convicted on the most con-

vincing evidence often assert their innocence while standing face to face with their executioners." We held in that case that it was reversible error to charge the jury that a dying declaration should be "given all the sanction of evidence which the law can give to evidence." Dying declarations are received from necessity, in order to prevent a failure of justice, upon the theory that the belief of impending death is equivalent to an oath. The rule, as we understand it, goes no further. The fear of punishment by the law for perjury furnishes no safeguard that the declarant will speak the truth, and hence such evidence has no sanction except a belief in responsibility after death. All men, however, do not entertain that belief. Moreover, as was pointed out by Judge Gray in *People v. Kraft*, *supra*, the power of cross-examination, which is wholly wanting, is quite as essential in the process of eliciting the truth as the obligation of an oath. We recently reversed a judgment of death in a case in which the dying declaration of the deceased seemed utterly unreliable. *People v. Carbone*, 156 N. Y. 413, 415, 51 N. E. 23. Courts of high standing have held that an instruction that dying declarations are to receive as much credit as testimony given under oath in open court is erroneous. *State v. Van Sant*, 80 Mo. 67, 77; *State v. Mathes*, 90 Mo. 571, 573, 2 S. W. 800; *Lambeth v. State*, 23 Miss. 322, 359. It has happened that a dying declaration accusing the defendant made one day was contradicted by another dying declaration of the same person made on a subsequent day, stating that the defendant "did not do it." *Moore v. State*, 12 Ala. 764. So dying declarations have been shown to be positively untrue. *White v. State*, 30 Tex. App. 652, 18 S. W. 462. The elementary writers upon the subject dwell upon the infirmities of this kind of evidence, and all authorities agree that the credibility of the declaration is wholly for the jury. *Underh. Cr. Ev.* § 110; 8 *Rice, Ev.* 336; *Rosc. Cr. Ev.* 35. The learned trial judge virtually told the jury that if the deceased had no hope of recovery when he made the declaration, and was correctly reported, according to the experience of mankind he spoke the truth. It is true that he directed them to consider the evidence which tended to corroborate or contradict the statement made, and left it to them to say whether in fact the statement was true or not, and whether the general proposition laid down was correct or not in the case in hand. In other words, he allowed the jury to find that in this particular instance the deceased did not speak the truth, notwithstanding the circumstances surrounding him had always been found sufficient to influence other persons so situated to speak the truth. This was equivalent to saying that, if they should find this dying declaration untrue, it would be the first instance on record, yet they might so find if they saw fit. We think that the main proposition laid down by the court upon the subject, even when considered with

what preceded and followed it, was erroneous and tended to injure the defendant.

Evidence was given in behalf of the defendant tending to show that Orson Webb, during his attendance as a witness for the people, had stated that he was going to swear the defendant to hell; that a bystander said, "That is a pretty hard saying for the main witness in the case for the people;" and that Webb replied, "I am going to do it, any way." Webb, in a guarded manner, denied this. The court was asked to charge the jury that they had the right to take this declaration into account in passing upon the weight of Webb's evidence; but the court replied, "I have called their attention to every fact that they have a right to take into consideration, whatever he said on the subject connected with the trial." In fact, the court had not in any way called the attention of the jury to the subject of the threat made by Webb. He had, however, directed their attention to the evidence tending to impeach and sustain the character of Webb, and, among other things, had said to them: "Now, of course, it is true that, while it is not always safe, still it is true that there are men who will engage in the commission of petty crimes, and yet you may rely upon their testimony, when that testimony is disconnected with any crime of which they are guilty or with which they are charged; and you have the right to take into consideration all the evidence which was given by the witness Stimson, who swears that this man's credit is such that he is fairly entitled to consideration. You have a right to take into consideration that when he was arrested for taking cucumbers from some place, where it is claimed that he had had the man arrested for selling liquor to a minor, when he went before the magistrate he confessed his guilt, and that he was convicted. Now, is such a man as that liable to tell the truth? Do you believe what he says? Gentlemen, you have a right to take into consideration the evidence of the balance of the Webb family as to this transaction there at the house, and see whether they corroborate the testimony which he has given. If he is fully corroborated, you have the right to take that into consideration for the purpose of seeing whether he is worthy of belief. Gentlemen, you have the right, and it is your duty, to take into consideration the character and standing and intelligence and respectability of all the witnesses in the case, from the highest to the lowest." While the court thus submitted to the jury the credibility of Webb in a general way, he did not mention the threat, which was of great importance, because it indicated a strong bias against the defendant. In response to the request made, he did not decline to charge further upon the subject than he had already charged, but virtually stated that he had called the attention of the jury to every fact that they had a right to take into consideration as affecting Webb's credibility. This, we think, was error, because the jury clearly

had a right to take the threat into account, and should have been permitted to do so.

It is true that none of these errors was challenged by an exception, but, under the humane statute governing our powers in capital cases, an exception does not stand between life and death. We are authorized to order a new trial when we are satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, even if no exception was taken in the court below. Code Cr. Proc. § 528; *People v. Barberi*, 149 N. Y. 256, 278, 43 N. E. 635; *People v. Leonard*, 143 N. Y. 360, 367, 38 N. E. 372. While we are required to give judgment without regard to technical errors or defects which do not affect the substantial rights of the parties, we cannot say in this case that the errors were technical, or that the defects did not affect a substantial right of the defendant. Code Cr. Proc. § 542. The great power intrusted to us of reversing without an exception should be cautiously exercised, but it was given to be used, and it should be used, whenever we are satisfied from the record that justice requires a new trial. In the interest of the people, as well as the defendant, it should be exercised when the question of fact as to guilt, or the degree of guilt, is close, and there is a reasonable probability that the error affected the result. A multitude of rulings, made without much chance for reflection, during a protracted and closely-contested trial, is apt to result, and perhaps of necessity must result, in some errors of law but, when the percentage is so small that another trial would not be apt to reduce it, a new trial should not be ordered, unless upon the facts. When, however, the errors, even if not excepted to, are so grave and numerous as to satisfy the court that the defendant has not had a fair trial, under all the circumstances, the verdict should be set aside. Without further discussion, we close our review in the words of Judge MARTIN, used in rendering judgment on the former appeal in this action: "After carefully examining and considering the evidence, the rulings, and the charge contained in the record before us, we have become satisfied that justice requires us to grant the defendant a new trial in this action. In reaching this conclusion, we have not been wholly controlled by any one of the questions discussed, but upon a consideration of them all we have been led irresistibly to the conclusion that in the furtherance of justice a new trial should be granted." The judgment should be reversed and a new trial ordered.

HAIGHT, J. (dissenting). There is really no dispute about the main and controlling facts in this case. Whatever conflict exists pertains to minor details, which could not and ought not to change the result. Suppose George did catch hold of the defendant's shirt and tear it while receiving the stabs which caused his death, under the evidence, it could

have occurred at no other time. I fail to see how this fact, if such it be, tends to relieve the defendant, or to show an absence on his part of motive and deliberation. His declarations before the act and his written statements afterwards show quite conclusively what his motive and intentions were. If this case was involved in any doubt, I should heartily join with my associates in the exercise of a discretion to award a new trial. But, viewing the case as one in which the essential and controlling facts are without dispute, I think we should disregard the technical errors and defects pointed out and affirm the judgment.

VANN, J., reads for reversal of judgment and granting new trial; PARKER, C. J., and O'BRIEN, BARTLETT, and MARTIN, JJ., concur; HAIGHT, J., reads for affirmance of judgment, and GRAY, J., votes for affirmance.

Judgment reversed, and new trial granted.

(157 N. Y. 312)

TINKER v. NEW YORK, O. & W. RY. CO.

(Court of Appeals of New York. Nov. 22, 1898.)

APPEAL.—REVIEW.—FINDING OF JURY.—ACTION FOR OBSTRUCTION IN HIGHWAY.—DEFENSE —QUESTION FOR JURY.

1. The finding of a jury will not be disturbed by the court of appeals, where there is evidence to sustain it.

2. That defendant owns the fee in a highway in which he placed an obstruction frightening plaintiff's horses is no defense to plaintiff's action therefor.

3. Whether placing in an adjoining highway timbers removed from a railroad cattle guard undergoing repairs was reasonably necessary in the conduct of the repairs, and not an unreasonable interference with the rights of the public, was for the jury, in an action for injuries to plaintiff caused by his horses taking fright thereat.

O'Brien, J., dissenting.

Appeal from supreme court, general term, Fourth department.

Action by Mary A. Tinker against the New York, Ontario & Western Railway Company for personal injuries. From a judgment for plaintiff, affirmed by the general term (36 N. Y. Supp. 672), defendant appeals. Affirmed.

Howard D. Newton, for appellant. George W. Ray, for respondent.

PARKER, C. J. This judgment awards to the plaintiff \$5,000 for damages which she sustained by being thrown to the ground from her seat in a wagon. The jury have found that the accident was caused by the horses drawing the wagon becoming frightened at two heavy timbers, about 10 feet long and 12 inches square. These timbers were weatherbeaten, and nearly black "with oil and stuff on them." They were lying in a ditch from 1 to 2 feet in depth, at a distance of about 10

feet from the traveled part of the highway, and about 15 feet from the fence separating the highway from the defendant's land. The jury have found that the horses were road-worthy, and, as the record is not wholly without evidence to support the finding, it cannot be questioned here. While the sticks complained of were situated within the highway limits, although not in the beaten track, the defendant was the owner of such highway, subject only to the rights of the public in and to it for highway purposes; for the land on both sides of the highway at this point belonged to defendant. It insisted upon the trial: First, that it was not responsible for the placing of the sticks upon the highway; and, second, if it was, that the act was one clearly within its rights as owner of the fee of the highway.

As to the first question, it appears that on the 4th day of September, two days before the accident, certain employes of the defendant were engaged in taking out old cattle guards and putting in new ones on defendant's railroad at a point from 30 to 50 feet distant from the place where the sticks were placed. When the sticks were first taken out of the cattle guard, they were moved into the highway far enough to get them out of the way while a new cattle guard was being put in and completed. When the work was finished these sticks were taken across the highway, and then along it for a distance of about 50 feet, and deposited in the ditch. The appellant does not contend that it is not responsible for the acts of its servants while engaged in the master's business within the scope of their employment, and it concedes that inasmuch as its servants were repairing the cattle guards, in the doing of which they were compelled to take out the sticks and place them somewhere, if they or their foreman decided to put them in the ditch the act was one for which their master, this appellant, would be chargeable; but it does insist most strenuously that the evidence conclusively establishes that the two sticks were appropriated to the use of one Volmer, who was an employe of the defendant, and connected with the section gang at work on the cattle guards. The witness Atwell, when asked why the sticks were placed where they were, answered that one of the men, Anthony Volmer, was to have them, and the men carried them over to the ditch for the purpose of assisting him in securing them. This, with other evidence adduced by the defendant upon the subject, shows, the appellant insists, that while the section gang was proceeding in the discharge of the master's work, and before putting the sticks on its own property, outside of the line of the highway, as it did in another instance, one of the servants stepped in and appropriated the sticks as his own; that while it is true he was not the foreman, and could not command, yet he persuaded his fellow laborers to assist him in the appropriation. Thus, appellant urges, it appears

that the men, instead of being engaged in the master's business, were taking property away from that master, and aiding another person to appropriate it. Upon this foundation counsel constructs a most interesting argument, leading to the conclusion that the defendant should not be charged with the responsibility of placing the sticks in the ditch. But the difficulty with this contention in this court is that here it must be assumed that the fact is not as the appellant claims. While the record contains the evidence referred to, tending to show that the sticks were placed in the ditch for Volmer's convenience, upon the understanding they were to be used by him for firewood, there were present certain circumstances that persuaded the trial court that the question whether Volmer and his associates did undertake to convert the sticks to Volmer's use was presented for the jury, and so that question was fully and fairly submitted to them. The verdict that followed established, so far as this review is concerned, that the deposit of the sticks in the ditch was not in pursuance of a plan to appropriate them to Volmer's benefit. In our further consideration of the case, therefore, we are to assume that the defendant is responsible for the acts of its employes in placing the sticks in the ditch.

The appellant next insists that, although it be charged with the acts of its employes in depositing the sticks as complained of, yet as it owned the fee, and had the right temporarily to make necessary and reasonable use of the highway in the course of its business, and only exercised such right while engaged in repairing the cattle guards, it can be held responsible for damages resulting from such use only by showing that it was negligent; and the claim is that under the evidence submitted the defendant cannot be charged with negligence. The primary purpose of highways is use by the public for travel and transportation, and the general rule is that any one who interferes with such use commits a nuisance. Indeed, the statute declares it to be a public nuisance, and a crime against the order and economy of the state, to unlawfully interfere with, obstruct, or tend to obstruct, a street or highway. Pen. Code, § 885. There are some exceptions to the general rule. An abutting owner may, if necessary, temporarily and reasonably encroach upon the street by the deposit of building materials, a tradesman may convey goods in the street to or from his adjoining store, and in a variety of other ways the use of a highway for public travel may be temporarily interfered with, without the creation of what in the law is deemed a nuisance. But such obstructions must not only be temporary, but necessary in the transaction of the business of him who obstructs the highway, and reasonable as regards the rights of others. In *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, it was held that any unnecessary or unreasonable use of a sidewalk or street,

to the serious inconvenience of the public, is a nuisance per se. And while the court recognizes the right of the owner of land abutting upon a public street, when necessary, to encroach upon the primary right of the public, to a limited extent and for a temporary purpose, it lays down the rule by which to determine whether an obstruction of a highway is lawful or a nuisance. It says: "Two facts, however, must exist, to render the encroachment lawful: (1) The obstruction must be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public,"—citing *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. 633, and *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264. It follows that, if an encroachment be not justified by these two facts, it is unlawful and a nuisance; and such is the law, unless the obstruction is one authorized by the municipal authority having control of the street. In such a case the owner is relieved from the imputation of trespassing in doing the act consented to, and is in the position of one liable for negligence only. *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132. The rule relating to encroachments on highways is not confined to obstructions in the beaten track, but embraces all parts of the highway; nor is it necessary that the injury should be done to a traveler coming in contact with the obstruction. "There is," says Mr. Thompson in his work on Negligence (volume 1, p. 349), "no judicial distinction between an injury happening through a traveler's horse taking fright at the object, and an injury happening through his coming into direct collision with it." Indeed, it has been held many times, in other states besides our own, that objects calculated to frighten horses of ordinary gentleness constitute an encroachment upon the highway which will support a recovery for injuries sustained by the person injured without fault on his part. See cases cited in *Thomp. Neg.* pp. 995, 1181. Recoveries for injuries occasioned through the frightening of horses by obstructions in the highway have been sustained in this state in the following cases: *Stewart v. Manufacturing Co.*, 18 N. Y. St. Rep. 220; *Champlin v. Village of Penn Yan*, 34 Hun, 33, affirmed without an opinion in 102 N. Y. 680; *Burns v. Town of Farmington*, 31 App. Div. 364, 52 N. Y. Supp. 229; and *Quinn v. Town of Sempronius*, 33 App. Div. 70, 53 N. Y. Supp. 825. In *Stewart's Case* the horses became frightened at boilers standing on the edge of the sidewalk, next to the gutter. In *Champlin's Case*, a banner suspended over the street so frightened a horse that he ran away; in *Burns' Case*, the horses were frightened by a pile of hub timber irregularly piled; while, in *Quinn's Case*, poles piled by the side of the road, intended for use in constructing barriers to a bridge, so frightened horses that they ran away. The last two cases were against towns.

The appellant cites *Eggleston v. Turnpike Co.*, 82 N. Y. 281, in support of his argument that defendant was not a trespasser, and could be held liable, if at all, only on the ground of negligence. In that case the horses were frightened by a pile of stones that had been placed beside the traveled part of the road, about a week before the accident, to be used in repairing a bridge owned by the defendant, a turnpike company. It is true, the court said: "If the pile of stones had a tendency to frighten horses, and was of a dangerous character, although not technically a defect or obstruction in the highway, I entertain no doubt that the defendant could be made liable for damage caused to travelers thereby, after notice of its character and neglect to remove the same." But a very different question was presented in that case from the one before us. The action was brought against a turnpike company that was charged with the duty of maintaining the road and keeping it in repair; the pile of stones that frightened the horses was placed by the side of the traveled part of the highway for the purpose of making needed repairs to a bridge; the object aimed at was a proper one; indeed, it was the duty of the company to make the repairs, and, therefore it was lawful and proper for it to place the stones where it did; but it neglected to repair the bridge promptly, with the result that several horses had been frightened before the plaintiff's were, and the plaintiff claimed to recover upon the ground that defendant negligently permitted the pile of stones to remain after notice had been given to it that the stones had a tendency to frighten horses traveling upon the road, and had actually done so. We have seen, then, that a person, even if he be the owner of the land over which the highway passes, commits a nuisance, if he places in the highway an obstruction with which horses or vehicles may come in contact, or which is calculated to frighten horses of ordinary gentleness, unless the obstruction be reasonably necessary for the conduct of his business, and at the same time does not unreasonably interfere with the right of the public to make use of the highway.

Whether or not the evidence in this case justified the claim of the defendant that its action in placing the sticks where it did was reasonably necessary in the conduct of its repairs, and not an unreasonable interference with the rights of the public, presented a question of fact. This is obviously so, but in addition it should be said that it has been so decided by this court. *Callanan v. Gilman*, supra; *Flynn v. Taylor*, supra; *Hudson v. Caryl*, 41 N. Y. 553. It was the duty of the court, therefore, to submit to the jury, under all the facts of the case, the question whether the use which the defendant made of the highway was necessary and reasonable, within the rule we have referred to. This the court did, in a charge which was fair and free from legal fault. As there was no error

in the rulings of the court in admitting or rejecting evidence, it follows that the judgment should be affirmed, with costs. All concur (*HAIGHT, J.*, in result), except *O'BRIEN, J.*, dissenting, and *MARTIN, J.*, not sitting. Judgment affirmed.

(157 N. Y. 323)

BATES et al. v. SALT SPRINGS NAT. BANK OF SYRACUSE et al.

(Court of Appeals of New York. Nov. 22, 1898.)

MECHANICS' LIENS—PRIORITIES—CONTRACTS—PERFORMANCE—WAIVER—ASSIGNMENTS.

1. Laws 1885, c. 342, providing that a mechanic's lien originates with filing a notice, gives the lienor no preference over a creditor to whom, before such filing, the building contractor had assigned the amount due, or to become due, under the contract.

2. A requirement in a building contract of a certificate from the county clerk that no liens are unsatisfied of record, before payment thereunder, is, in the absence of more definite explanation, for the owner's protection, and not the lienors', and hence does not prevent an assignment by a contractor, of sums to become due, from operating as an equitable assignment, and giving the assignee a preference over liens subsequently filed.

3. The fact that contractors became insolvent, and requested the owner to complete the building, does not affect the right of their assignee to the balance due them, after deducting the cost of completing the building, as against subsequent mechanics' lienors, the owner electing to complete the building, and by payment of the balance into court waiving his objection that the money unpaid was not due under a stipulation that it should not be paid until a certificate was produced showing no liens to be filed.

O'Brien, J., dissenting.

Appeal from supreme court, general term, Fourth department.

Separate actions by Edward P. Bates and others against the Salt Springs National Bank of Syracuse and others to foreclose mechanics' liens. The cases were consolidated, and from a decree of the general term (84 N. Y. Supp. 598) affirming a decree for plaintiffs, defendants appeal. Reversed.

Wm. G. Tracy, for appellants. S. M. Lindsey, Edwin H. Risley, and Wm. Kernan, for respondents.

GRAY, J. These actions were brought for the foreclosure of mechanics' liens, and were consolidated by order of the court. The question presented is whether the appellant the Salt Springs National Bank of Syracuse, as the assignee of the contractors, is entitled to a fund, which has been paid into court to abide the event of the action, as against the various parties who have filed liens for work done and materials furnished in the execution of the contract. It appears that in December, 1890, the firm of Dickison & Allen entered into a contract with the Trustees of the Masonic Hall and Asylum Fund for the erection of a Masonic home near Utica. The contract price of \$139,500 was to be paid in

12 installments; the last of which, being stated at the sum of \$28,500, was payable when the buildings were completely finished and accepted. After the making of said contract, and in February, 1891, before any work had been performed under the contract, the contractors assigned, in writing, to the defendant the Salt Springs Bank the last payment to be made on said contract as collateral security for their existing and future indebtedness to the bank. Notice of this assignment was given to the trustees on April 28, 1892. On May 31st, and on June 4th following, mechanics' liens were filed by the defendants Cahill and Utica Planing Mills. On the latter date the contractors made a further assignment to the Salt Springs Bank, as collateral security, of all payments then, or which might thereafter become, due and payable on said contract, including extra work. Notice of this assignment was received by the trustees on June 6th. Thereupon the contractors, being insolvent, abandoned the work, and requested the trustees to finish the buildings under the contract. Between June 5 and July 17, 1892, other liens, aggregating over \$18,000, were filed by the creditors of the contractors. At the time of the abandonment of the work, there was unpaid upon the contract, including extra work, the sum of \$33,067.31. The trustees in completing the work on the buildings under the contract expended the sum of \$8,478.82. Deducting from that amount certain damages for delay and the expenses of completing the buildings, the sum which would have been payable to the contractors, if they had completed their contract, and which is now to be disposed of in this action, is \$23,788.49. The Salt Springs Bank, on the 6th and on the 9th of June, 1892, recovered judgments against the contractors aggregating in amount the sum of upwards of \$38,000, and, in proceedings supplementary to execution, the defendant Ross was appointed receiver of the joint and several property of the contractors. It was found that the indebtedness unpaid to the bank, inclusive of interest, exceeded the sum of \$25,000.

The general term of the supreme court has affirmed a judgment of the trial court, under which the parties who had filed mechanics' liens were adjudged to be entitled to be paid the amount of their respective liens in preference to the Salt Springs Bank. The theory upon which this conclusion has been reached is that, under the proper construction of a certain clause in the contract, it was intended by the parties thereto that persons who labored for, or furnished materials to, the contractors should be protected. The clause which received this construction reads as follows: "It is also agreed that no payment shall be made hereunder until the said parties of the second part (meaning the contractors) shall have obtained a certificate from the clerk of Onondaga county, showing that, at the date of such payment, no liens or claims have been recorded or filed against said premises

or building, which are then unsatisfied of record." Upon the interpretation to be given to this provision must depend the decision of the question involved in this case, whether the amount unpaid upon the contract belonged to the bank by virtue of its assignment, or whether it belongs to the lienholders to the extent of their liens. In considering that question the learned general term discarded the suggestion of the respondents, that the amount unpaid upon the contract was not due by reason of the provision that no payment should be made until the contractors produced the county clerk's certificate that no liens were unsatisfied, and, very properly, held that, if the assignment to the bank carried the right to the amount unpaid on the contract, it was the duty of the court to set aside the liens, so that the bank could procure the proper certificate, and thus obtain the fund to which it was in fact entitled. The opinion held that, under the mechanic's lien law (Laws 1885, c. 342), the laborer or material man has no preferential right to be paid out of the sum due the contractor until he files his notice of lien. In the absence of anything to the contrary in the contract, and before any notice is filed, the contractor may assign to his creditor, in payment of his debt, the whole, or any portion, of the moneys due, or to become due, under the contract, and the assignee acquires a preference over a subsequent lienor. This view was based on abundant authority and is indisputable. *Brill v. Tuttle*, 81 N. Y. 454; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229; *Beardsley v. Cook*, 143 N. Y. 143, 38 N. E. 109. The principle to be extracted from the cases is that a lienor obtains no greater right to the moneys payable by the owner than the contractor has, and, if the latter has assigned to a creditor pro tanto, the assignee gains a preference over subsequent liens. The court, however, adopting the view that the provision or clause of the contract in question prohibited payments until the county clerk's certificate was furnished, reached the conclusion that it had for its purpose the protection of the lienors, the laborers, and the material men, as well as the protection of the trustees. The reasoning to this conclusion was made upon the authority of certain cases in this court, which were thought to be controlling, viz.: *Merchants' & Traders' Nat. Bank v. Mayor, etc., of New York*, 97 N. Y. 355; *Bank v. Winant*, 123 N. Y. 285, 25 N. E. 262. These cases related to contracts made by the city of New York in 1875 and 1876. They contained, by direction of an ordinance of the city, this clause: "The said party of the second part [meaning the contractor] hereby further agrees that he will furnish said commissioner [meaning the commissioner of public works] with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and who may have

given written notice to the said commissioner, * * * have been fully paid or secured such balance. And, in case such evidence be not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid (meaning the persons who had done work or furnished materials) shall be retained from any moneys due the said party of the second part under this agreement until the liabilities aforesaid shall be fully discharged or such notice withdrawn." Those cases held, in effect, that the purpose of that provision was to protect those employed under the contractor. That was its only purpose, and the reason for it was obvious. At the time when the contracts were made, there was no lien law relating to work done and materials furnished on public works in cities. Such an act was not passed until 1878. Laws 878, c. 315. The construction of the ordinance which required such a provision in city contracts, as given in the Bank Cases, *supra*, was that it did secure to persons furnishing labor and material to contractors with the city some of the advantages which the lien laws of the state gave to mechanics and material men. The city in such a contract assumed no express liability to pay them, and could not be sued therefor; but it was placed under the implied obligation to hold, as trustee, the unpaid balance due upon its contract for the benefit of such persons. In *Bank v. Winant*, *supra*, the opinion followed the case of *Merchants' & Traders' Nat. Bank v. Mayor*, etc., of New York, *supra*, as to the nature of the contract; but it dealt with a question of the effect of the subcontractor's failure to file the notice provided for in the clause of the contract with the comptroller as the city official designated, and it was held that the plaintiff could not raise such an objection. The distinction between those cases and the cases where the contract is between private parties is marked; for, in the latter, a lien could be acquired which would be binding upon the owner, and therefore the presence of a clause in the contract dispensing the owner from the obligation of payment, if there were liens upon the building, is only for his relief and protection. To this effect is *Lauer v. Dunn*, *supra*. In *Lauer v. Dunn* the provision was that, "in case any lien or liens shall exist upon the property at the time or times when any payment is to be made, such payment, or such part thereof as shall be equal to not less than double the amount of or for which such lien or liens shall or can exist, shall not be payable at the said stipulated times, notwithstanding anything in this agreement to the contrary contained." It was there held of that provision that it was for the protection of the owner simply. In that case, if, when moneys were payable to the contractor, liens existed, the owner might reserve double the amount claimed under the liens from the funds in his hands, while in the present case no payment should be made. The plaintiffs in that action were subcontractors for the con-

struction of buildings, and received from the contractors a written order on the owner for the payment of a certain sum. We held that the order amounted in law to an assignment pro tanto of the funds in the owner's hands, and as such it bound that fund in preference to liens which were subsequently filed. The provision in the contract was for the protection of the owner, and after notice of the order, which was in effect an assignment of the contractor's interest in the money in the owner's hands, the owner was bound to apply the fund in his hands to its payment and to no other purpose. That decision is controlling upon the decision in the present case, for there is no material distinction to be made in the effect of the respective clauses under consideration.

The reasoning in the New York City cases is not applicable to create a distinction, as against the authority of *Lauer v. Dunn*, in the decision of this case. It is not quite consistent with reason, or with the motives which usually influence parties in the making of contracts, that we should regard the clause in the present contract as inserted otherwise than for the protection of the trustees who had contracted for the construction of the buildings. The owner, in such a case, is only desirous to be protected, in his payments due under the contract, against the liens of laborers and material men, and that purpose is accomplished by requiring the contractor, as a condition precedent to payment, to produce a certificate as to no liens being filed. Of course, the contractor is not interested in the insertion of such a provision. To infer from the presence of the clause a design to protect third parties requires something more definite to that effect in writing, in order to make the inference reasonable and natural. To attribute to an ordinary business agreement between parties an altruistic purpose requires some support in the language. In its absence, the inference to be drawn, in the interpretation of its clauses, is subject to the usual rules which govern in the construction of legal instruments which define the respective undertakings and obligations of the parties.

Nor does the fact that the trustees completed the buildings affect the right of the plaintiff. They elected to do so, and therefore such part of the last payment as remained in their hands, after deducting the cost of completion, became applicable to the payment of the claim of the assignee of the contractor. *Beardsley v. Cook*, 143 N. Y. 143, 148, 38 N. E. 109. That election and the payment of the moneys into court are a waiver of any objection that the moneys unpaid upon the contracts were not due, by reason of the non-production of the county clerk's certificate as to there being no liens. *Beardsley v. Cook*, *supra*. Under the doctrine of equitable assignments, it is of no consequence to the relative rights of assignees and lienors that the money may not be immediately payable.

Concluding, therefore, as I think we are bound to do under the authority of *Lauer v. Dunn*, that this clause in the contract was for the benefit of the trustees only, it follows that the assignment by the contractor to the Salt Springs Bank of the last payment upon the contract, executed upon the making of the contract, operated as an equitable assignment of the moneys remaining unpaid upon the contract when notice of it was given to the trustees, and gave to the assignee a preference over liens subsequently filed. There is no question as to there being an indebtedness from the contractors to the bank, and, upon notice of the assignment to the trustees, the effect was to bind the moneys remaining unpaid upon the last installment in favor of the bank's claim. There had been an equitable assignment of the moneys, which only required for its enforcement a fund to fasten upon and a notice to the holder of the fund. The bank acquired the right of the contractors, who lost their interest in, and dominion over, the fund, and its assignment was subject to no other equities than such as the trustees may have had against the contractors at the time they had notice of the assignment. It follows, from the views expressed, that the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur, except O'BRIEN, J., dissenting, and MARTIN, J., not sitting. Judgment reversed, etc.

(157 N. Y. 259)

WARREN et al. v. UNION BANK OF ROCHESTER et al.

(Court of Appeals of New York. Nov. 22, 1898.)

GUARDIAN AND WARD—CONTINUATION OF WARD'S BUSINESS—MORTGAGES—COLLUSION—EQUITY—PLEADING—JUDGMENTS—COLLATERAL ATTACK—RES JUDICATA.

1. The unauthorized continuation of an infant devisee's business by his guardian is a breach of trust, and hence debts therein contracted are the guardian's, and he cannot mortgage the trust estate to secure them.

2. Where a creditor knows that a guardian's prosecution of the ward's business is unauthorized, and he is a party to the transaction whereby the ward's estate is mortgaged to secure him, it amounts to collusion.

3. Where a guardian, having incurred debts in the unauthorized prosecution of an infant's business, colludes with the creditor to secure a judgment authorizing him to mortgage the infant's estate to secure the debts, the infant may maintain an original bill to vacate the judgment and set the mortgage aside.

4. A complaint setting out facts constituting fraud is a sufficient showing to call for equitable relief, although fraud be not directly charged.

5. Under Code Civ. Proc. § 2348, providing that an infant's realty may be mortgaged where the personalty and income of the realty do not suffice to pay his debts, or for his maintenance or education, the court has no jurisdiction to mortgage such realty to pay a debt incurred by the guardian in the unauthorized prosecution of the infant's business, nor a debt of the infant, in the absence of a showing that the personalty and income of the realty are insufficient, though it be a court of gen-

eral jurisdiction, since it must follow the statute strictly as to proceedings not falling within the ordinary proceedings of a court of common law. Hence a judgment authorizing the mortgage is subject to collateral attack.

6. Where a suit is to set aside proceedings to mortgage realty, and also the mortgage, it is a direct attack on the judgment in such proceedings, and hence the court granting the judgment is not prohibited from re-examining its decision.

7. The statute does not authorize a guardian to sue the ward for an accounting, and impose a mortgage on his realty to secure the amount found due.

8. A guardian, having contracted debts in the unauthorized prosecution of the infant's business, together with the creditor, secured authority of court to mortgage the infant's realty to secure the debts. The ward sued the guardian and creditor in the same court to set the proceedings aside. *Held*, that the same questions were not presented in both proceedings, since the gist of the second was collusion of the guardian and creditor, of which there was no showing in the first.

Appeal from supreme court, appellate division, Fourth department.

Action by Haskell B. Warren, an infant, by Edward P. Coyne, guardian ad litem, and another, against the Union Bank of Rochester and Gilman H. Perkins, impleaded with Holmes B. Stevens. From a judgment of the appellate division (51 N. Y. Supp. 27) reversing a judgment for plaintiffs, the latter appeal. Reversed.

This action was to set aside proceedings to mortgage certain real estate of the infant plaintiff, including the mortgage as a part of such proceeding. The mortgage was executed on behalf of the infant by his special guardian appointed in that proceeding, was payable to Gilman H. Perkins, and by him assigned to the Union Bank of Rochester. It was made to secure the sum of \$25,000, and was upon the real property described in the complaint. The proceeding was instituted in the supreme court by Holmes B. Stevens as general guardian of the infant. At the commencement of this action the plaintiff Warren was under 14 years of age, and resided with his mother, in the city of Rochester. In February, 1895, and for several years before, he was the owner in fee simple and in possession of the premises described in the complaint, upon a portion of which there was a brewery, with the appliances for manufacturing beer and ale. Prior to November 25, 1891, Holmes B. Stevens was the general guardian of the person and property of such infant, and was the administrator with the will annexed of Edward K. Warren, who died seised and possessed of the real property in question, and who was the grandfather of the infant. For some time prior to November 25, 1891, the defendant Stevens, as such administrator, had carried on upon the premises the business of a brewer, buying and selling barley, and manufacturing beer and malt and ale. On that day the accounts of Stevens as administrator were finally settled, and all the personal property used in connection with

the brewery was turned over by him as administrator to himself as guardian of the infant plaintiff, in pursuance of a decree of the surrogate's court. From that time until the 1st day of July, 1893, Stevens, claiming to act as general guardian of the infant, conducted upon the premises the business of a brewer, buying and selling barley and malt, manufacturing beer and malt and ale, selling the products of the brewery for cash and upon credit, and buying supplies for cash and upon credit. He then sold all the personal property used in that business to a corporation, and took in payment its stock of the par value of \$23,000. During that time he borrowed money of the Union Bank, which he used in the business, and gave notes therefor, signed "Haskell B. Warren, by Holmes B. Stevens, General Guardian," and on the 6th day of May, 1895, he made and delivered to the bank a promissory note of that date for \$25,431.00, which was signed in the same manner. This note represented the money, and interest unpaid thereon, which was borrowed by Stevens of the bank while carrying on the brewery business, between the 25th of November, 1891, and the 1st of July, 1893. In the month of February, 1893, as such general guardian, Stevens presented a petition to the supreme court, setting forth the existence of the indebtedness to the bank upon such note; alleged that it amounted to \$24,500 and upwards; that the bank was pressing for the payment of it, and threatened to sue therefor unless it was paid; that the real property of the infant would be thus sacrificed if it was not paid; that the interests of such infant would be promoted by paying the debt to the bank; that the income of the infant from his property was not sufficient to pay that indebtedness; and that, unless the money could be raised to pay the bank, the property of the infant would be sacrificed to pay it. It was then alleged that William S. Kimball had offered to loan the sum of \$25,000 upon the property, subject to the existing mortgage, at the interest or rate of 6 per cent. per annum, payable quarterly, the principal to be paid one year from date, and the petitioner, Stevens, then asked that the real estate mentioned might be mortgaged for \$25,000 under the direction of the court. Such proceedings were had therein that the attorney for the defendant bank was appointed the special guardian of the infant. The usual order of reference and proceedings before the referee were had, and a contract was made between the special guardian and Kimball, the president of the bank, by which it was agreed that a mortgage should be executed to him by the special guardian upon the real estate described in the complaint for the sum of \$25,000. While the proceedings were pending, Kimball died, and a new agreement was made between the special guardian and the defendant Perkins, who was vice president

and a director of the bank, for the execution and delivery of a mortgage for the same amount. The referee reported that it would be for the benefit of the infant to mortgage the property mentioned, for the reason that the brewery business conducted by Stevens as guardian was not productive, and resulted in loss; that when the business was transferred to the corporation it was largely in debt, and it became necessary to pay those debts to protect the estate; that a large sum of money was borrowed of the bank upon the notes of Stevens as guardian, aggregating \$24,500; that the bank had called in such loans, and threatened to sue the notes unless paid, and that there was no money to pay the same unless it could be realized by mortgaging the property of the infant; that the latter had no funds or property to draw upon to pay that debt; that Perkins would loan \$25,000 upon the property, and that from that sum should be paid the amount of the debt due the Union Bank, so far as the money would pay the same. This report was received, and the special guardian was ordered to contract for mortgaging the infant's property. Subsequently he reported that he had entered into an oral agreement to mortgage the property to Perkins for \$25,000. He was then directed to execute the mortgage, and from the \$25,000 first to pay the expenses of the proceeding, which amounted to \$430.50, and to pay the remainder, \$24,569.50, upon the note of Stevens held by the Union Bank. Subsequently the special guardian executed and delivered to Perkins the mortgage mentioned, and received therefor the sum of \$25,000, which was paid as directed by the previous order. Shortly afterwards Perkins executed and delivered to the bank an assignment of the mortgage, and the bank paid him the \$25,000 he advanced. The sole purpose of the proceeding to mortgage the infant's real estate was to discharge Stevens' indebtedness to the bank, and it was instituted in pursuance of an agreement between Stevens and the officers of the bank to secure that end. Perkins advanced the \$25,000 to the special guardian under an agreement with Stevens and the bank that the net proceeds thereof should be applied upon the debt of the bank, and to no other purpose, and that the bank should refund to Perkins the money paid by him, and the mortgage should be assigned to the bank. The bank received the assignment of the mortgage with full knowledge that the money paid by the special guardian had been applied upon the indebtedness of Stevens which was secured by his notes, and that the purpose and effect of the proceeding to mortgage the infant's real estate was to secure and pay the individual debt of Stevens to the bank, and for that purpose alone. Nothing has been paid upon this mortgage since its execution and delivery, but it remains an apparent lien upon the real property described.

Charles J. Bissell, for appellants. George F. Danforth, for respondents.

MARTIN, J. (after stating the facts). It is obvious that the sole purpose and object of the proceeding to mortgage the infant's real estate was to obtain about \$25,000, with which to pay the debt of Holmes B. Stevens to the defendant bank. It is equally apparent that the proceeding was commenced and continued to its conclusion, and that the assignment of the mortgage to the bank was made under and in pursuance of an agreement between the officers of the bank and the general guardian that the real estate of the infant should be mortgaged to secure the debt of the former, and that the mortgage thus obtained should be substituted as security for and in place of his debt to the bank. Stevens, as the general guardian of the infant plaintiff, had no right or authority to embark in or conduct the business of brewing, or the purchase and sale of barley or other merchandise, in the name of his ward, and employ therein the capital or credit of the latter. It is a well-established and elementary principle of the law relating to the rights and liabilities of trustees that, in the absence of an express and sufficient authority therefor, the employment of trust property in trade or speculation, or in manufacturing, is a gross breach of trust upon the part of the trustee. This rule applies even where he simply continues the business or trade of a testator. It is the duty of a trustee to close up the trade or business, to withdraw the funds, and invest them in proper security at the earliest convenient moment. *Perry, Trusts*, § 454. The employment by trustees of the property or credit of an infant in trade, or in the prosecution of manufacturing or speculative enterprises, has been uniformly condemned as illegal, and constituting a devastavit of the estate. *Wilmerding v. McKesson*, 103 N. Y. 329, 336, 8 N. E. 665; *King v. Talbot*, 40 N. Y. 76, 90; *Fellows v. Longyor*, 91 N. Y. 324; *Wetmore v. Porter*, 92 N. Y. 76.

Another principle firmly established by the cases is that trust funds invested by trustees in the hands of third persons, who have knowledge of their character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed and restored to the trust fund. *Wilmerding v. McKesson*, *supra*; *Wetmore v. Porter*, *supra*; *Rogers v. Squires*, 98 N. Y. 49; *Clark v. Hougham*, 2 Barn. & C. 149; *Perry, Trusts*, §§ 828, 832; *Williams, Ex'rs*, 801; *Field v. Schieffelin*, 7 Johns. Ch. 150. It is beyond the power of a trustee to bind the estate he represents to any use of its funds by contract with third persons who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its object. *Deobold v. Oppermann*, 111 N. Y. 531, 538, 19 N. E. 94.

That these rules apply with much greater force where a trustee seeks to dispose of the real property of his cestui que trust, who is an infant of tender years, to pay losses of a business carried on by himself without any semblance of authority, there can be no manner of doubt. The relation which existed between Stevens as guardian and his infant ward was that of trustee and cestui que trust. Therefore the debt for which the real estate of the infant was mortgaged was not the debt of the infant at all, but was the debt of the guardian, for which, so far as the record discloses, he had no claim against the infant or his estate either in law or in equity.

This transaction, plainly and correctly stated, is that Stevens was individually indebted to the bank in the sum of about \$25,000. For the purpose of imposing a liability upon the property of the infant for what must be regarded as his own debt, and to relieve himself from its burden, he entered into an agreement with his creditor, by which it was agreed that a proceeding in court should be instituted to secure a transfer of the individual debt of the guardian to the property of the infant, and thus obtain the payment of the guardian's debt to the bank from the infant, who was in no way liable therefor. This was a clear and palpable fraud upon his rights. The guardian was guilty of a breach of his trust in embarking the property of his ward in business. When it proved disastrous, he, in conjunction with his creditor, sought to impose the consequences of his own disaster upon his infant ward. This purpose was obvious. It is equally manifest that the bank and its officers must have understood that the purpose of the proceeding to mortgage was to wrongfully deprive the infant of his legal rights and property. That such was the effect of the transaction is clear, and it must be presumed that the parties who conferred and acted in concert in instituting and prosecuting the proceeding intended the natural consequences of their acts. Therefore it must be regarded as conclusively established that, in pursuance of a plan or scheme contemplated and agreed upon, the officers of the bank and the general guardian intended to substitute, and procured the property of the infant to be substituted, in place of the debt of the guardian, and thus, to that extent, defrauded the former of his rights in the property. It was the plain legal duty of the general guardian not to waste the property of his ward, or suffer it to be wasted, and, above all, not to be instrumental in effecting its loss. It was his duty to protect, and not to destroy. Utterly disregarding that duty, he entered into an agreement with his own creditor to inaugurate a proceeding which would necessarily and wrongfully deprive his ward of his property. This arrangement between the officers of the bank and the general guardian amounted to collusion. "Collusion," as defined by *Bouvier*, is "an agreement between two or more persons to defraud a

person of his rights by the forms of law or to obtain an object forbidden by law." Thus, the mortgage was secured in pursuance of a collusive agreement between the defendants, the purpose of which was to deprive the infant of his property without sufficient consideration, and for their own benefit. Having entered into a collusive agreement to illegally deprive the infant of his property, in furtherance of it the general guardian alleged in his verified petition that, unless the property of the infant was mortgaged, it would be sacrificed, and that the interests of the infant would be promoted by paying the debt to the bank. The guardian in no way apprised the court of the collusive agreement between himself and the officers of the bank, or that the debt for which he sought to mortgage the infant's property was his own, and not that of the infant. On the other hand, he employed language in the petition which was well calculated to convey the idea to the court that the debt was the debt of the infant, although that fact was not directly alleged.

It is not seriously denied by the respondents that the infant's just rights have been imperiled by the execution and delivery of this mortgage. Nor is it claimed that he has no remedy for the injury he has sustained. Their principal contention is that a court of equity has no authority in this case to award the relief to which the infant plaintiff is entitled. It is difficult to believe that a court of equity is so impotent, or its arms so paralyzed, that it cannot reach out and remedy this wrong. More than 20 years since, this court declared: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail." *Warner v. Blakeman*, *43 N. Y. 487, 507. There seems no doubt of the general power of a court of equity, in proper cases, in one suit to grant relief from a decree or order in another, either by a bill of review, or by a supplemental bill in the nature of a review, or by an original bill. The general grounds upon which the interposition of a court of equity may be successfully invoked do not include cases where the sole ground of relief is that the former decision was contrary to equity or good conscience. While the courts of England and of this country have, with great uniformity, refused aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon its merits, they have, upon the other hand, invariably extended it over a large and well-defined class of cases, to prevent the retention of an unconscientious advantage by a party in a court of law or equity, through

his own fraud, or through some excusable mistake or unavoidable accident on the part of his adversary. Where it appears to be against conscience to execute a judgment which the injured party could not have prevented, or where he might have prevented it except for fraud or accident, unmixed with any fault or negligence of himself, a situation is presented which will justify a court of equity in granting the necessary relief. Without pursuing this subject further to ascertain all the cases in which a party may avail himself of such an action where his defense was not available in the original action, or he was, without fault on his part, prevented from asserting it, it is sufficient for the determination of this case that the rule is firmly established that a judgment of either a legal or equitable tribunal may be vacated by a court of equity if obtained by fraud or collusion. *Smith v. Nelson*, 62 N. Y. 288; *Ward v. Town of Southfield*, 102 N. Y. 287, 6 N. E. 660; *Freem. Judgm. c. 22*. The proposition upon which the respondents rely to uphold the judgment of reversal relates to methods and procedure rather than to substantive rights or existing equities. They contend that in no aspect of the case does the complaint herein state facts sufficient to constitute a cause of action. Examining it, we find that it is alleged that the plaintiff Warren is an infant; that he owned real estate, of which the brewery and mortgaged property constituted a part; that the defendant Stevens carried on the business of a brewer there, and borrowed money, as general guardian of the infant, for that purpose; that he conducted the business in the name of the infant without any authority, and contracted individual debts at the Union Bank, for which the infant was in no wise liable; that he and the officers of the bank entered into an agreement by which proceedings to mortgage the real estate of the infant were to be undertaken, and the premises mortgaged, for the purpose of discharging the indebtedness of the guardian, and for no other purpose; that in pursuance thereof the general guardian as such presented to the court a petition, setting forth such indebtedness as the debt of the estate, and praying that the real estate of the infant might be mortgaged for its payment; that upon that petition proceedings were had which resulted in a mortgage upon the infant's real property to secure \$25,000 and interest, and that the moneys secured thereby were employed to pay the expenses of that proceeding and the debt of the guardian; that the mortgage was given and the money was paid for those purposes, and those alone; and that in pursuance of the original agreement between them the mortgage was assigned to the bank with full knowledge in both the mortgagee and assignee that the moneys paid to the special guardian were obtained for, and applied to the indebtedness of Stevens. Thus, the complaint shows that the guardian, as trustee of

his ward, was guilty of a breach of his trust, thereby incurring an individual liability of about \$25,000. This was known to the bank and its officers. Notwithstanding these facts, the guardian and officers of the bank entered into an agreement to employ the processes and machinery of the court to mortgage the real estate of the infant to pay the individual debt of the guardian. This was a fraud upon the court as well as upon the infant and his rights. We think the complaint fully sets forth all the wrongful acts of the parties, and as fully states a cause of action as it would if it had charged all the acts thus alleged to have been fraudulently and wrongfully performed. The Code only requires a plain and concise statement of the facts constituting a cause of action. That the complaint in this action contained. If the acts charged were wrongful, or necessarily fraudulent, it was not essential to a cause of action that they should be charged as having been wrongfully or fraudulently performed. The acts charged were not less fraudulent because the word "fraud" or "fraudulent" was not employed by the pleader in characterizing them. *Warner v. Blakeman*, 43 N. Y. 487. Where, as in this case, the law presumes fraud because it is the necessary consequence of the acts alleged, and they carry in themselves inevitable evidence of fraud, independent of the motive of the actor, it is unnecessary to characterize the acts alleged as fraudulent or otherwise. Whether or not fraud exists is a conclusion of law derived from facts and circumstances. 9 Enc. Pl. & Prac. 688; Beach, Mod. Eq. Jur. § 72. Therefore, an allegation in a complaint of facts from which such a conclusion necessarily results must be regarded as sufficient. In *Maher v. Insurance Co.*, 67 N. Y. 290, there was no specific allegation of mistake of facts, but facts were averred in the complaint showing that the parties were mistaken as to the effect of the language employed, and it was held that this was a sufficient allegation to justify a reformation of the contract. In *Whittlesey v. Delaney*, 73 N. Y. 575, the facts substantially as proved upon the trial and found by the court were averred in the complaint, although the precise and particular charge of fraud as a ground of relief was not specifically, and in terms, put forth. It was there held that it was not necessary to employ the word "fraud" or "fraudulent" in order to characterize the transaction or specify the ground of relief. We think the general doctrine of these cases is applicable here, and that the absence of the word "fraud" or "collusion" does not render the averments of the complaint less sufficient to constitute a cause of action for the fraud or collusion of the defendants to deprive the infant of his property. In the language of Judge Finch, "Calling names does not alter facts." We are of the opinion that the respondents' claim that the complaint was insufficient cannot be sus-

tained. Moreover, as the proof in the case established all the facts set out in the complaint, we think it was amply sufficient to justify the special term in setting aside the mortgage and proceedings to mortgage the infant's real estate upon the ground that they were procured by the fraud and collusion of the defendants.

The question whether the court before which the proceeding to mortgage was instituted acquired jurisdiction to grant the order directing the mortgage, or to confirm the action of the special guardian in making it, is also presented. The jurisdiction of a court to direct the execution of a mortgage upon an infant's real estate is derived wholly from the provisions of the Code of Civil Procedure relating to that subject. Code Civ. Proc. c. 17, art. 4, tit. 7. It can only be exercised in such cases, under such circumstances, and in the manner in which the statute directs. Section 2348 of the Code specifically points out the cases in which the real property of an infant may be sold, mortgaged, or leased. The first is: "Where the personal property, and the income of the real property, of the infant, * * * are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family." This is the only provision which has any application to this case, and the one under which the general guardian sought to mortgage the infant's real estate. It is to be observed that it is only in case the personal property and the income of the real property are insufficient to pay the debts, or for the maintenance and education of the infant and his family, that his property may be mortgaged. When we turn to the petition in the proceedings to mortgage, we find that the only debt for the payment of which it was sought to mortgage the infant's property was the debt of the guardian, and not the debt of the infant at all. There was no allegation in the petition, nor proof upon the hearing, of the existence of any debt of the infant which the income of his property was not amply sufficient to pay. Indeed, it appears in the petition that he had sufficient personal property and income from his real property to pay all his debts, and hence the condition necessary under the statute to authorize the mortgage was not shown to exist.

The precise question presented is whether, where the petition, proofs, and all the papers in a proceeding under this statute show, without dispute or contradiction, that its sole purpose is to mortgage the property of an infant to pay the debt of another, and there is no proof or claim that the personal property and income of the infant are insufficient for the payment of all his own debts, and for the necessary education of himself and family, but, on the contrary, the proof tends to show that they are sufficient, a court acquires jurisdiction to direct his property to be mortgaged. We are of the opinion that the court acquired no jurisdiction in that proceeding to

direct the property of the infant to be mortgaged for the debt of the guardian, and that there were no facts in the petition which would have justified the court in mortgaging the infant's property, even for the payment of his own debts. The action of the court was invoked therein for a single purpose, which was to direct a mortgage upon the infant's real estate for an object which was wholly unauthorized by the statute. That it had no jurisdiction to do. The filing of a petition which disclosed the existence of a valid outstanding debt of the infant, which required the mortgaging of his property to pay it, was, under this statute, necessary to confer jurisdiction upon the court of the subject-matter. *Insurance Co. v. Barnard*, 96 N. Y. 531. In such a proceeding the requirements of the statute must be strictly followed. This court has repeatedly held proceedings instituted under this statute to be void when not taken in conformity with it. *Battell v. Torrey*, 65 N. Y. 294; *In re Valentine*, 72 N. Y. 184; *Ellwood v. Northrup*, 106 N. Y. 172, 12 N. E. 590; *Losey v. Stanley*, 147 N. Y. 560, 573, 42 N. E. 8. It has also held that a court of equity has no inherent power to direct a mortgage of the real property of infants. If we are correct in our conclusion that the court had no jurisdiction of the proceedings to mortgage, then the proceedings and mortgage are open to collateral attack for that reason, and should be set aside. *Risley v. Bank*, 83 N. Y. 318; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8. If it be said that the court before which this proceeding was taken was a court of general jurisdiction, still, as the proceeding does not fall within the ordinary proceedings of a court of common law, its jurisdiction is yet special and limited, wholly dependent upon the statute; and no presumption can be indulged in favoring that particular jurisdiction. In that class of cases the statute must be strictly pursued, whatever jurisdiction the court may possess.

The respondents also insist that, as the purpose of this action was to set aside the mortgage, and not solely to set aside the proceedings to mortgage, the attack upon the proceedings was collateral, and falls within the rule which prohibits a court from re-examining its decision upon the same subject; and cite *Black, Judgm. § 252*, as sustaining the claim. The authority cited is to the effect that, to constitute a direct attack upon a judgment, it is necessary that a proceeding be instituted for that very purpose. But if the action has an independent purpose, and contemplates some other relief or result, although the overturning of the judgment may be important, or even necessary to its success, then the attack upon the judgment is collateral, and falls within the rule. On the other hand, a complaint alleging that a judgment is void, but is apparently a lien upon land described, is said by that author to be a direct, and not a collateral, attack upon it. This action was to obtain a judgment declaring all the pro-

ceedings void, including the mortgage. The mortgage was, at most, a part of the proceeding, and had no validity independent of it. It was as much a part of the proceeding as any paper or order in it. Hence, we find nothing in the fact that the plaintiff asked to have the mortgage, as well as the other proceedings, set aside, which in any way changes the character of the action, or deprives the plaintiff of the right to the relief sought.

It is also claimed that the learned appellate division seems to have, in effect, held that the guardian might have had some equitable claim against the infant, and hence he could properly maintain a proceeding to mortgage his real estate to secure or pay it. We do not perceive any ground upon which such a doctrine can be upheld. We not only find nothing in the statute which authorizes the inauguration of such a proceeding to obtain an accounting in equity between a guardian and his ward, and then impose upon his real estate a mortgage to secure the amount found due, but we find nothing in the record to show even the existence of any equity as a basis for such a claim. The equities of the guardian were in no way involved in that proceeding. It was a special proceeding under a special statute for a single purpose, which certainly did not include an accounting between the guardian and his ward.

The appellants claim that, under a well-established principle or rule in equity, where an important decree, which deprives an infant of his inheritance, has been rendered against him, either with or without actual fraud or surprise, the infant has a remedy during his minority, either by a bill of review, original bill in the nature of a bill of review, or by original bill directly attacking the decree for error, and cite as sustaining that proposition: *Coop. Eq. Pl. 97*; *Richmond v. Tayleur*, 1 P. Wms. 734; 1 *Daniell, Ch. Pl. & Prac. p. 164*; *Freem. Judgm. § 513*; *Bank v. Ritchie*, 8 Pet. 128; *Savage v. Carroll*, 1 Bal. & B. 548; *McLemore v. Railroad Co.*, 58 Miss. 514; *Lloyd v. Malone*, 23 Ill. 43; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Lloyd v. Kirkwood*, 112 Ill. 329; *Kingsbury v. Sperry*, 119 Ill. 280, 10 N. E. 8; *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537; *Wright v. Miller*, 1 *Sandf. Ch. 103*; *Wright v. Miller*, 8 N. Y. 9; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8; *In re Price*, 67 N. Y. 231; *Lefevre v. Laraway*, 22 Barb. 167; *McMurray v. McMurray*, 66 N. Y. 175. It is impossible, within the proper limits of this opinion, to review these authorities in detail. But a careful examination of them discloses that, while some are not applicable to the question here, yet the weight of their authority sustains the contention of the appellants, at least so far as they claim to be authorized to maintain an original action in equity to set aside the order and mortgage in this case as being in fraud of the infant's individual or property rights, and being procured by fraud and collusion of the parties.

Those authorities fully justify this action, and authorize its maintenance upon the ground that the agreement between the defendants to obtain the infant's property to pay the debt of the guardian was collusive, and their action under it was in fraud of his rights; and as the rights of a bona fide purchaser, without notice, were not involved, they fully sustain the judgment of the special term in this case. In those cases many similar questions have arisen, and the courts have, with great uniformity, held that, under circumstances similar to those existing in this case, a court of equity has the right, by original bill, to set aside a judgment thus obtained. As illustrative of the principle of these authorities, we may refer to a few in this state which seem to bear upon the legal questions involved in this controversy. In *Wright v. Miller* it was said that the jurisdiction of a court of chancery to set aside a decree obtained by fraud, upon an original bill filed for that purpose, has long been unquestioned. In that case an action had been commenced against infants, and a decree obtained setting aside a conveyance made in trust for their benefit, without giving them a day to show cause after they became of age, and it was held that such a decree was erroneous, and that the infants, by an original bill filed, might be relieved against it. When that case reached this court, it was again held that the infants were authorized to bring an action in equity to avoid the fraudulent disposition of the trust property, and that equity would entertain a suit to vacate a decree obtained by collusion between the trustees and tenants in possession of a trust estate to defeat the rights of persons entitled to equitable interests therein in remainder. In the *McMurray Case* a party died seised of certain premises, which were mortgaged to the defendant. The former devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to the plaintiffs. The balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, including the mortgage. After the testator's death, the mortgagee commenced an action of foreclosure, making the widow and the plaintiffs, who were infants, parties. They were served with process, but no guardian ad litem was appointed. The widow answered, but under an arrangement with the defendant that he would lease to her for life, at a nominal rent, a portion of the mortgaged premises, executed a deed to him of a portion of the premises directed to be sold. She withdrew her answer, and stipulated that the defendant might take judgment, which he did, taking judgment by default against the plaintiffs, under which the premises were sold, and bid in by the defendant. An original action was brought to set aside the judgment and sale, and it was held that the facts sustained a finding of fraud and collusion, and that the plaintiffs were entitled to have the decree of foreclosure avoid-

ed as to them, and could maintain an original action in equity for that purpose. In *Michigan v. Phoenix Bank*, 33 N. Y. 9, 27, it was said: "It is needless to multiply cases showing that the courts, upon bill filed, will set aside as a nullity a judgment, decree, or award obtained by fraud." In *Hackley v. Draper*, 60 N. Y. 92, where it was conceded that the special term had authority to hear a motion and grant the relief sought, it was held that, even if the motion could have been made, an equitable action would lie to vacate an order of a court obtained for a fraudulent purpose, and a sale made in pursuance of it. In *Tiernan v. Wilson*, 6 Johns. Ch. 411, a sheriff's sale of real estate was set aside in an action brought for that purpose, upon the ground that it was fraudulent in law, as the sheriff was charged with a gross act of negligence and abuse of trust. The same question was again considered by this court in *Stevens v. Bank*, 144 N. Y. 50, 39 N. E. 68, which was an action to set aside a judgment in the United States circuit court, and it was held that, as it was fraudulent as against the plaintiffs, they might maintain an original action to set it aside. Under the doctrine of these cases it is obvious that the plaintiffs had a right to institute this suit to set aside the proceedings and mortgage which were the result of a collusive agreement between the defendants, and which was obtained by a palpable fraud upon the rights of the infant, which presumably was known to all the defendants.

The contention of the respondents that the same questions were before the supreme court in the proceedings to mortgage as are presented in this action cannot be sustained. Surely, there was no proof in the original proceeding of the collusion between the defendants to procure an appropriation of the infant's property to pay the guardian's debts. After a full and careful examination of the facts and law applicable to the questions presented upon this appeal, we have reached the conclusion that the special term possessed abundant authority to entertain this action, and was fully justified by the facts in setting aside the proceedings to mortgage and the mortgage made therein, and that the learned appellate division erred in reversing the judgment of that court. In reaching this conclusion we have recognized the correctness of the rule, invoked by the respondents, that the judgment of the appellate division should not be reversed unless there was no error of law committed by the trial court to justify it. We have found nothing in the record to indicate the commission of any such error which authorized a reversal of the judgment entered upon its decision. It follows that the judgment of the appellate division should be reversed, and that of the special term affirmed, with costs to the plaintiffs in all the courts. All concur, except PARKER, C. J., and GRAY, J., not voting. Judgment reversed, etc.

(157 N. Y. 189)

PEOPLE ex rel. ARMSTRONG CORK CO.
v. BARKER et al.(Court of Appeals of New York. Nov. 22,
1898.)

TAXATION—FOREIGN CORPORATIONS—CAPITAL INVESTED—ACCOUNTS RECEIVABLE—MERCHANDISE IMPORTED FOR SALE—CONTINUOUS BUSINESS.

1. Accounts receivable of a foreign corporation, payable in New York, for goods sold there, are taxable in the state, as capital invested, under Laws 1896, c. 908, § 7, subjecting capital invested in business as personal property by nonresidents to taxation.

2. Where a foreign corporation filed with the secretary of state a certificate of its incorporation and statement of its business, as required by General Corporation Law, § 15 (Laws 1892, c. 687), as a condition precedent to doing business, and established a factory at one place in New York, and an agency at another, at which goods manufactured in New York, as well as those imported from its home office, were kept on hand for sale, there was an establishment of a continuous business; and hence the goods imported, as well as those manufactured in New York, were taxable, under Laws 1896, c. 908, § 7, subjecting to taxation capital of nonresidents invested as personal property in the state, in a business carried on therein, to the same extent as if they were residents.

Appeal from supreme court, appellate division, First department.

Certiorari by the people, on the relation of the Armstrong Cork Company, against Edward P. Barker and others, commissioners of taxes and assessments of the city of New York. From an order of the appellate division (52 N. Y. Supp. 921) modifying an order by which the assessment of relator's property was reduced, all parties appeal. Modified.

These are cross appeals in this case, which bring up the same record. The defendants appeal from so much of the order as modified the order of the special term by refixing and limiting the amount of the assessment to the sum of \$240,872.20. The relator appeals from so much of the order as modified the order of the special term by increasing the amount of the assessment from \$189,408.96 to \$240,872.20. This proceeding was by certiorari, issued, in pursuance of the provisions of chapter 908 of the Laws of 1896, to review an assessment of the capital of the relator invested in business in this state for the year 1897. The relator is a foreign corporation, organized under the laws of the state of Pennsylvania, having its principal place of business at Pittsburg, in that state. Its business is the manufacture and sale of corks, cork goods, the product of cork, and kindred articles. It has in this state two places of business,—one at 45 Murray street, in the borough of Manhattan, and the other at the corner of Bayard and Lorimer streets, in the borough of Brooklyn. At its Brooklyn house it both manufactures and sells merchandise of the character mentioned, but the business carried on at the Murray street house is the selling of such merchandise. From the latter the relator sells goods that are made at its factories,—a portion being manufactured

without the state, and a portion at Brooklyn, within the state. The business in Murray street was established for the purpose of selling the goods manufactured at those factories. The money realized from the sale of the merchandise at the Murray street place is, after deducting the expenses of the business, remitted to the company's chief office, at Pittsburg. The relator's statement to the defendants, showing its condition on the second Monday of January, 1897, discloses that there was then due it on notes and accounts for the business transacted at the Brooklyn house, \$38,371.82, and on notes and open accounts for business done at the Murray street house, \$51,403.24, making a total of \$89,835.06; that the value of the merchandise in this state, owned by the relator, which was at the Brooklyn house, amounted to \$133,318.71, and that which was at the Murray street house, to \$101,451.80, making a total of \$234,770.51; that the value of its plant and machinery in the state was \$38,687.89; that the value of its safes, fixtures, and furniture at the Brooklyn house was \$1,232.78, and at the Murray street house, \$2,062.80, making a total of \$3,295.58; that the Brooklyn house had cash on hand and in bank, \$4,318.77, and the Murray street house had in cash and in bank, \$348.55, making a total of \$4,667.32; and that there were bills and accounts payable, incurred for items included in the sales and assets enumerated, which were due from the Brooklyn house, amounting to \$16,558.13, and from the Murray street house to \$12,295.64, making a total of \$28,853.77. Thus, it appears from the relator's verified statement that its property in the cities of New York and Brooklyn was of the value of \$371,256.36, and that, after deducting the liabilities mentioned, \$342,402.59 was the net value of the relator's property. It was substantially for this sum that the commissioners assessed the relator. The special term deducted from that assessment the amount of the notes and accounts which were receivable at the Murray street house, and the value of the merchandise therein, which amounted to the sum of \$152,915.04, upon the theory that those items did not constitute property within this state which was assessable against the relator; thus leaving the amount \$189,408.96. Upon appeal to the appellate division, that court held that the amount of the notes and accounts owing the business at the Murray street house was improperly deducted, and that it should be added to the \$189,408.96; thus making the amount of the assessment, as corrected by that court, \$240,872.20.

Charles J. Hardy, for relator. James M. Ward, for defendants.

MARTIN, J. (after stating the facts). The appeals in this case present two questions. One is whether the appellate division correctly held that the value of the notes and accounts owing to the relator for property sold at the Murray street house was prop-

erly included in its assessment. The second is whether the goods and merchandise in its store on Murray street were properly assessed. The relator claims that neither was the proper subject of assessment in this state, while the defendants contend that both should be included. The contention of the relator, that the appellate division erred in restoring the assessment as to its bills receivable for property sold at the New York house, cannot be sustained. A contrary doctrine was held in *People v. Barker*, 23 App. Div. 524, 48 N. Y. Supp. 553; and that case was affirmed by this court on the prevailing opinion of the court below (155 N. Y. 686, 49 N. E. 1103), so that the validity of that assessment is not an open question in this court.

This brings us to the consideration of the second question. The statute under which this assessment was made provides: "Non-residents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state." Laws 1890, c. 908, § 7. This is a substantial reenactment of section 1 of chapter 37 of the Laws of 1855. The latter statute has been the subject of adjudication by this court in at least two cases. In *People v. Commissioners of Taxes*, 23 N. Y. 242, it was held that the goods of a nonresident, sent to this state for the purpose of sale, without reinvestment of the proceeds, were not liable to taxation under the statute of 1855, and that that act was designed to reach the capital of nonresidents employed within the state in a continuous business, and not property sent here only as to a market for sale. In the discussion of the question in that case, it was, in effect, said that the statute was intended to apply to foreign corporations—particularly to insurance companies—who establish agencies in the city of New York for the transaction of their corporate business, and to persons who were engaged in business in New York, having large amounts of property in the state, which escaped taxation under the rule that personal property is deemed to follow the person of the owner. In *People v. Barker*, 5 App. Div. 246, 39 N. Y. Supp. 151, affirmed by this court 149 N. Y. 623, 44 N. E. 1128, it was held that a foreign corporation which had its principal office and manufactory in Cleveland, Ohio, and sent its manufactured goods to a salesroom in New York for sale, the proceeds of which, except a small amount to pay its office expenses, were remitted to Cleveland, was not liable to assessment for the amount of the goods usually kept on hand. If the facts in this case are like those in the cases to which we have alluded, it follows that the judgment of the appellate division must be affirmed.

The record in this case discloses that one of the directors of the relator, and the manager of the Murray street house, testified that the re-

lator was incorporated under the laws of the state of Pennsylvania; that its home office was in Pittsburg; that he was in business in the state of New York, and had filed with the comptroller of the state copies of the certificate of incorporation of the relator, giving the name of the company, its purposes of transacting business, and where the business of the company and its office in this state are located; that the certificate indicated the principal place of business as being at No. 45 Murray street, in the city of New York, and did not indicate any other place of transacting business in this state; that the company was engaged in the manufacture and sale of corks; that in the house at Brooklyn corks were manufactured from the raw material, and sold from there, while in the Murray street house the goods were principally manufactured in Pittsburg, and sent here for sale; and that no manufacturing was done in New York City. Section 15 of the general corporation law (Laws 1892, c. 687) provides that no foreign or other than moneyed corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in the state, and that no foreign stock corporation doing business here without such certificate shall maintain any action upon any contract made by it here until it has complied with the law. This statute then declares that before granting such certificate the secretary of state shall require such corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement, under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state in the manner prescribed by Code, § 16. This evidence shows quite distinctly not only that the relator intended to do business as a corporation within the state, but that it intended that its principal place of business should be at 45 Murray street, in the city of New York. This evidences a plain intent on the part of the corporation and its officers to establish a continuous business in the city of New York, and not one of a temporary character. The distinction between this case and the cases to which we have referred lies in the fact that it was the purpose and intent of the relator to establish a permanent and continuous business in the state of New York, which included both the manufacture and the sale of goods manufactured, and in the fact that it designated its principal place for the transaction of such business as 45 Murray street, in the city of New York. It is true that a large portion of the property sold at the Murray street house was manufac-

tured in Pittsburg, yet it also sold merchandise manufactured in this state. Under these circumstances, we are of the opinion that the commissioners were justified in holding that the relator had invested in this state an amount equal to the value of the merchandise it had on hand, and that it was invested for the purpose of carrying on a somewhat permanent and continuous business here. Thus, this case is clearly distinguishable from the cases to which we have adverted. We think the commissioners were justified in including in the relator's assessment the value of the merchandise on hand at its Murray street house, as well as the amount of the notes and accounts owing to it for property sold, and that the appellate division erred in refusing to restore the assessment to its original amount. The order of the appellate division should be modified by restoring the assessment of the relator to its original amount as fixed by the defendants, and, as so modified, affirmed, without costs to either party. All concur. Ordered accordingly.

(174 Ill. 317)

BARLOW v. ROBINSON.

(Supreme Court of Illinois. June 18, 1898.)

VENDOR AND PURCHASER—NOTICE—INFANTS—RATIFICATION.

1. The vendee of lands in possession of a third person under a bond for deed from an infant is chargeable with notice of affirmation of the bond by the infant on coming of age.

2. Where one having given a bond for deed during infancy told the vendee, after coming of age, that she would not convey the land to another unless the vendee failed to perform his contract, and afterwards demanded an advance payment from him, she affirmed the bond.

Appeal from circuit court, Fulton county; John J. Glenn, Judge.

Ejectment by Jesse E. Barlow against Charles F. Robinson. Judgment for defendant, and plaintiff appeals. Affirmed.

Chiperfield, Grant & Chiperfield, for appellant. Kinsey Thomas, for appellee.

BOGGS, J. This was ejectment, brought by the appellant against the appellee. The declaration alleged appellant was the owner in fee and entitled to the possession of a certain described part of the S. W. $\frac{1}{4}$ of section 32, township 8 N., range 2 E., in Fulton county, and that appellee unlawfully withheld the possession thereof from him. A trial before the court, the intervention of a jury being waived by the parties, resulted in a finding and judgment for the defendant, the appellee. The parties claim title from a common source, viz. the title which rested in one Cora B. Vandecar, afterwards Cora B. Lewis. On the 24th day of November, 1894, the said Cora B. Vandecar contracted to sell the land in question to the appellee, and executed a bond obligating herself to convey the same to

him when certain deferred payments specified in the bond should have been made by the appellee, who made a cash payment, and at once entered into actual possession under the bond. At the time of the execution of the bond the said Cora had not arrived at her majority. Subsequently, and while yet a minor, she intermarried with one E. C. Lewis. She arrived at the age of 18 years on the 5th day of December, 1895. On the 14th day of January, 1896, she and her husband executed and delivered to the appellant a warranty deed purporting to convey to him the premises in question. Appellee was then in the actual and open possession of the premises, holding the same under the bond for a deed, executed, as before mentioned, by the said Cora B. Vandecar, now Lewis. Appellee contended that the said Cora, after she arrived at the age of 18 years, and before she executed the deed to appellant, ratified and confirmed the sale of the land to him, and recognized and acknowledged the bond executed during her minority to be a valid and subsisting contract. The contract and bond of the said Cora was voidable only, not void, and became valid and effectual if ratified and affirmed by her after reaching her majority. The appellee was in the open and actual possession of the land when the appellant received the deed from the said Cora B. Lewis. It is familiar law that the appellant was bound to inquire as to the rights and interests of appellee in the land, and he is chargeable with notice and knowledge of all facts relating to the title which he might have ascertained had he made such inquiry. The possession of the appellee operated to charge the appellant not only with notice of the execution of the bond for a deed, but also with notice of any act of ratification or affirmation thereof. *Morrison v. Kelly*, 22 Ill. 609; *Bank v. Godfrey*, 23 Ill. 531; *Truesdale v. Ford*, 37 Ill. 210; *Black v. Hills*, 36 Ill. 376; *Flint v. Lewis*, 61 Ill. 299; 16 Am. & Eng. Enc. Law, 800.

The appellee was not in default in the performance of any of the obligations of the contract set forth in the bond, and, if the bond was affirmed and ratified by the said Cora after she arrived at her majority, and before she conveyed to appellant, the bond, its affirmation, and the possession of the appellee constituted a complete defense to the action of ejectment. The contention is then reduced to the single question whether the said Cora after she became of age, and before she made the conveyance to the appellant, ratified and affirmed the contract and bond entered into while she was a minor. The appellee testified that after the said Cora arrived at her majority he heard that appellant was endeavoring to get her to convey the land to him, and that he (appellee) went to see her for the purpose of ascertaining whether she intended to abide her contract with him. That he met her, and said to her: "This is that bond for a deed. Are you going to stand by your agreement, and make me a deed when the

time comes?" She said: "I will do it, but I would like to have some money." I said: "All right. There will be some money due on the 5th day of December next. If you need the money now, I will advance that to you ahead." She said: "I will be down to your place within a week. Ted [her husband] and I will be down, and we will fix the whole matter up." It was proven that within one week from that time said Cora wrote the following letter to appellee and sent it to him by her husband, viz.: "Berwick, Ill., Dec. 31, '95. Mr. C. F. Robinson, Ellisville, Ill.: Will you please let Ted have \$550? It will be a great accommodation, as I want the money very much. Cora B. Lewis." Appellee testified he offered to advance a smaller sum on the 1st of March thereafter, and the husband said that would do, and went away. The version of Mrs. Lewis as to the conversation was: "He [appellee] had a paper in his hand, and said something about Barlow [appellant], and I said: 'I have made no arrangement with Barlow at all. I have nothing to do with him.' That was all the conversation. I had made no deed to Barlow, and did not intend to. If Mr. Robinson [appellee] came and filled his contract, I should fill mine. * * * I wrote to him to send me \$550 or \$500, by my husband; but, if my husband had any conversation about the land, I don't know anything about it." This conversation occurred on the 24th day of December, 1895, and the letter asking appellee to pay \$550 was dated December 31, 1895, and the deed to appellant was executed on the 14th day of January, 1896. The appellant asked the court to hold the following proposition as a correct expression of the doctrine of ratification, to wit: "(5) That, in order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences, and with the intention to ratify what is known to be voidable." The court held the proposition to be correct, and no other proposition bearing upon the point was presented. Therefore the question is whether the evidence was sufficient to constitute a ratification within the rule declared by the proposition, for the reason that the appellant, having requested the court to so declare the law, cannot be heard now to question the correctness of it. The appellee and Mrs. Lewis were the only witnesses who gave testimony with relation to the conversation between them. The subject of that conversation, according to the testimony of both of them, was whether it was the intention of Mrs. Lewis to carry out her contract with the appellee, or to disaffirm the same, and sell the land to the appellant. It is therefore clear she knew it was within her power to avoid the obligations of her bond. According to her version of the conversation, she did not intend to convey to the appellant except in the event the appellee should refuse to perform his contract. Appellee testified she said she intended to fulfill

her contract with him, but that she needed some money, and wanted him to make some payment in advance of the maturity of any payment provided for by the bond. She denied that she said she intended to be governed by and carry out her contract set forth in the bond, or that she asked the appellee to advance her any sum upon the purchase price of the land. It was abundantly proven and admitted that within a week after the conversation she wrote a note to the appellee, requesting him to make an advance payment upon the purchase price of the land, and sent such note by her husband, for the purpose of procuring some part of the purchase price of the land. This note, with the action of Mrs. Lewis in causing the same to be sent to the appellee, is consistent only with the version given by the appellee of the conversation, and inconsistent with the version given by Mrs. Lewis. We think the circuit court was justified in concluding that Mrs. Lewis intended to ratify, and did ratify, her bond, and that the appellant, at the time he received the deed from her to the land in question, was chargeable with notice of such affirmance. The judgment of the circuit court is correct, and will be affirmed. Judgment affirmed.

(174 Ill. 229)

THOMPSON v. OWEN et al.

(Supreme Court of Illinois. June 18, 1898.)

WILLS—EXECUTION—EVIDENCE—IMPEACHING WITNESS.

1. On appeal to circuit court from refusal of probate of will, the attestation clause, containing full recitals of due execution, is competent to prove the will, though the persons whose names are signed as witnesses merely acknowledge the genuineness thereof, and state that they have no recollection as to the will; Rev. St. c. 148, § 13, providing that, on such appeal, the will may be supported by any evidence competent to establish a will in chancery.

2. Rev. St. c. 148, § 7, providing that the certificate of the oaths of the witnesses at the "first probate" shall be admissible on hearing of bill to contest a will, does not make competent, on hearing of petition for probate or on appeal to circuit court from denial thereof, affidavits relative to execution of the will offered on a prior application, when the county court admitted the will to probate; the petitioner therefor, on appeal therefrom to the circuit court, and before hearing therein, having dismissed the application, so that the order admitting to probate was blotted out.

3. Affidavits of attesting witnesses used on first application for probate may be used on hearing in the circuit court, on appeal from denial of second application, where having a tendency to contradict their testimony on such hearing; petitioner having a right to impeach such witnesses, because obliged by Rev. St. c. 148, §§ 2, 13, to call them.

Appeal from circuit court, Hancock county; Charles J. Scofield, Judge.

Petition of Mary A. Thompson, opposed by Letha J. Owen and others, for probate of will of Thomas J. Thompson, deceased, was denied by the county and circuit courts, and petitioner appeals. Reversed.

John B. Risse & Son, for appellant. O'Hara, Scofield & Hartzell, for appellees.

BOGGS, J. The appellant filed in the county court of Hancock county an instrument in writing purporting to the last will and testament of Thomas J. Thompson, deceased, and also filed her petition praying that the said instrument might be admitted to probate. A hearing was had, and the county court refused to admit the instrument to probate as the will of the said deceased. The appellant appealed from this order of the county court to the circuit court of said county, and in the said circuit court the cause was, by agreement of the parties, submitted to the court without the intervention of a jury. The circuit court entered an order refusing and disallowing the petition of the appellant that said instrument be admitted to probate, and the appellant has brought the cause to this court by a further appeal from the said order and judgment of the circuit court.

The alleged will purported to bequeath and devise all the real and personal property of the said deceased, and upon its face appeared to have been duly executed, with all the formalities provided for by statute, and appended thereto was an attestation clause containing full recitals to that effect. The attestation clause was as follows: "The within instrument, consisting of two (2) sheets, or four (4) pages, was now here subscribed by Thomas J. Thompson, the testator, in the presence of each of us, and at the same time declared by him to be his last will and testament; and we, at his request and in his presence, and in the presence of each other, sign our names hereto as attesting witnesses, this 6th day of January, 1893. Arch E. McNeill. S. M. Irwin." The attesting witnesses were produced, and each for himself testified that the signature appended to the attestation clause, purporting to be his signature, was his true and genuine signature; each of them, however, testifying he had no recollection of signing the said attestation clause, or of seeing the deceased sign the will, or that the deceased ever acknowledged the same to be his act or deed.

It was proved by the testimony of two witnesses, and not denied or questioned, that the signature to the will was the true and genuine signature of the deceased, Thomas J. Thompson. The body of the will and the attestation clause were both in the handwriting of David E. Mack, judge of the county court of said Hancock county. It appeared from the testimony of Judge Mack that the deceased, who resided at Bowen, in said county of Hancock, about two years before his death came to the office of the witness in Carthage, in said county, and requested and directed him to prepare the will in accordance with his wishes, which he then fully made known to the witness. The witness testified he advised the deceased as to the requirements of the statute with relation to the execution of wills, and

gave him full and explicit directions as to the mode and manner in which the instrument should be signed, executed, and witnessed; that he afterwards, on the same day, wrote the instrument (including the attestation clause) offered as the will, and sent it by mail to the said deceased, at Bowen. This witness identified the instrument offered as being the one so prepared and written by him. It was also proven that the deceased delivered the instrument purporting to be his last will and testament to one George Nash, a banker residing and doing business in Bowen, and requested him to preserve and safely keep the same, and that said Nash produced the instrument after the death of said Thompson.

The court rejected from consideration the recitals of the attestation clause as being incompetent. The will bore the genuine signature of the alleged testator; the attesting clause recited full compliance with all the requirements of the statute with relation to the execution of the will, and bore the genuine signatures of the attesting witnesses; no evidence appeared tending to disprove the observance of any requirement of the statute; circumstances were proven corroborative of due execution; the attesting witnesses were produced, identified their signatures to the attesting clause, and gave no testimony tending to contradict anything recited in said clause,—and in such state of circumstances we think the attesting clause was competent to be received in evidence, and to be considered in connection with the testimony of the two attesting witnesses on the question of the execution of the will by the said deceased. Such, of course, is not the rule when a will is presented to the county court for probate, and the attesting witnesses are present in that court, and under no disability; for the reason that it is expressly provided, in order to authorize a county court to admit a will to probate, the execution of the will shall be proven by two or more credible witnesses, declaring, on oath or affirmation, they were present, and saw the testator sign the said will in their presence, or that the testator acknowledged to them that the instrument purporting to be his last will was his act and deed. Rev. St. c. 148, § 2, entitled "Wills." But it is also expressly provided by section 13 of the same chapter that if the probate of any will shall have been refused by any county court, and an appeal shall have been taken from such order of the county court to the circuit court, it shall be lawful for the party seeking probate of such will to support the same, on the hearing in the circuit court, by any evidence competent to establish a will in chancery.

There is abundant authority for the view we have expressed that an attestation clause which the attesting witnesses to a will swear bears their signatures is competent evidence tending to establish the due execution of the will in chancery, when the only defect in the proof of the execution is that

the subscribing witnesses are unable to recollect that all the formalities prescribed by the statute and recited in the attesting clause were actually complied with. In 1 Jarm. Wills (6th Ed.) 123, 124, it is said that "failure of memory on the part of witnesses will not upset the will, where the attestation clause is sufficient"; citing many cases. Also, in 1 Redf. Wills (4th Ed.) p. 128, it is said: "It seems to be well settled that, in the absence of all proof, the witnesses being deceased or not in a condition to give testimony, the presumption *omnia rite acte* will arise, as in ordinary cases. * * * And, where the attestation clause contains all the particulars of a good execution, it will always be *prima facie* evidence of due execution, and will often prevail over the testimony of the witnesses who give evidence tending to show that some of the requisites were omitted." The text is supported by many authorities cited, and it is further said in note 26, on page 238, that "the mere forgetfulness of the witnesses of the facts certified in the attestation clause is not regarded as any obstruction to granting probate of the will." To the same effect, see Schouler, Wills, §§ 347, 348.

In *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810, where one of the attesting witnesses failed to remember, and could not therefore testify, that all the formal requisites required by the statute to be observed had been complied with, the late Chief Justice Campbell said: "But we know of no rule of law which makes the probate of a will depend upon the recollection, or even the veracity, of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But, if the forgetfulness or fraud of a subscribing witness can invalidate a will, it would be easy, in many cases, to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are more or less truthful than others. It presumes they had, when they signed, full knowledge of what they were doing, and, in case they are dead, their attestation, when proved, is *prima facie* evidence that all was done as it should be."

In New Jersey (*McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566) it was said: "The attestation clause is perfect, and the execution to which the witnesses thus certify and attest is an exact compliance with the statute. Under such circumstances, the court must have clear proof to warrant the conclusion that the will was not duly executed. *Wright v. Rogers*, L. R. 1 Prob. & Div. 678. In *Allaire v. Allaire*, 37 N. J. Law, 312, it is laid down that, 'if the attestation clause is perfect, and shows on its face that all the forms required by the statute have been complied with, and the subscribing witness-

es, when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements.' In *Tappen v. Davidson*, 27 N. J. Eq. 459, it was held that if, in such case, it be merely doubtful, from the evidence, whether the statutory requisites have been complied with, the presumption arising from the attestation clause is not overcome. In this case the evidence is by no means such as to disprove the statements in the attestation clause."

In New York (In re *Kellum's Will*, 52 N. Y. 517) it was said: "If the attestation clause is full, and the signatures genuine, and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute are complied with, although the witnesses are unable to recollect the execution or what took place at the time. In proportion to the absence of memory should care and vigilance be exercised in examining the facts to prevent fraud and imposition: but, if the circumstances of good faith and intelligence of the witnesses satisfy the judgment that the statute has been complied with, there is no rule of law to prevent admitting the will to probate; and this accords with the authorities in this state. *Lewis v. Lewis*, 11 N. Y. 220; *Orser v. Orser*, 24 N. Y. 51; *Peck v. Cary*, 27 N. Y. 9; *Trustees v. Calhoun*, 25 N. Y. 422; *Chaffee v. Missionary Convention*, 10 Paige, 85."

In *Jauncey v. Thorne*, 2 Barb. Ch. 40, Chancellor Walworth said: "It is a very different question, however, whether, to sustain and establish the validity of a will, the courts should hold it necessary for the subscribing witnesses to recollect and testify to the fact that all the formalities prescribed in the statute were actually complied with; for, if this were required, very few devises of property would be supported unless the testimony of the witnesses was taken and perpetuated soon after wills attested by them were made. This, in many cases, would be wholly impracticable, as the testator frequently lives many years after he has executed his will; and where there is good reason to suppose that the will has been duly executed, and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead, as well as to the living, requires that the declared wishes of the testator should not be defeated by the imperfect recollections of attesting witnesses, or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumptions in favor of the due execution of wills are sanctioned by the courts of justice, when, from lapse of time

or otherwise, it may be impossible to give positive evidence on the subject." See, also, *Peck v. Cary*, 27 N. Y. 9, and *In re Cottrell's Will*, 95 N. Y. 830. In the *Peck Case* Chief Justice Denio said: "A different rule, and one which would require the witnesses always to remember and be able to state affirmatively the several matters required to be done, would render wills the most uncertain of all legal instruments."

In *Wisconsin*, see *In re Meurer's Will*, 44 Wis. 392, *In re Lewis' Will*, 51 Wis. 101, 7 N. W. 829, and *In re O'Hagan's Will*, 73 Wis. 78, 40 N. W. 649. In the latter case, as in the case at bar, both of the attesting witnesses testified that they had no recollection whatever of signing the instrument, and could testify only to the genuineness of their signatures; and the supreme court said that "the presumption arising from the attestation and the attestation clause, to the effect that it was subscribed by the witnesses in the presence of the testator, is not overcome by proof; hence the instrument was properly probated as the last will and testament of Peter O'Hagan." See, also, to the same effect, note to *Welch v. Welch*, 15 Am. Dec. 126; *Ela v. Edwards*, 16 Gray, 91; *Pates' Adm'r v. Joe*, 3 J. J. Marsh. 116; *Clarke v. Dunnavant*, 10 Leigh, 13; *Griffith's Ex'rs v. Griffith*, 5 B. Mon. 511; *Lamberts v. Cooper's Ex'r*, 29 Grat. 61; 29 Am. & Eng. Enc. Law, 199 et seq. The rule seems to have been the same in England both before and after the passage of Act 1 Vict. c. 26, in 1838. 1 Jarm. Wills, c. 6.

It is, however, insisted this view cannot be harmonized with the declaration of this court in *Dickie v. Carter*, 42 Ill. 376, *Crowley v. Crowley*, 80 Ill. 469, and *Canatsey v. Canatsey*, 180 Ill. 397, 22 N. E. 595. The first of these cases enumerated four things which it was declared must concur to entitle a will to probate, one of such things being stated as follows: "Two witnesses must prove that they saw the testator or testatrix sign the will in their presence, or that he or she acknowledged the same to be his or her act and deed." The later cases cited adopt the language of the former case as expressive of the true rule. It is contended the true interpretation of this language so employed by the court in *Dickie v. Carter*, *supra*, and quoted with approval in the later cases, is that it must be "proved" by at least two subscribing witnesses, to the will that they saw the testator or testatrix sign said will, or that it must be "proved" by said two subscribing witnesses that the said testator or testatrix acknowledged the will to be his or her act and deed. It is manifest such was not the interpretation which this court intended should be given to the language in question in *Dickie v. Carter*, *supra* (the case in which the language was first employed), for the reason that in that case the will was held to have been legally and duly proven, though one of the two subscribing witnesses thereto did not see the tes-

trix sign the will, and could not swear the testatrix acknowledged to him that the will was her act and deed. In that case the attestation clause bore the names of two subscribing witnesses, viz. George S. Pidgeon and one Fitzgerald. The witness Pidgeon testified that he drew the will, and that the testatrix signed it in his presence. Fitzgerald, the other subscribing witness, testified that he did not know the testatrix and did not see her sign the will; that he was in an office in Cairo, and the other attesting witness asked him to witness a paper; that he saw a lady in the office, and asked her, "Is this your signature?" and she answered, "Yes," whereupon he signed as a witness; that there were two women in the office, both unknown to him; that he did not know the woman he addressed, never saw her before or since, and did not know he was witnessing a will. This witness did not and could not "prove" that Mrs. Elizabeth Burnett, the testatrix, signed the will, or acknowledged it to be her act and deed; but other witnesses were produced, and their testimony "proved" that the woman who acknowledged to Fitzgerald that the signature to the will was her act and deed was the testatrix, and such proof was deemed competent and sufficient, in connection with the testimony of the subscribing witness, to sustain the will. It is manifest this court did not then understand that it could only be proved by the testimony of the subscribing witnesses that the testatrix acknowledged to the subscribing witnesses that the instrument purporting to be her will was her act and deed.

Nor do we think the interpretation claimed must be given to the language in question in order to harmonize the view adopted in this case with the principle which was accepted in *Crowley v. Crowley*, *supra*. In that case we said (page 470): "It cannot be claimed that the testimony of the subscribing witnesses to the will was sufficient to admit the instrument to probate. Neither of the witnesses had written his signature to the document, but each had signed by a cross, and they could not identify the instrument of writing as the one they had attested, nor could the witnesses testify that Daniel Crowley was, at the time the instrument of writing was executed, of sound mind and memory. * * * The evidence of the attesting witnesses failed entirely to establish two very important facts: First, the execution of the will, as they could not identify it as the one they signed as witnesses; second, they could not swear they believed the testator to be of sound mind and memory when the instrument was executed. So far, then, as appellant relied upon the evidence of the attesting witnesses to establish a state of facts under which the circuit court could admit the instrument of writing to probate, he failed entirely. It is, however, urged that as probate of the will was refused in the county court, on the trial of the appeal in the circuit court appellant was entitled, under section 13, c. 148, of 'Wills,' to prove

the will by any evidence competent to establish a will in chancery. The statute authorizes such proof on the trial of an appeal in the circuit court in a case where probate of the will was denied in the county court, and it was expressly held in *Andrews v. Black*, 43 Ill. 256, in such a case, for the purpose of establishing the sanity of the testator, resort might be had to the same character of evidence as upon a hearing of a bill in chancery, filed under the statute, to set aside the will. Appellant was not, therefore, bound to rely upon the testimony of the two attesting witnesses to establish the execution of the will or the sanity of the testator, but could resort to any legitimate evidence to establish the fact." The opinion then proceeded to show that, aside from the testimony of the subscribing witnesses, the only legitimate evidence produced which could be relied upon to establish the execution of the will was the testimony of the scrivener who drew the will, who testified that the alleged maker of the will executed it in the presence of the two attesting witnesses. It was insisted that the evidence of the scrivener was sufficient to establish the execution of the will, but we held that the requirement of the statute that the evidence of two witnesses should be required to establish that a testator executed a will could not be satisfied by the uncorroborated testimony of the scrivener. In that case proof of a valid and sufficient clause of attestation was wholly lacking. The attesting witnesses were unable to identify the will or the attesting clause, and the extent of the ruling was that the testimony of the scrivener alone was not sufficient to supply the proof demanded by the statute to establish the execution of the will. In the case at bar the attesting witnesses established that the attesting clause bore their genuine signatures. The signature of the deceased was also fully established. The defect in the proof was that the attesting witnesses were unable to recollect the facts connected with the action of the deceased and their action at the time they signed the attesting clause. In such state of case, we think the attesting clause competent to be received in evidence, and to be given such weight as it may be found properly to have in connection with the testimony of the attesting witnesses.

In *Canatsey v. Canatsey*, *supra*, the expression of the court in *Dickie v. Carter*, *supra*, is quoted, but neither the conclusion reached, nor any observation of the court in the course of the opinion, is antagonistic to the position assumed in the case at bar.

It appears a prior application had been made to the county court of Hancock county by the appellant to have the will under consideration admitted to probate, and that the attesting witnesses then signed and made oath to certain affidavits relative to the execution of the will. The county court then admitted the will to probate, but an appeal was prosecuted to the circuit court, and the appellant dismiss-

ed the proceeding before it was reached for hearing in the latter court. Whether the certificates of the oaths of said witnesses were competent to be received in evidence in the present proceeding is a question discussed in the briefs, and which we ought to determine, in view of the fact that the cause must be again tried. The circuit court deemed the certificates or affidavits of such witnesses competent to be received in evidence.

The seventh section of chapter 148 of the Revised Statute, entitled "Wills," provides that "the certificates of the oaths of the witnesses at the time of the first probate shall be admitted in evidence" on the hearing of a bill in chancery to contest a will. There was, however, no first probate. The appeal and the dismissal of the application by the appellant blotted out the order of the county court admitting the instrument to probate. Therefore the statute cited cannot operate to render the certificates admissible. The certificates tended, however, to contradict, in some degree, the testimony given by the subscribers thereto on the hearing. We think the certificates were, for this reason, competent to be received in evidence, together with the testimony of the subscribers thereto as to the facts and circumstances which attended the signing of the same. It is true the appellant introduced the witnesses before the court for the purpose of having them testify in her behalf; but the well-known general rule that a party who produces witnesses vouches for their integrity and credibility, and cannot be allowed to impeach and discredit them, has not full application where the law requires the party shall produce such witnesses in the cause. Under section 2 of our statute of wills, a party who desires a will to be admitted to probate must of necessity produce the subscribing witnesses, if living and within the jurisdiction of the court and sane, as witnesses in the probate court; and such party, on appeal from an order refusing to so admit the alleged will, is not relieved, by the provisions of the thirteenth section of the same statute, from the duty of laying before the circuit court the testimony of the subscribing witnesses, though such last-mentioned section authorizes such party to produce other testimony in addition to that of the subscribing witnesses. As to a witness whom a party is required by law to introduce, the rule is that the truthfulness and integrity of the witness is not vouched for, and that the party so producing the witness may bring forward proof of previous declarations at variance on material points with his testimony, for the purpose of impeaching him or contradicting his testimony on such points. 29 Am. & Eng. Enc. Law, p. 816, and cases cited in note 1.

Because of the error of the chancellor hereinbefore indicated, the order and decree of the circuit court must be reversed, and the cause remanded for further proceedings consistent with the views herein expressed. Reversed and remanded.

(152 Ind. 517)

PRESCOTT et al. v. HAUGHEY et al. 1

(Supreme Court of Indiana. Nov. 29, 1898.)

NEW TRIAL—JOINT MOTION—FAILURE AS AGAINST ONE—DISCRETION OF COURT—REVIEW.

1. Where a motion by plaintiffs for a new trial, in an action against joint defendants, is a joint motion against all defendants, and the judgment is proper as to one of the defendants, it is not error to refuse a new trial.

2. Where a motion by plaintiffs for a new trial is properly refused in the form in which it is made, because it is a joint motion against all defendants, as to one to whom the judgment was proper, the failure of the trial court to exercise its discretion, and sustain the motion only as to defendants, as to whom it might properly be sustained, cannot be reviewed.

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by William B. Prescott and another against Theodore P. Haughey and others. Judgment for defendants, and plaintiffs moved for a new trial, and from an order overruling the motion they appeal. Affirmed.

W. V. Rooker, for appellants. Hawkins & Smith, Ferdinand Winter, and Baker & Daniels, for appellees.

JORDAN, J. This action was instituted in October, 1893, and prosecuted in the lower court, by appellants, William B. Prescott and Abner G. Wines, to recover a money judgment against the defendants, appellees here, namely, Theodore P. Haughey, Charles F. Meyer, Robert B. F. Pierce, Harvey Satterwhite, and Schuyler Colfax, as the alleged directors of the Indianapolis National Bank, a banking institution organized under the laws of the United States, and situated and doing business in the city of Indianapolis. This bank failed and closed its doors in July, 1893, and subsequently was placed in the hands of a receiver. Appellants alleged in their complaint that, prior to the time of the failure of the bank, they were depositors of money therein, and purchasers of bills of exchange from said bank, which bills were returned protested, and not paid; and the gist of the complaint is that said defendants, as the directors of the bank, were guilty of fraud in making and publishing in certain newspapers, from time to time, prior to the failure of the institution, false reports in regard to its solvency, and the security and character of its assets, etc., which reports came to the knowledge of the plaintiffs, who, relying on the same as true, were induced to become depositors in the bank of a large amount of money, and patrons of the institution in the purchase of exchange, as heretofore mentioned. The falsity of these reports, and the deceit practiced thereby, and the damages sustained by the plaintiffs, are averred, and, on account of the alleged fraud or deceit imputed to the defendants, the plaintiffs sue them, and demand judgment against all. Appellees separately answered the complaint by a general denial of all of its mate-

rial allegations, and a trial by a jury resulted in the latter, by the direction of the court, returning a verdict in favor of all of the appellees. Appellants jointly applied for a new trial, and assigned 129 reasons in support of the motion, among which it is stated that the verdict is contrary to the evidence and is not sustained thereby. This motion the court denied, and appellants excepted, and the error, and the only one, assigned in this appeal, is predicated upon the action of the court in overruling the motion.

The application or motion for a new trial which appellants presented to the trial court was not only joint as to them, but it was so framed as to be in its nature or character a joint and general motion as to all the defendants, and the court thereby was requested to vacate the verdict, and grant a new trial, upon the issues as to all the defendants; or, in other words, appellants so formulated this motion as to place themselves thereunder in the attitude of demanding a re-examination upon all the issues involved in the case, and the grounds assigned therefor were made to apply to the defendants en masse, and the theory thereof was that the verdict was incompatible with the evidence as to all, and that the alleged erroneous rulings of the court were prejudicial to both of the moving parties, and favorable alike to all the defendants, and upon this theory, and this alone, appellants, in effect, insisted that the motion be sustained.

We have so fully referred to and set forth the character or theory of the application presented for a new trial, and the attitude in which appellants placed themselves thereby, for the reason that, at the very threshold of the consideration of the questions which they seek to present, we are confronted with the earnest contention of counsel for appellees that, inasmuch as the motion is not only joint as to the movers, but also a joint and general one as to all of the five defendants, against whom it is directed, therefore it must be well taken as against all, else the alleged error, that the court erred in overruling it, can in no respect be available. It is insisted by appellees that none of the reasons assigned in the motion, under the facts, will entitle appellants to a new trial as to the appellee Colfax, for the reason that there is an entire absence of any evidence offered or given upon the trial which even tends to establish, as against him, any liability. This contention of counsel we find to be fully supported by the record.

Appellants, on the trial, endeavored to sustain the issues or charge of fraud imputed by them in their complaint to the appellees by the introduction of reports made to the controller of the currency by the bank mentioned, as required by the statutes of the United States relating to national banks. These reports, in each particular instance, appear to have been attested, as exacted by the law authorizing them, by the signatures

¹Rehearing denied, 53 N. E. 766.

of at least three of the appellees, as the directors of the bank, and were published officially in a newspaper of the city of Indianapolis, and were published in other newspapers of that city, and also by means of "folders." None of the reports in question was signed by the appellee Colfax, and there is no evidence tending to show that he had any connection whatever, either in making any of the reports or in their publication. In fact, we fail to find any evidence in the record which can be accepted as disclosing that Mr. Colfax was a director of the bank, or that he was connected therewith, or that he had anything to do with the management of its affairs. Appellants seemingly made no effort to introduce any evidence which would entitle them, under their complaint, to recover against him. It was specifically stated by them to the court that the reports of the bank and other documentary evidence were offered as evidence against the appellees other than Colfax. When tested by the record, there are absolutely no facts to support, as against him, any of the grounds assigned in the motion for a new trial, and it is too clear for controversy that the action of the trial court, under the circumstances, in directing a verdict as to him, was proper and right, and there could be no reason for appellants' demanding a retrial of the issues as to him.

It is not a case where there is some evidence or some ruling of the court which can be said to be applicable to the defendant, but the case presented is one in which there is an entire absence of any such evidence and ruling. Appellants, it would seem, in the light of the evidence, improperly and unnecessarily brought the appellee Colfax into this action, and during the trial, when they must have been apprised by the facts that the charge of fraud as against him could not be sustained, instead of moving to dismiss the action as to him, they proceeded to prosecute it as against all, until the return of the verdict; and then, apparently not content with the result, they so formulated their motion and placed themselves in the position thereby of challenging, jointly and generally, under the facts, the right of Colfax to the verdict, so far as it concerned him, along with the rights of his co-defendants, instead of so framing the motion as to make it applicable alone to the latter. While the court might, perhaps, have exercised its discretion, if in its judgment the facts justified it, and sustained the motion upon all of the issues in the case, so far as the same related to the defendants other than Colfax, and affirmed the verdict as to him, still its failure to exercise such discretion in the matter is not available as reversible error, nor is it a proper question for review upon appeal to this court. *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018; *Elliott, App. Proc.* § 839. The reason for the rule, as asserted in *Dorsey v. McGee*, *supra*, is that, in order to make the

decision of the trial court, denying an application for a new trial, in any event a case for reversal on appeal, it should appear that it was presented to the court in the terms or on the theory upon which it ought to be sustained. That the trial court may, on a proper application, when authorized by the facts, vacate a verdict as to some of the parties, in whose favor it has been returned, and affirm it as to the others, cannot be controverted. The motion in question, as we have seen, however, was directed against the defendants as a body, and was, under the terms or reasons assigned therein, alike applicable to all; and the burden was upon the appellants, as the moving parties, to show that they were entitled to have it sustained as presented, otherwise there could be no available error imputed to the action of the court in overruling it. *Kendel v. Judah*, 63 Ind. 291. This rule, by analogy, finds support in the well-affirmed principle that a motion for a new trial must be good as to all who unite therein or it will not be good as to any; or, in other words, where two or more parties join in a motion or application to have a verdict or finding set aside and a new trial granted, it is properly denied if the verdict or finding of the court can be justified as to any of the moving parties. *Elliott, Gen. Prac.* § 992, and authorities there cited in footnote 1; *M. A. Sweeney Co. v. Fry* (at this term) 51 N. E. 234, and cases cited. It is also sustained by a similar rule, whereby it is held that where a complaint or other pleading, consisting of several paragraphs or specifications, is challenged as an entirety, by a demurrer for insufficiency of facts, the demurrer is properly overruled if one of the paragraphs or specifications, at least, is good, although the others may be bad (*Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815, and cases there cited); and it is also upheld by the same general principle, by which it is asserted that if a series of propositions be embraced in the charge of the court to the jury, and the charge be excepted to in a mass, and one of the propositions be correct, the exception is rightly overruled, regardless of the fact that the others may be bad. *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258; *State v. Gregory*, 132 Ind. 387, 31 N. E. 952; *Wertz v. Jones*, 134 Ind. 475, 34 N. E. 1. The rule is in harmony with the one which asserts that, where several parties unite in the same assignment of errors in this court, they will meet with defeat unless the assignment can be sustained as to all. *Elliott, App. Proc.* § 318. In fact, the doctrine that a motion for a new trial ought to be presented to the court in terms or upon the theory which all who unite therein have the right to insist that it shall be sustained, is but the application of the general principle, so often affirmed, as shown by the authorities to which we have referred. It must follow, under the circumstances, as a necessary result of the application of the rule in

question, that we can do nothing in this appeal but ascertain whether appellants are entitled, under their motion, to insist, as they did, that the verdict should be set aside as to all of the appellees; and finding that they are not entitled to have it vacated as to the appellee Colfax, for the reasons stated, we must affirm the judgment without further inquiry as to the merits of the questions which appellants seek to present in regard to the other appellees. Judgment affirmed.

McCABE, J., doubts.

(152 Ind. 651)

HAY v. MARSH et al.¹

(Supreme Court of Indiana. Nov. 29, 1898.)

FRAUDULENT CONVEYANCE—EVIDENCE—SUFFICIENCY—FINDINGS OF FACT—REVIEW.

1. Where a vendor testified that he had received from the vendee several items of cash and personal property; that these had not supplied the consideration for the conveyance, but had been paid for or secured by the assignment of a judgment; that the vendee "gave nothing for the deed"; that he told vendee of his debt to plaintiffs, but he "said he would do them up,"—the evidence is sufficient to justify a setting aside of the conveyance as fraudulent as to creditors.

2. Where there is evidence which, if standing alone, would support a finding by the trial court, the supreme court must disregard all evidence in conflict therewith.

Appeal from circuit court, Clark county; Jacob Herter, Judge.

Action by James K. Marsh and others against Charles S. Hay. Judgment for plaintiffs, and defendant appeals. Affirmed.

Burt & Taggart, for appellant. L. A. Douglass and James W. Fortune, for appellees.

HACKNEY, J. The question in this case is as to the validity, as against creditors, of a conveyance by one McDanel to the appellant. The only contention on behalf of the appellant is that the evidence showing a conveyance for an adequate consideration did not establish a fraudulent design on the part of Hay, the grantee. The grantor testified that he had received from Hay several items of cash and personal property; that these had not supplied the consideration for the conveyance, but that he had assigned to Hay a certain judgment in payment or as security therefor; that "Hay gave * * * nothing for the deed"; that he told Hay of his indebtedness to the appellees, but Hay "said he would do them up" (meaning that he would beat them out of their claim). There was evidence in conflict with this, but we are not permitted to weigh and determine conflicts in evidence. When there is evidence which, if standing alone, supports a finding of the trial court, it is our duty to accept such evidence, and to disregard all evidence in conflict therewith. The evidence to which we have referred very clearly authorized the finding of fraud on the part of the appellant, it having

been further shown that the debtor possessed no other property at the time of the conveyance or since. The judgment is affirmed.

(151 Ind. 485)

STATE v. McEWEN.

(Supreme Court of Indiana. Nov. 29, 1898.)

CRIMINAL LAW—APPEAL—PRESUMPTIONS—VARIANCE.

1. Where there is no statement in the bill of exceptions, nor evidence in the record, showing that the instruction refused was relevant, it will be presumed that it was refused because there was no evidence to which it was applicable.

2. While it is neither necessary nor proper, in appeals by the state, to set forth the evidence in full, yet, where the refusal to give an instruction is assigned as error, there must be some statement in the bill of exceptions showing that such instruction was relevant, as, without such statement, nothing arises but an abstract question.

3. Where an indictment charges larceny from "Frank" A., and the evidence shows the larceny to have been from "Franklin" A., it cannot be presumed that the names apply to the same person; and, in the absence of testimony showing such fact, the variance will be fatal.

Appeal from circuit court, Johnson county; W. J. Buckingham, Judge.

Alfred McEwen having been acquitted of larceny, the state appeals. Affirmed.

Alonzo Blair, Wm. E. Dupree, and M. L. Herbert, for the State. W. A. Johnson and Miller & Barnett, for appellee.

McCABE, J. The appellee was prosecuted for the crime of larceny in the Johnson circuit court, and was acquitted. The state appeals, and assigns as error the refusal to give the following instruction: "I instruct you, gentlemen of the jury, that if the indictment in this cause shows and alleges that the property stolen or alleged to have been stolen was owned at said time by Jackson A. Pruitt and Frank A. Pruitt, and the evidence shows that the property stolen was the property of Jackson A. Pruitt and Franklin A. Pruitt, and that said Franklin A. Pruitt is, and for years has been, known and been doing business in the name of and called himself Frank A. Pruitt, then I instruct you that there would be no variance between the evidence and the allegation of the indictment that would entitle the defendant to an acquittal under the law; but the jury are the exclusive judges of both the law and the evidence." The evidence is not in the record, nor is there any statement in the bill of exceptions or in the record showing that this instruction was relevant to the evidence, and hence no question of law is presented for decision. Without some statement of the evidence, we must presume that the instruction was refused because there was no evidence to which it was applicable. While it is true that it is neither necessary nor proper, in appeals by the state, to set forth the evidence in full, it is also true that there must be some statement in the bill of

¹Rehearing denied. See 51 N. E. 1095. Rehearing denied.

exceptions showing that there was evidence to which the instructions were relevant. It is a well-established principle in appellate procedure that the court will not decide mere abstract questions, and, where there are no facts stated, nothing but abstract questions can, in such a case as this, arise upon a ruling refusing instructions. *State v. Kern*, 127 Ind. 465, 26 N. E. 1076.

The giving of an instruction is assigned by the state as error, reading as follows: "The names of the persons who are alleged to be the owners of the money alleged to have been stolen are material allegations of the indictment, and must be proven as charged; so, if you find from the evidence that the name of one of the owners of the money alleged to have been stolen was Franklin A. Pruitt, then you must find the defendant not guilty." The alleged names of the owners of the money alleged to have been stolen were Jackson A. Pruitt and Frank A. Pruitt. If the evidence showed that the name by which Franklin A. Pruitt was commonly known was Frank A. Pruitt, even though Franklin A. Pruitt was his correct name, the instruction was erroneous, because the name by which a person is commonly known may be employed in an indictment, and it will be good if the proof shows that he is commonly known by that name. *Bish. New Cr. Proc.* § 686; *Whart. Cr. Ev.* § 95; *Ehlert v. State*, 93 Ind. 76; *Henry v. State*, 113 Ind. 304-307, 15 N. E. 593; *Walter v. State*, 105 Ind. 589, 5 N. E. 735; *Kruger v. State*, 135 Ind. 573, 35 N. E. 1019; *Hix v. People*, 157 Ill. 382, 41 N. E. 862. But, the evidence not being in the record, and no statement therein as to what the evidence showed, we cannot, as the attorney for the state seems to suppose, presume that the evidence showed that Franklin A. Pruitt was commonly known by the name Frank A. Pruitt. In the absence of such evidence or statement in the record, proof that the name of one of the owners of the stolen money was Franklin A. Pruitt instead of Frank A. Pruitt would be a fatal variance. See the authorities last above cited. Therefore we cannot say that the court erred in giving the instruction. The appeal is not sustained.

(151 Ind. 496)

STATE v. WINSTANDLEY.

(Supreme Court of Indiana. Nov. 29, 1898.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—INSTRUCTIONS—ASSIGNMENT OF ERROR.

1. Bills of exceptions, in a criminal case, to the giving or refusing of instructions, cannot be considered, unless they affirmatively show that they contain all the instructions.

2. An assignment of error, based on the admission of evidence, will not be reviewed where the page and line of the record where same may be found are not pointed out.

Appeal from circuit court, Clark county; George H. D. Gibson, Judge.

Isaac S. Winstandley was acquitted of embezzlement, and the state appeals. Affirmed.

Wm. A. Ketcham, H. C. Montgomery, W. C. Utz, and J. K. Marsh, for the State; Kelso & Kelso, M. Z. Stannard, A. Dowling, Jewett & Jewett, and W. H. Watson, for appellee.

MONKS, C. J. Appellee was indicted, tried, and acquitted of the charge of embezzlement. The indictment was based upon section 2031, Burns' Rev. St. 1894 (Acts 1891, p. 395). The state has appealed, and has assigned numerous errors, calling in question the action of the court in giving and refusing to give instructions. So far as the record shows, the court was not requested to instruct the jury in writing, nor is it shown that all the instructions given were in writing. Bills of exceptions containing instructions given by the court, as well as instructions requested by appellant, which the court refused to give, were signed and filed in the court below; but it is not stated in said bills, or either of them, that all the instructions given by the court are set forth therein. On the contrary, it is affirmatively shown by one of the bills of exceptions that some of the written instructions given have been omitted from the record. When, in a criminal case, it is not affirmatively shown by the bill of exceptions that it contains all the instructions given by the court to the jury, this court must presume that such bill of exceptions does not contain all the instructions given. *Cooper v. State*, 120 Ind. 377, 383, 384, 22 N. E. 320. In such case the presumption is that the substance of the instructions asked was embraced in the instructions given by the court which are not contained in the bill of exceptions, and that, if any instructions given by the court, and set out in the bill of exceptions, are erroneous, they were corrected or withdrawn by other instructions given by the court, and not set forth in the record. *Pence v. Waugh*, 135 Ind. 143, 157, 158, 34 N. E. 860; *Board v. Nichols*, 139 Ind. 611, 619, 620, 38 N. E. 528; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *Forsyth v. Wilcox*, 143 Ind. 144, 150, 41 N. E. 371. This doctrine is fully sustained by an eminent writer on the subject of appellate procedure, who says: "It has been again and again decided that the trial court is presumed to have given the jury correct instructions upon all the material points in the case. A party who desires to break the force of the presumption must present to the court on appeal a record fully and clearly showing that the trial court erred in giving or refusing to give instructions. * * * The presumption is not overcome by bringing a part only of the instructions into the record, since the presumption is that those not in the record cured errors or defects in those that were given to the jury. It is necessary, in order to break the force of the presumption, to bring all of the instructions into the record, or to show, when such a showing is allowable, that the instructions not in the record do not affect the point in controversy." *Elliott, App. Proc.* § 722. The same doctrine is declared and ap-

plied to other proceedings in the trial court. In *Robb v. State*, 144 Ind. 569, 43 N. E. 642, complaint was made of misconduct of the prosecuting attorney in his opening statement to the jury, and this court held that it would presume that the trial court, in its instructions, withdrew any such misstatements of a prejudicial character, and directed the jury to disregard them, for the reason that all the instructions given were not in the record. The court, at page 572, 144 Ind., and page 643, 43 N. E., said: "However, it is the duty of this court to indulge all reasonable presumptions in favor of the action of the trial court, and in doing so in this instance we must presume, the contrary not appearing, that the court, in its charges to the jury, withdrew any misstatements of a prejudicial character, and directed the jury to ignore them." If the presumption in such a case is that the trial court withdrew the improper statements of the prosecuting attorney, and directed the jury to disregard them, it certainly follows that, if the instructions are not all in the record, and any instruction contained therein is erroneous, it will be presumed, not only that the same was corrected, or the defect therein supplied by other instructions given, and omitted from the record, but that the same was withdrawn, and the jury directed to disregard it, if such presumption is necessary to prevent a reversal of the cause. It is true that it has been said in several cases where the instructions given were not all in the record that, unless the instructions in the record which were complained of were so radically wrong that no supposable instruction could correct them, a reversal would not follow, but it would be presumed that other instructions, not in the record, were given, which, when construed with those in the record, all taken together, correctly stated the law to the jury. *Treager v. Mining Co.*, 142 Ind. 164, 166, 167, 40 N. E. 907, and cases cited. But we have not been cited to any case, and we have been able to find only one,—*Vancleave v. Clark*, 118 Ind. 61, 66, 20 N. E. 527,—in which this court, when the instructions given were not all in the record, refused to indulge the presumption that an error in giving an instruction was cured by another plainly withdrawing it, and reversed the cause because such withdrawal was not affirmatively shown by the record. In the case of *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630, it was said that "the giving of a fatally erroneous instruction can only be cured by a plain withdrawal of such instruction, and that the withdrawal of such instruction will not be presumed, but must be affirmatively shown"; citing a number of cases. In that case, however, it was held that the record showed that all the instructions given were in the record. Under such circumstances, where all the instructions given are in the record, the record must show that the fatally erroneous instruction was plainly withdrawn by another instruction. None of the cases cited in the case last named

lend any support to the doctrine that, where all the instructions are not in the record, it must affirmatively appear that a "fatally erroneous instruction was withdrawn; and, so far as *Lower v. Franks* may seem to hold such doctrine, it was obiter dicta. The same may be said of all the cases, except *Vancleave v. Clark*, supra, which seem to hold that, where all the instructions are not in the record, it will not be presumed that a "fatally" erroneous instruction given was withdrawn by another instruction, not in the record, but that such withdrawal must be affirmatively shown by the record. The general rule declared by the decisions of this court is that errors in instructions cannot be considered when all the instructions are not in the record. *Hannan v. State*, 149 Ind. 81, 47 N. E. 628; *Hawley v. Zigerly*, 135 Ind. 248, 249, 34 N. E. 219; *Clanin v. Fagan*, 124 Ind. 304, 305, 24 N. E. 1044; *Gallaher v. State*, 101 Ind. 411; *Musgrave v. State*, 133 Ind. 313, 32 N. E. 885. In *Pence v. Waugh*, supra,—an action to contest a will,—the court instructed the jury that, to entitle the plaintiffs to recover, they must prove both unsoundness of mind and undue influence. The court, in another instruction, said that, if the unsoundness of mind of the testator was established, plaintiffs could recover. This instruction, while correct, contradicted the one first mentioned, which was clearly erroneous. The correct instruction did not withdraw the first, the erroneous one; nor do the two, when considered together, correctly state the law. The only way that the error in giving such erroneous instruction could be corrected was by giving another, plainly withdrawing the same, and directing the jury to disregard it. *Roller v. Kling*, 150 Ind. 159, 163, 164, 49 N. E. 948; *Railway Co. v. Nofstger*, 148 Ind. 101, 109, 47 N. E. 332; *Wenning v. Teeple*, 144 Ind. 189, 196, 41 N. E. 600, and cases cited. The instructions were not all in the record, and this court refused to reverse the case for that reason.

In *Board v. Nichols*, 139 Ind. 611, 619, 38 N. E. 529, this court said, in regard to this question: "Possibly, if a charge were found to be so radically misleading and erroneous as not to be pertinent to any possible view of the case made by the pleading or the evidence, and one which was so prejudicial that its evil effects could not be said to be withdrawn by another charge, it might be considered, notwithstanding the absence of other charges from the record." This is an express recognition of the rule that, when all of the instructions given are not in the record, it will be presumed, when necessary to sustain the judgment of the court below, that any erroneous instructions given were withdrawn, and the jury directed to disregard the same; but the court, in the part of the opinion quoted, goes further, and intimates that an erroneous instruction might be so prejudicial that no instruction withdrawing the same could cure the error, and that in such case

the erroneous instruction would be considered, although all the instructions given were not in the record. In *Gallaher v. State*, 101 Ind. 411, 412, this court said: "The safer practice is to bring all the instructions into the record. There may, perhaps, be cases where this court could decide that there was an error in giving instructions without having all the instructions before it, but the case that would warrant such a course must be an extraordinarily strong one." The presumption that an erroneous instruction was withdrawn is necessary to sustain the judgment of the trial court, when the instructions are not all in the record, is as reasonable, and no more radical or violent, than the presumption that instructions were given which corrected the error in those contained in the record, or the presumption that the court withdrew the prejudicial statements of the prosecuting attorney, and directed the jury to disregard them, as in *Robb v. State*, supra. As said by Judge Elliott in his work on Appellate Procedure (section 709): "If the appellate tribunal is compelled to resort to presumptions, it will choose that which sustains the proceedings of the trial court, and reject that which would overthrow them. If the condition of the record is such as to require the higher court to act upon a presumption, it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted."

It is also assigned as error that the court erred in refusing to admit in evidence the deed of assignment of the Bedford Bank. Counsel for appellant have not called our attention to the page and line of the record where any such evidence was offered by the state, or where the court made any such ruling as that complained of. Rule 26 of this court requires the party asserting that a ruling of the trial court is erroneous to cite the page and line of the record where the same may be found, and it has been repeatedly held by this court that, if this rule was not complied with, it would not search the record to find such error. *Siberry v. State*, 149 Ind. 684, 689, 39 N. E. 936; *Burnett v. Milnes*, 148 Ind. 230, 236, 46 N. E. 464; *Packet Co. v. Pikey*, 142 Ind. 304, 317, 40 N. E. 527; *Harness v. State*, 143 Ind. 420, 422, 423, 42 N. E. 813; *May v. State*, 140 Ind. 88, 94, 95, 39 N. E. 701; *Harlan v. State*, 134 Ind. 339, 342, 33 N. E. 1102; *Railway Co. v. Donnegan*, 111 Ind. 179, 190, 12 N. E. 153; *Sanders v. Scott*, 68 Ind. 130, 132; *Rout v. Woods*, 67 Ind. 319, 326; *Brunner v. Brennan*, 49 Ind. 98-101; *Elliott*, App. Proc. § 440. Finding no available error in the record, the appeal is not sustained.

(151 Ind. 511)

LANE v. STATE.

(Supreme Court of Indiana. Nov. 29, 1898.)

MURDER—INDICTMENT—SUFFICIENCY—APPEAL—REVIEW—RECORD—DYING DECLARATIONS.

1. An indictment charging that accused killed and murdered a certain person by shooting

against him with a gun loaded with powder and leaden balls, charges the death of such person by the act of accused.

2. An indictment that accused "did then and there unlawfully, feloniously, purposely, and with premeditated malice unlawfully kill and murder G., by then and there feloniously, purposely, and with premeditated malice, shooting at and against the said G.," charges murder in the first degree with sufficient certainty to enable the court, on conviction, to pronounce judgment, and without unnecessary repetition, within Burns' Rev. St. 1894, § 1824, cls. 4, 5 (Hornor's Rev. St. 1897, § 1755).

3. An indictment that accused killed and murdered another states a matter of fact, and not a conclusion.

4. Error in giving or refusing instructions cannot be reviewed unless the bill of exceptions affirmatively shows that it contains all the instructions given.

5. To make instructions a part of the record in a criminal case, a bill of exceptions is necessary. Setting them out in the transcript under an order of the trial judge reciting that they were given to the jury, and ordering them to be made part of the record, is insufficient.

6. Under a specification for new trial because of the admission of a dying declaration as an entirety, error in not excluding a portion of it cannot be considered.

7. Deceased's dying declaration that he made no attempt to injure accused is admissible, being a statement of fact, and not an opinion.

8. A motion to strike evidence is properly overruled where the objection is not the same as that raised when the evidence was offered.

9. Where several dying declarations are made at different times, all are admissible.

10. An oral dying declaration is not inadmissible, because declarant subsequently made another declaration in writing.

11. The appellate court will not weigh conflicting evidence.

Appeal from circuit court, Clinton county; James V. Kent, Judge.

Robert Lane was convicted of murder in the first degree, and appeals. Affirmed.

W. R. Moore and W. H. Everroad, for appellant. Wm. F. Palmer, Wm. A. Ketcham, and Merrill Moores, for the State.

MONKS, C. J. Appellant was tried and convicted of the crime of murder in the first degree, and his punishment assessed at imprisonment for life. It is insisted that the court erred in overruling appellant's motion to quash the indictment, for the reason that the indictment does not show that the death of Thomas Good was caused by the alleged act of appellant. The indictment charges "that one Robert Lane, on the 20th day of October, 1897, at said county of Clinton, and state of Indiana, did then and there unlawfully, feloniously, purposely, and with premeditated malice, unlawfully kill and murder Thomas Good, by then and there feloniously, purposely, and with premeditated malice shooting at and against the said Thomas Good with a gun, which was then and there loaded with powder and leaden balls." The indictment charges in clear and unmistakable terms that appellant killed and murdered Thomas Good by shooting at and against the said Good with a gun loaded with powder and leaden balls, and this is certainly a direct averment that Good died, and that the cause of death was

appellant's acts, as alleged in the indictment. *Wood v. State*, 92 Ind. 269, 270; *Melers v. State*, 56 Ind. 336, 342; *Welch v. State*, 104 Ind. 347, 348, 3 N. E. 850. The offense charged, "murder in the first degree," is clearly set forth in plain and concise language, without unnecessary repetition, and is stated with that degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case, as required by the fourth and fifth clauses of section 1824, *Burns' Rev. St. 1894* (section 1755, *Horner's Rev. St. 1897*). Under the Code of Criminal Procedure in this state, no more certainty is required in criminal than in civil pleading; all that is required is that the averments be certain to a common intent. *Melers v. State*, supra; *McCool v. State*, 23 Ind. 127, 129; *State v. Jenkins*, 120 Ind. 268, 269, 22 N. E. 133; *State v. Hopper*, 133 Ind. 460, 464, 32 N. E. 878; *Gillett, Cr. Law* (2d Ed.) § 125. Appellant insists, however, that the allegation "that appellant killed and murdered Thomas Good" is simply a conclusion. In *Bechtelheimer v. State*, 54 Ind. 128, there was no specific allegation in the indictment that the death of the deceased was caused by the alleged wrongful acts of the appellant, and objection was made to the indictment for that reason. Upon that question this court said (at page 133): "It is, however, alleged that the appellant and Young, by the means aforesaid, did kill and murder her. If this is true, the woman is dead, for the word 'murdered' ex vi termini imports death. *Cordell v. State*, 22 Ind. 1. If the allegation is true, moreover, she died by means of the administration of the poison. This objection is not well taken." There is no defect or imperfection in the indictment which tended to prejudice the substantial rights of the defendant upon the merits of the case. Section 1825, *Burns' Rev. St. 1894* (section 1756, *Horner's Rev. St. 1897*). The court did not err in overruling the motion to quash.

A number of causes for a new trial are assigned, calling in question the action of the court in giving certain instructions to the jury and in refusing to give each of the instructions asked by appellant. In order to present any question concerning the action of the court in giving or refusing to give instructions, the bill of exceptions must affirmatively show that it contains all of the instructions given by the court to the jury. *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *State v. Winstandley* (this term), 51 N. E. 1054; *Hannan v. State*, 149 Ind. 81, 83, 47 N. E. 628; *Reynolds v. State*, 147 Ind. 3, 12, 46 N. E. 31; *Robb v. State*, 144 Ind. 569, 572, 43 N. E. 642; *Forsyth v. Wilcox*, 143 Ind. 144, 151, 41 N. E. 371; *Elliott, App. Proc.* § 722. The bill of exceptions in this case does not affirmatively show that it contains all of the instructions given to the jury; on the contrary, it affirmatively shows that it does not contain all the instructions given to the jury. No question is presented, therefore, by said specifications, for

51 N.E.—67

a new trial. It is true that a number of instructions are set out in the transcript, as well as an order of the trial court making them a part of the record, and it is recited therein that said instructions were given to the jury by the court; but this does not make said instructions a part of the record, for the reason that in a criminal case instruction can only be brought into the record by a bill of exceptions. *Bealer v. State*, 150 Ind. 391, 392, 50 N. E. 302, and cases cited; *Graybeal v. State*, 145 Ind. 623, 44 N. E. 641, and cases cited.

It is insisted that the court erred in admitting in evidence a dying declaration of Thomas Good, which was reduced to writing, and signed by him. Counsel for appellant, in their brief, do not insist that the court erred in admitting the dying declaration as an entirety, but that the part which reads as follows: "I made no attempt to injure him," should have been excluded by the court. Two causes for a new trial call in question the action of the court in admitting such dying declaration as an entirety, but do not call in question the action of the court in admitting the part of said dying declaration complained of in this court. No question, therefore, is presented to this court concerning the admissibility of the part of said dying declaration above quoted. The same was, however, clearly admissible, under the doctrine declared by this court in *Boyle v. State*, 97 Ind. 322-328; and in *Boyle v. State*, 105 Ind. 469-475, 5 N. E. 203, and cases cited. See, also, *Wroe v. State*, 20 Ohio St. 460; *Roberts v. State*, 5 Tex. App. 141; *Payne v. State*, 61 Miss. 161; *State v. Nettlebush*, 20 Iowa, 257; *Sullivan v. State*, 102 Ala. 135, 15 South. 264; *State v. Black*, 42 La. Ann. 861, 8 South. 594; *Rex v. Scaife*, 1 Moody & R. 551.

During the progress of the trial, one Warren, a witness for the state, testified to certain statements made to him by the deceased after he received the fatal wound, concerning who shot him, and the circumstances immediately connected therewith. Appellant objected to the evidence on the ground that it had not been shown that the deceased, when he made said statements to the witness, had abandoned all hope of recovery, and believed that death was near at hand. We cannot say the preliminary proof was not sufficient to authorize the trial court to find that the deceased, when he related to the witness Warren the circumstances immediately connected with his injury, believed that his death from the wounds received was not only certain, but that it was near at hand. Under such circumstances, dying declarations are admissible in evidence. *Underh. Cr. Ev.* § 103; *Gillett, Ind. & Col. Ev.* § 195. After the witness Warren had testified, and left the witness stand, and a number of other witnesses had testified, appellant moved the court "to strike out and withdraw the evidence of said Warren as to the dying declaration of Good, the deceased, and direct the jury to disregard the

same, for the reason that the statement of the deceased, testified to by Warren, was prior and anterior to the one afterwards made by the deceased, which latter statement was reduced to writing, and signed by the deceased, and was read to the jury as the dying declaration of the deceased." This motion was overruled by the court. It is settled that a motion to strike out and withdraw the evidence, or any part of the evidence, of a witness, for reasons different from those interposed when the evidence was offered and introduced, is properly overruled. *Bingham v. Walk*, 128 Ind. 164, 172, 173, 27 N. E. 483; *Newlon v. Tyner*, 128 Ind. 466-471, 27 N. E. 168, and 28 N. E. 59; *Railway Co. v. Wynant*, 134 Ind. 681, 694, 34 N. E. 569. If the objection to said evidence presented by said motion had been made when the evidence was offered, the motion was properly overruled, because, if dying declarations are made at different times, all are admissible; and the fact that the dying declaration made at one of the times was reduced to writing, and signed by the declarant, will not render those made at other times inadmissible. *People v. Simpson*, 48 Mich. 474, 478, 12 N. W. 662; *Krebs v. State*, 8 Tex. App. 1-29; 6 Am. & Eng. Enc. Law, 134; *Underh. Cr. Ev. § 112*; *Whart. Cr. Ev. § 295*.

Appellant insists that the verdict is not sustained by the evidence. There was evidence from which the jury had the right to find the defendant guilty as charged, and, although there was a conflict, we cannot, under the well-settled rule, weigh the evidence. *Shields v. State*, 149 Ind. 395, 412, 49 N. E. 351, and cases cited. No available error appearing in the record, the judgment is affirmed.

(152 Ind. 484)

LAYMAN v. HUGHES et al.¹

(Supreme Court of Indiana. Nov. 29, 1898.)

**HIGHWAYS—ASSESSMENTS—COLLATERAL ATTACK—
REPORT OF VIEWERS—AMENDMENT BY
COMMISSIONERS.**

1. In a collateral attack by injunction on assessments against plaintiff's lands to pay the expenses of constructing a macadamized road, in pursuance of Rev. St. 1881, §§ 5091-5103 (*Burns' Rev. St. 1894, §§ 6855-6867*), mere irregularities or defects in making the assessment cannot be inquired into, where the board of commissioners had jurisdiction.

2. A complaint to enjoin the collection of assessments on plaintiff's lands to pay the expenses of a road constructed under Rev. St. 1881, §§ 5091-5103 (*Burns' Rev. St. 1894, §§ 6855-6867*), alleging that his lands had never been reported by any engineer or by any viewers as benefited by the road, is insufficient, without further alleging what the commissioners' record discloses on the subject, since ample authority is conferred on the commissioners by the statute to make all needed corrections and supply all omissions.

Appeal from circuit court, Putnam county; R. W. McBride, Special Judge.

Action by James T. Layman against George W. Hughes and others. From a judgment for defendant Hughes, plaintiff appeals. Affirmed.

Moore & Bro. and S. D. Coffey, for appellant. Frank D. Ader and H. H. Mathias, for appellees.

McOABE, J. The appellant, Layman, sued the appellee Hughes, as treasurer of Putnam county, to enjoin the collection of certain assessments upon appellant's land to defray the expense of the construction of the Mt. Meridian and Putnamville free macadamized road. The other appellees, who were defendants below, filed cross complaints setting up the same facts, substantially, set forth in the complaint, the only difference being that each cross complaint refers to the land owned by such cross complainant, and assessed for such road, instead of the land owned by the plaintiff. Each defendant filed a separate cross complaint. Demurrers to the complaint and to each cross complaint were sustained for want of sufficient facts, and, the plaintiff and cross complainants failing to amend or plead further, judgment was rendered that the plaintiff and cross complainants take nothing by the complaint or cross complaints. These rulings are called in question by the assignments of error. There are 18 separate assignments of error under different titles. The first one makes the plaintiff below the sole appellant, and the defendants below, or cross complainants, appellees. In the other 17 assignments, one or more of the cross complainants are made appellants, and the balance of them are made appellees, along with the plaintiff below.

This being a vacation appeal, the proper parties are required to be made. All of the parties to the appeal are made both appellants and appellees. And, unless we regard this as 18 separate appeals, which is not authorized in one transcript, we would probably be justified in dismissing the appeal. We held in *Gregory v. Smith*, 139 Ind. 48, 38 N. E. 395, that the same party cannot be both appellant and appellee. But, as it is not discussed or noticed in the argument, we will not pass upon it.

The case of *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330, was an action to enjoin the collection of assessments made by the same order of the board of commissioners, and for the same irregularities relied on in this action, but by different landowners from those involved here. The record shows that the trial court was controlled in sustaining the demurrers by the law as declared in that case. We held in that case that the defects in the proceedings of the board were mere irregularities that did not affect the jurisdiction of the board, and that the record showed that it had complete jurisdiction, and that its orders and judgment in establishing the road and making the assessments could not be collaterally impeached by an injunction. In one of the briefs of appellant's counsel it is substantially conceded that that case is decisive of this, but it is contended that that case was wrongly decided, and ought to be overruled.

It is contended that that case is in conflict with *Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949. In the latter case, on appeal from the board to the circuit court, it was attempted to show that there were other lands, not reported benefited, that were actually benefited. This offer was rejected in the circuit court, and its action affirmed in this court, because no such question was raised in the commissioners' court by attacking the report of the viewers before the board. This court there said: "Unless some such action was taken, we think the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed." It is therefore urged that the language, "the territory sought to be assessed," as used in the statute, means the lands embraced in the report of the viewers. The whole case shows that no such thought existed in making the decision. If that were so, as soon as a report of viewers is made, showing certain lands benefited within the two-mile limit, that would end the controversy, even though other lands were within the two-mile limit actually benefited, but not so reported. If the report of the viewers, leaving such actually benefited lands out of such report, excludes the jurisdiction of the board as to such omitted lands, as is contended by appellant, then such jurisdiction does not depend on facts, but on mistakes. But this court there explicitly denied such a construction of the statute by saying: "We do not hold that the parties interested may not, upon the return of the report of the viewers, attack it before the board by proper pleading, upon the ground that it does not include all the lands benefited, and procure new viewers and a new report; but no such question is presented here, for nothing of the kind was attempted." Now, if such irregularities and defects cannot be inquired into on appeal from the board to the circuit court, simply because they were not attacked before the board, there is much greater reason why they cannot be inquired into on a collateral attack by injunction. That case is not in point here, because this is a collateral attack, and that was a direct attack by appeal, the purpose of which is in the nature of an attempt to correct errors by a trial de novo.

An injunction against a judgment establishing a gravel road, and making assessments therefor, proceeds upon the idea that the proceedings and judgment of the board are void. If the board had jurisdiction, its proceedings are not void, though ever so erroneous. In the other brief, on behalf of appellant, it is contended that Judges McGregor and McBride had a misconception of the purport of the opinion in *Bowen v. Hester*, supra. It is said in said brief that: "It appears from the statement of the record in the case of *Bowen v. Hester*, supra, that the viewers amended their report so as to include the lands of appellee in that case. If this was true, of course he could not enjoin the collection of the assessment,

for the viewers have the right, at any time before they are discharged, to amend their report. Therefore, when this court held, under this state of facts, that *Hester* could not enjoin, it decided all there was in the case." That case shows that the report of the viewers was made and filed before the amendment thereto was made by adding the lands in controversy; that the amendment was made by the board by adding the omitted lands. But it is contended that that case is not controlling here, because nothing of the kind appears in the complaint here. While it is alleged in a vague and indefinite manner only that appellant's lands were assessed, it is substantially averred that they had never "been reported by said engineer and viewers, or any other engineer and viewers, as benefited, and ought to be assessed to pay for the cost of said improvement." But it is not alleged what the commissioners' record states or discloses upon the subject. The complaint does allege in one place that the report of the viewers and engineer that certain lands therein described would be benefited was filed, and it did not include appellant's lands, and that such report appeared of record. So the complaint does not set forth what steps were taken by the commissioners before the order assessing appellant's lands for the improvement. It alleges that appellant's "lands were not reported by said engineer and viewers, or by any other engineer and viewers, as benefited," but it fails to aver what the commissioners' record states as to the matter. All these averments may be true, and yet it may also have been true, as shown by the complaint in the case of *Bowen v. Hester*, supra, that the board had entered of record the following order: "Comes now McC. Hartley, auditor, and presents the report of John W. McNarry, William Broadstreet, and James H. Sparks, viewers in the cause filed within, and said report is as follows, after correction made by the board from evidence submitted: * * * And now come said viewers, and report the following lands and lots benefited, which said lands and lots are by the board added to the foregoing list, and after correction to stand assessed," etc. In *Ricketts v. Spraker*, 77 Ind. 378, it is said: "The statute confers ample authority upon the commissioners to make all needed corrections and to supply all omissions." After quoting the statute, that case continues: "For anything that appears, the commissioners may have added to the assessment roll the lands alleged to have been omitted. The presumption is that they did their duty, and placed all the lands upon the list. It was at least incumbent upon the appellants to show not only that the committee omitted lands, but that other public officers did not supply the omission." This is one of the cases on which *Bowen v. Hester*, supra, is founded. This is but an application of the general doctrine to this

sort of a case, and that doctrine is thoroughly settled by our decisions that a record of a judgment cannot be impeached collaterally by allegation of matters dehors the record unless the complaint states what is shown by the record in relation to such matters. *Bailey v. Rinker*, 146 Ind. 129, 136, 137, 45 N. E. 38, and authorities there cited on this point; *Fitch v. Byall*, 149 Ind. 554-558, 49 N. E. 455; *Denton v. Arnold* (at this term) 51 N. E. 240. And in *Million v. Board*, 89 Ind., at page 15, quoting from *Stoddard v. Johnson*, 75 Ind. 20, it is said: "The complaint charges numerous errors and defects in the reports of the original viewers and of the committee of apportionment; as, for instance, that benefited lands had been omitted, and other tracts so defectively described as that the assessments made thereon were void. It is evident, however, that these and like objections do not affect the jurisdiction, and, if true, constitute errors and irregularities which the law expressly authorizes the board to correct at any time." Both of the cases last referred to were among the cases on which the decision in *Bowen v. Hester*, supra, was founded. It is therefore clear that that case was correctly decided; and, even if the complaint does not show that the report of the viewers was amended and corrected by the board, in the absence of any averment in the complaint in this case as to what the record of the commissioners shows as to that matter, it is insufficient to uphold a collateral attack on those proceedings, which this suit is; and the presumption arises that the report was so amended before the assessment complained of was made. It follows that the circuit court did not err in sustaining the demurrers. The judgment is affirmed.

(151 Ind. 529)

GEISEN v. REDER.

(Supreme Court of Indiana. Nov. 29, 1898.)

APPEAL—RECORD—NECESSITY OF PLEADINGS— AGREED CASES.

A record on appeal, in order to be sufficient, must disclose a decision in a pending cause, based on pleadings, unless there is an agreement in writing sufficient to constitute an agreed case.

Petition for rehearing. Overruled.
For former opinion, see 51 N. E. 353.

HACKNEY, J. The learned counsel for the appellant supports the petition for a rehearing with bitter criticism of a procedure which does not enable litigants to define their own issues, and have them passed upon by the courts, or which enables the courts to avoid passing upon the merits of a case by resorting to technicalities. It is, we think, fortunate that a Code has been formulated and adopted as a guide to the administration of justice, since, if every lawyer were permitted

to arbitrarily determine for himself the forms and methods of procedure, we would have, instead of an orderly system of procedure, a chaotic entanglement, which would hide and disguise every scientific principle in pleading and practice. We would not profit even by that once popular treatise, "Every Man His Own Lawyer." No, we would not abolish the Code, if we could; but, since we cannot, we feel an obligation to enforce its provisions, which limit appeals to those controversies which assume the form of a case at law or a suit in equity. There is but one instance in which a case or suit is recognized without pleadings, and that is where the parties submit their differences upon an agreement in writing, properly signed, and constituting an "agreed case." So far as the present appeal informs us, this is not a case or suit resting upon pleadings or upon the required agreement. It bears no more resemblance to the cases where an appeal is authorized than if the lawyers had submitted their views to a friendly neighbor, from whose decision a transcript had been certified to this court. We do not hesitate to hold that a sufficient record on appeal must disclose a decision in a cause pending, and that no cause can find lodgment in the courts of this state without pleadings or the statutory agreement. Other authorities supporting the original opinion are *Helzer v. Kelly*, 73 Ind. 582; *Riley v. State*, 149 Ind. 48, 48 N. E. 345; *Davis v. Talbot*, 149 Ind. 80, 47 N. E. 829; *Davis v. Union Trust Co.*, 150 Ind. 46, 49 N. E. 817; *Hutchings v. Hay*, 132 Ind. 369, 31 N. E. 938; *Seager v. Aughe*, 97 Ind. 285; *Sumner v. Goings*, 74 Ind. 293; *Railway Co. v. Raden*, 10 Ind. App. 607, 38 N. E. 341; *Todd v. Winants*, 36 Cal. 129; *Olsen v. Crescio*, 10 Ill. App. 541; *Road Dist. v. Miller*, 156 Ill. 221, 40 N. E. 447; *Collins v. Express Co.*, 27 Ind. 11; *Bonsell v. Bonsell*, 41 Ind. 476; *Galley v. Knapp*, 14 Neb. 262, 15 N. W. 329; *McCardle v. McGinley*, 86 Ind. 538; *Elliott, App. Proc.* § 198. In the last citation it will be found that "the pleadings must, in general, be regarded as part of the record embraced in an appeal, since, in their absence, it would not be possible to ascertain what was in controversy." The statute relating to appeals (Rev. St. 1894, § 662; Rev. St. 1881, § 650) provides that "all proper entries made by the clerk, and all papers pertaining to a cause and filed therein * * * are to be deemed parts of the record." Another provision (Rev. St. 1894, § 652; Rev. St. 1881, § 640) permits less than a complete record, and to include only "so much thereof as is embraced in the appeal." This, however, cannot be held to support a record omitting steps, essential to the existence of a cause, preceding, and upon which a rational view of the alleged error depends. It is a common rule of practice which permits the appellee to answer that an alleged error is harmless, if the appellant has no cause of action. *Improvement Co. v. Small* (Ind. Sup.) 50 N. E. 476. This privilege would be de-

feated if the appellant might omit the complaint from the record. The petition is overruled.

(151 Ind. 503)

STATE ex rel. MORGAN, County Assessor, v. REAL-ESTATE BUILDING & LOAN FUND ASS'N et al.

(Supreme Court of Indiana. Nov. 29, 1898.)

TAXATION—STOCK IN BUILDING ASSOCIATION—EXAMINATION OF BOOKS BY ASSESSOR—MANDAMUS—PARTIAL.

1. Stock in a building association, whether paid up, prepaid, running, or otherwise, is taxable at its true cash value.

2. Mandamus lies to compel a building association to permit the county assessor to examine its books to determine whether any of the stock of the association has been omitted from taxation, both for the current year and for previous years, under the authority given him by Burns' Rev. St. 1894, § 8444 (Horner's Rev. St. 1897, § 6302).

3. In mandamus proceedings by a county assessor to compel a building association and its officers to permit him to examine its books to determine whether any of the stock has been omitted from taxation, the officers are proper party defendants, since the writ, when issued, must be obeyed by them.

4. A writ of mandamus is proper, though there is another remedy, where the latter is not adequate.

Appeal from circuit court, Monroe county; W. H. Martin, Judge.

Action by the state, on relation of John D. Morgan, as county assessor, against the Real-Estate Building & Loan Fund Association and others, for a writ of mandamus. From a judgment sustaining a demurrer to the alternative writ, relator appeals. Reversed.

Henley & Wilson, for appellant. Louden & Louden, for appellees.

MONKS, C. J. This action was brought by the relator, as county assessor, to compel appellee said building association and its officers to permit him, as such assessor, to examine the books of said building association for the purpose of determining whether any of the stock of said association had been omitted from taxation. An alternative writ of mandamus was issued, and appellees' demurrer thereto was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellees.

The only errors assigned call in question the action of the court in sustaining said demurrer. It is settled law in this state that the stock in building and loan associations, whether paid up, prepaid, running, or otherwise, is taxable at its true cash value. *Harn v. Woodward* (Ind. Sup.) 50 N. E. 33; *Deniston v. Terry*, 141 Ind. 677, 41 N. E. 143. The tax laws of this state make it the duty of county assessors to assess all property which has been omitted from taxation, and for that purpose he not only has the power expressly given him by statute, but also the power given to township assessors, county auditors, and treasurers. Sections 8526, 8531, 8560, 8600, Burns'

Rev. St. 1894 (sections 6371, 6380, 6409, 6449, Horner's Rev. St. 1897), being sections 108, 113, 142, 182, "Tax Law," Acts 1891, pp. 241, 245, 257, 268. Ample powers are conferred by statute upon the taxing officers in this state to perform their duties in discovering and assessing property. It is provided by section 8444, Burns' Rev. St. 1894 (section 6302, Horner's Rev. St. 1897), that "for the purpose of properly listing and assessing property for taxation, and equalizing and collecting taxes the township assessor, county assessor, county auditor, auditor of state, boards of review and board of tax commissioners, shall each have the right to inspect and examine the records of all public offices, and the books and papers of all corporations and taxpayers of this state, without charges; and they shall have also the power to administer all necessary oaths or affirmations in the discharge of their duties." The foregoing section is substantially the same as section 6317, Rev. St. 1881, except that the last-named section did not mention township and county assessors.

It was held by this court in *Satterwhite v. State*, 142 Ind. 1, 40 N. E. 654, 1087, that under said section 6317, Rev. St. 1881 (section 8444, Burns' Rev. St. 1894), a board of equalization had the power to inspect and examine the books and papers of corporations, and require a witness to testify in making a preliminary examination to determine whether any property had been omitted from taxation, before giving any notice to any taxpayer that said board was about to assess omitted property to him, and, further, that mandamus was the proper remedy in such investigation. It is clear from what was said in *Satterwhite v. State*, supra, that the relator was entitled to a writ of mandamus to compel said appellees, the building association and its officers, to permit him to examine its books and papers in his preliminary investigation to discover property omitted from taxation, not only for the year 1897, but for previous years. Sections 8526, 8531, 8560, 8600, Burns' Rev. St. 1894 (sections 6371, 6380, 6409, 6449, Horner's Rev. St. 1897), not only make it the duty of the county assessor and other taxing officers to search for, discover, list, and assess all omitted property subject to taxation for the current year, but for previous years, and in the performance of this duty such officers are authorized to use all the means and instrumentalities the law provides. It is the policy of this state, as declared in the constitution, to subject all private property, real and personal, to taxation, except such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be especially exempted by law. Const. art. 10, § 1; *State v. Halter*, 149 Ind. 292, 301, 47 N. E. 665. The sections of the tax law heretofore cited were enacted by the legislature, in obedience to the mandate of the constitution, in order that the taxing officers might discover, list, and assess all real and personal property not exempt

from taxation, as provided in the constitution. The officers of the building association, being the custodians of its books and papers, were properly made co-defendants with the association in the court below, for the reason that the writ, when issued, must be obeyed by the officers, and, if not obeyed, the punishment for such disobedience should be assessed against them, or such of them as are guilty of a disregard of the mandate. It is insisted by appellees that "the writ of mandamus is not proper unless there is no other remedy." The rule in this state is that such writ is not proper, if there is another adequate remedy. *State v. Kamman* (No. 18,522) 51 N. E. 483, and cases cited; *Manor v. State*, 149 Ind. 310, 313, 49 N. E. 160, and cases cited; *Wampler v. State*, 148 Ind. 557, 563, 564, 47 N. E. 1068, and cases cited. It follows, from what we have said and the authorities cited, that the court erred in sustaining the demurrer to the alternative writ. Judgment reversed, with instructions to overrule the demurrer to the alternative writ, and for further proceedings in accordance with this opinion.

(151 Ind. 517)

CONN. v. BOARD OF COM'RS OF CASS COUNTY.

(Supreme Court of Indiana. Nov. 29, 1898.)

DRAINS — CONSTRUCTION OF DITCH — CONTRACT — LIABILITY OF COUNTY — REMEDY OF CONTRACTOR — MANDAMUS.

1. Under *Horner's Rev. St. 1897, § 4317c* (*Burns' Rev. St. 1894, § 5690*) et seq., authorizing the construction of drainage ditches, and providing that the county commissioners shall "direct the surveyor or engineer, who helped make the apportionment, or some other competent surveyor or engineer," to attend at the letting of the construction of the ditch, and receive bids therefor, and make contracts, and take bonds from the contractors, and empowering the board to approve or disapprove the contracts, and issue bonds to raise money to pay for the ditch, a contract for the construction of a section of the ditch, made with the engineer appointed by the board, is not a contract of the board, so as to render it liable to a suit for the breach thereof.

2. Although the statute omits to point out the method by which a contractor may secure an acceptance of his work and payment therefor, yet, when construed in the light of *Horner's Rev. St. 1897, § 4305* (*Burns' Rev. St. 1894, § 5675; Rev. St. 1881, § 4305*), authorizing the construction of a public drain, and providing that the county surveyor, upon being notified by any contractor that his job is completed, shall inspect it, and, if completed according to contract, he shall accept it, and give a certificate stating that it is completed, and the amount due the contractor, it authorizes a writ of mandate to compel the engineer to issue the necessary certificate and voucher.

Appeal from circuit court, Cass county; D. H. Chase, Judge.

Action by Francis Conn against the board of commissioners of Cass county. From a judgment sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

Daniel P. Baldwin, for appellant. Nelson & Myers, for appellee.

JORDAN, J. Appellant sued appellee, the board of commissioners of the county of Cass, and by his complaint sought to invoke the chancery powers of the court to compel appellee to account to him, and pay the judgment which he demanded against it, out of a certain fund created by the sale of bonds to defray the expenses of constructing a public ditch in Cass county. Appellee appeared to the action, by its attorneys, and demurred to the complaint for insufficiency of facts, and also for want of jurisdiction in the court over it and the subject-matter of the action. This demurrer was sustained, and, appellant electing to stand by his complaint, judgment was accordingly rendered against him for costs; and the decision of the court in sustaining the demurrer is the sole error assigned and relied upon by appellant to secure a reversal.

The facts averred in the complaint disclose that the ditch out of which the controversy in this action arises was established by the board of commissioners of Cass county in 1891, under the provisions of an act of the legislature entitled "An act concerning drainage under specified conditions," approved March 7, 1891. See Acts 1891, p. 455; section 5690, *Burns' Rev. St. 1894* (section 4317c, *Horner's Rev. St. 1897*), and sections following. The county surveyor appears to have been appointed by the board as engineer to superintend the construction of the ditch, as authorized by the statute; and appellant entered into a contract with this official, as such superintendent, whereby he, under a written contract, agreed to construct that part of the drain apportioned to his lands, for a price mentioned in the contract, the work to be performed in the manner stipulated in the report of the viewers, and to the acceptance of said engineer; and it was further stipulated that the terms of payment should "be as the law provides." The complaint substantially alleges that appellant has completely constructed the part of the improvement allotted to him according to the terms of the contract, and that said work has been accepted by said engineer, and that there is due him, and wholly unpaid, the sum of \$600, and he has demanded payment thereof from said board, and given it an opportunity to settle with him. All of which, it is alleged, the board has refused and neglected to do. It is further averred that, under the provisions of the statute in controversy, bonds to the amount of \$13,000 were sold in order to obtain money to defray the expenses incident to the construction of the ditch, and that the money so realized was received by the county treasurer, and that \$1,000 of that amount still remains in the hands of that official, subject to and under the control of appellee. Appellant further shows by his complaint that, after the completion of the job awarded to him, he applied to the engineer appointed by appellee for the "necessary voucher or final estimate certificate," in order that he might present the same to the county auditor, and thereby

receive from the latter a warrant on the county treasurer for the payment of \$600, the amount alleged to be due him under his contract. The engineer, it appears, refused to issue a certificate for the amount demanded, but offered to give one for \$106, provided it was accepted by appellant in full of all demands for the work performed, which offer appellant rejected; and thereupon, it is alleged, he appeared before the board of commissioners, and presented and disclosed to it all the facts in the case, and demanded payment for the \$600 due him. The board, it seems, offered to issue to him an order for \$106 upon the treasurer of the county, to be in full compensation for the work which he had performed, which amount he refused to accept; and the board thereafter made an order allowing him \$104.94, payable only out of the ditch assessments when an amount sufficient thereof was collected. Appellant further alleges in his complaint that he is not seeking to reach any general fund of the county under the control of the board of commissioners, but that said commissioners, as trustees, hold in their hands and have under their control the money, to wit, \$1,000, arising out of the sale of said bonds for the payment of the cost of the construction of the improvement, and that he is only seeking to compel the board to account to him for said money, and pay him the amount due for the work performed under his contract.

The theory of appellant's complaint, as well as the contention of his learned and eminent counsel, is that the contract under which the work in controversy was performed was made with the appellee in its corporate entity, and that in such capacity it must be held to be a trustee of the fund created by the sale of the bonds, and as such trustee ought to be required to account to him for an amount thereof sufficient, at least, to pay him for the services rendered. The written contract, however, which is set out in the complaint, discloses upon its face that it was entered into by and between appellant and the county surveyor, who, as averred, was appointed by the board to let the contracts for constructing the ditch, and to superintend the construction of the work. The theory and contention of appellant, that the contract in question was with the board of commissioners, are neither sustained by the facts in the case, nor by the provisions of the statute in dispute. Section 8 of the act expressly provides that the board of commissioners shall "direct the surveyor or engineer, who helped to make the apportionment, or some other competent surveyor or engineer," to attend at the time and place of letting the construction of the ditch, and receive bids therefor, and make contracts with the lowest responsible bidders, and take bonds from the contractors for the performance of the work undertaken by each. In the case of *Studabaker v. Studabaker* (decided at last term) 51 N. E. 933, we were called

upon to consider and interpret, to an extent, the identical statute now involved; and we in that case held, in effect, that the question as to the ultimate completion of the ditch, as an entirety, was one for the determination of the board of commissioners, upon the final report of the engineer appointed, and that this question, when presented by his report, as it should be, was one that any landowner affected by the ditch might challenge by an exception to the report, and was entitled to a hearing before the board of commissioners upon that question, and others properly arising out of the exceptions filed. The statute, on its face, is, to an extent, at least, vague and uncertain, and is open to construction. It does not profess to expressly define all the duties which its makers intended should be imposed on the board of commissioners, nor all of those which it was intended should be discharged by the engineer appointed to superintend the construction of the improvement. By the provisions of the first section the board of commissioners of any county, on presentation of the required petition upon the part of landowners, at any regular or called session, may cause to be located and constructed any ditch of the length of five miles and over. The improvement contemplated under the law, when completed, in no sense can be said to belong to the county. The board of commissioners, in its corporate entity, is not a trustee of the work, and certainly has no proprietary interest therein. The ditch, when completed, may be said to properly belong to the taxing district, or the landowners whose lands have been benefited thereby and taxed for its construction. The county commissioners, under the law, simply act as a board before whom the necessary proceedings leading up to its location and final construction are instituted and conducted. This statute expressly empowers the board to issue bonds, which the county treasurer is authorized to sell, without expense to the county, to the highest and best bidder, for the purpose of raising money to pay and discharge the cost and expenses growing out of the location and construction of the ditch. This money constitutes a fund in the hands of the treasurer for this purpose, and the payment of these bonds is secured by the money derived from the tax assessed against the lands benefited, which is made a lien thereon, in like manner as other taxes; and such tax, when collected, constitutes a fund which must be applied to the payment of the bonds, principal and interest, and the law forbids that it be applied or converted to any other purpose. See sections 12 and 13 of the act in controversy. As the county has no proprietary interest in the improvement, the law has been careful to guard and protect it against any liability for the construction thereof; and the act in question certainly does not contemplate that the county, through the agency of its board of commissioners, shall act as a trustee of the

fund derived from the sale of the bonds, and thereby be subjected, possibly, to the expense and cost of litigation by reason of suits instituted against it, as is done in this case, by an aggrieved contractor. There can be no warrant for placing a construction upon the law which should result in holding that the board of commissioners is charged with the duty of actually superintending the letting of the contracts, or the construction of the work thereunder, or that it holds the money arising from the sale of the bonds in the hands of the county treasurer in trust, or that this fund is under the direction and control of the board for payment to contractors for services rendered in the construction of the ditch. It certainly cannot be held, under the facts alleged in the complaint, that appellee, in its corporate capacity, in which it is sued in this action, is in any sense indebted to the appellant, or that it has any fund in its hands or under its control out of which he can rightfully demand payment for the money alleged to be due him. Therefore he is not in a position to call upon appellee to account to him in this action. Appellant's contract, as we have heretofore stated, was not with the board of commissioners, but with the engineer appointed by them. It was by and between the appellant and the engineer, whom the statute designates as the proper person to let out the construction of the work to the lowest responsible bidders, and to enter into a contract with each of such bidders for the performance of the work allotted. The contract set forth in the complaint does not in any manner profess to be one between appellant and the board of commissioners. It is simply an agreement or contract between the appellant and one N. A. Beck, county surveyor, who, as it appears, was appointed by the board to take charge of and superintend the construction of the ditch. Surely, therefore, the board, under the facts, cannot be said to be in any sense a party to the contract, and manifestly is not liable to be sued for any breach thereof. The fact that the board of commissioners is authorized to either approve or disapprove the contracts after they have been entered into by the engineer and the contractors as provided by section 9 of the statute certainly does not make the board one of the contracting parties. The decision in *Board v. Newlin*, 132 Ind. 27, 31 N. E. 465, under the facts, lends no support to the theory advanced by appellant in the case at bar.

We do not concur in the assertion of appellant's counsel, that, if his client cannot maintain this action, he is without remedy to enforce the payment of his claim for the work which he has performed under his contract. It is true the statute omits to expressly point out in express terms the method by which a contractor, when his job is completed, may secure an acceptance thereof, and payment of the money due him under his contract for

the work. The law in this respect is at least open to construction. We concur with the contention of the learned counsel for appellee that the statute, by necessary implication or inference, empowers the engineer appointed by the board and charges him with the duty of furnishing the contractor with the necessary instrument by which he may receive his pay from the county treasurer out of the fund set apart for the purpose intended. In *Studabaker v. Studabaker*, supra, in considering the duty enjoined upon the engineer by the statute in controversy, we said: "There is no doubt but what it is the duty, under the law, of the engineer, who is appointed by the board as a superintendent, to see that the work of constructing the ditch is fully completed as provided by the order of the board and the terms of the contract." The engineer, as provided by section 8, is invested with the duty of superintending the letting of the work, and the making of contracts with those who have bid for constructing sections thereof, and also with the further duty, as held in the case last cited, of seeing that the jobs which he has let are fully completed according to the order of the board and the terms of the contract. The principal duty or power of superintending the letting of the work, and making the contracts for its construction, with which he is expressly invested, cannot in reason be said to be terminated when the contracts are made and reported by him to the board; but this principal grant of power should be held to invest him with a general oversight of the work, and the duty to see that it is carried out to completion according to the terms of the contracts. That the legislature, under this statute, intended to impose upon the engineer important duties, finds support in the fact that he is required thereby to give a bond for the faithful performance of his duties; and, in the event of his failure or neglect to properly discharge them, he is made liable on his bond, at the suit of any person aggrieved. We are of the opinion that the statute must be held to impliedly empower him with the right, or impose upon him the duty, of accepting the jobs, when completed, of the respective contractors whom he may be said to have employed under the contracts which he has made, and also with the duty of adjusting their claims, and of furnishing them each with the necessary instrument or means by which they may be enabled to obtain pay for the work performed. It is a well-affirmed principle that, where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred, and make it effectual and complete, will be implied. *Studabaker v. Studabaker*, supra; *Suth. St. Const.* §§ 340, 341. The implication or inference which may arise in the construction of statutes is of something not expressly declared, but arises out of that which is directly or expressly declared in the statute. *And. Law Dict.* 527; *Rap. & L. Law Dict.* 629. If the

intention of the makers of the statute in question in regard to the remedy or method to be employed to enable a contractor to secure payment from the county treasurer upon the completion of his job can be ascertained, it will control, for it is a fundamental rule that a matter or thing within the intention of the makers of the law is the same in effect as if it were within its express letter. In our search to discover this intention, we may be guided by a well-settled canon of construction which permits us to look to kindred statutes or laws upon the same subject for aid in the exposition of such intention. It is not, generally speaking, as a rule, expected that a statute which has a place in a general system of laws will be so perfect as to need no support from the rules and provisions of the system of which it forms a part; and hence, when it is a part of a general system of laws upon the same subject, its construction or interpretation may receive support from the rules and provisions of that system. *Stout v. Board*, 107 Ind. 843, 8 N. E. 222, and cases there cited; *City of Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81, and cases cited; *Board of Com'rs of Fountain Co. v. Board of Com'rs of Warren Co.*, 128 Ind. 295, 27 N. E. 133. Keeping in view this principle, we may apply for aid in the solution of the question involved to an act of the legislature approved April 21, 1881 (Acts 1881, p. 410). See section 5655, *Burns' Rev. St.* 1894 (section 4285, *Rev. St.* 1881), and sections following. By this act the board of commissioners of any county is authorized to order the construction of a public drain or ditch. This latter statute and the one now under consideration are substantially alike in several respects, and each certainly forms a part of the general system of laws providing for and regulating the establishment of ditches. Section 21 of the act of 1881 (section 5675, *Burns' Rev. St.* 1894; section 4305, *Rev. St.* 1881; section 4305, *Horne's Rev. St.* 1897) provides that it shall be the duty of the county surveyor, upon being notified by any contractor that his job is completed, to inspect the same; and, if he finds that it is completed according to the contract, he shall accept it, and give to the contractor a certificate, stating therein that the job, share, or allotment is completed according to the specifications, and also stating the amount due to the contractor; and it is further provided in this section that when the assessment of benefits is collected the certificate shall be paid, upon a warrant issued by the auditor. In the interpretation of the law in controversy in the light of the principles to which we have referred, we are certainly justified in holding that the legislature intended that a rule similar to the one declared by its predecessors in the enactment of the drainage act of 1881, so far as applicable, should control or govern, and that a method for the adjustment and payment of the claims of contractors under the act in question, similar to the one provided by the act of 1881,

should be pursued. In other words, it was intended by the makers of the law in dispute that, when a contractor had completed his job according to the terms and provisions of his contract, he should notify the engineer of that fact, and that this officer should inspect the job, and, if he finds that it has been fully completed as provided in the contract, he should accept it, and issue to the contractor a certificate to that effect, stating therein the amount due, and require the contractor to give a receipt for the certificate, to be used by the engineer in his final report or settlement with the board of commissioners. This certificate, on being presented by the contractor to the county auditor, would authorize that officer to draw a warrant upon the proper fund in the hands of the treasurer for the payment thereof. We are constrained to believe that this interpretation is in full harmony with the spirit and intention of the law, and will accomplish what was intended by its makers. This being true, it must follow, as affirmed, that this intent of the legislature in the enactment of this law must be held to be as controlling and effectual as though it were within its express letter. We do not believe that it was intended by the lawmakers that the members of the board of commissioners, who, as it may be presumed, are not skilled in the science of civil engineering, should make a personal inspection of the several jobs, to learn if each is completed according to the contract made by the engineer, in order that they may award the contractors pay for the work performed. Neither do we think it is contemplated by this statute that the commissioners should sit as a board for the purpose of allowing the claims of contractors, and ordering their payment out of the fund dedicated to that purpose. The fair inference to be drawn from the provisions of the law involved, when aided by laws of a similar import or kindred character, points to the method or remedy mentioned as the one by which a contractor may obtain pay for services rendered. The engineer appointed by the board may be presumed to be versed in the science of civil engineering, and competent to discover on inspection if the several jobs are completed as required by the contract; and, if he finds this to be a fact, the contractor is entitled to his pay, and the engineer should furnish him with the necessary certificate or voucher, in order that he may be awarded that which is justly due him; and, for a failure to discharge this duty, this official may be compelled to perform it by a writ of mandate, upon a proper showing in a suit instituted by the contractor. *State v. Bever*, 143 Ind. 488, 41 N. E. 802. Appellant seems to have placed a proper construction upon the statute in the first instance, for his complaint reveals the fact that when his job was completed he applied to the engineer for a certificate, in order that he might present it to the auditor, and thereby secure an order for the money due him.

That appellant's right, under the facts, to maintain this action, must be denied, there is no doubt. His controversy, if any, in regard to his right to be paid in full for his work, is certainly with the engineer, and does not concern the appellee in this appeal. The court did not err in sustaining the demurrer to the complaint, and the judgment is therefore affirmed.

(151 Ind. 507)

FORGY v. HARVEY.

(Supreme Court of Indiana. Nov. 29, 1898.)

APPEAL—PLEADINGS—SPECIAL VERDICT—LANDLORD AND TENANT—FRAUD.

1. Assignments of error on rulings as to pleadings need not be considered, where the questions urged arise on a special verdict.

2. After a sale of mortgaged property to plaintiff under foreclosure, he induced defendant, who had been the mortgagor, to refrain from redeeming within the year for redemption by promising to let him redeem thereafter. Defendant executed a lease agreeing to pay plaintiff a certain yearly rent, and he supposed that it contained a stipulation under which the property should belong to him if he made certain payments in addition to the rent, but the stipulation was omitted, through plaintiff's fraud. *Held*, that such fraud did not enable defendant to assert that plaintiff was not his landlord, entitled to possession on breach of the conditions of the lease.

Appeal from circuit court, Cass county; Moses B. Lalry, Judge.

Action by George B. Forgy against Hiram Harvey. Judgment for defendant, and plaintiff appeals. Reversed.

Dewitt C. Justice and Geo. E. Ross, for appellant. Nelson & Myers, for appellee.

HACKNEY, J. This was an action for the possession of real estate alleged to be held over from the appellant as landlord by the appellee as tenant in breach of two certain leases. In the lower court there was a trial upon issues formed, and a special verdict, in the form of interrogatories and answers, upon which judgment was rendered for the appellee. One assignment of error urged is upon rulings as to pleadings. The questions so urged, arising upon the special verdict, need not be considered upon the pleadings. *Smith v. Manufacturing Co.*, 148 Ind. 333, 46 N. E. 1000; *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Wilmore v. Stetler*, 137 Ind. 127, 34 N. E. 357, and 36 N. E. 856. Facts found were to the effect that Harvey owned a tract of land in Cass county, subject to a mortgage for \$6,000; that he borrowed an additional sum, which he secured by a second mortgage; that the latter mortgage was foreclosed, the property was sold, and a certificate was issued and assigned to a Mrs. Crowell. A deed was executed upon said certificate to Mrs. Crowell, who, through the appellant as her agent, leased said lands to the appellee, who joined therein on the 14th day of January, 1895. Later she executed to the appellant a deed

of conveyance for said lands. Still later the appellant became the owner and assignee of said \$6,000 mortgage. On July 29, 1895, the appellant and the appellee joined in a lease of said lands to the latter. It was found that, to induce Harvey to make no redemption from said sale during the year for redemption, Forgy assured him that Mrs. Crowell did not want said lands, and that he controlled the matter, and would make a contract with him for a redemption after the year; that in each of said two leases Harvey believed there was a stipulation that he should pay Mrs. Crowell in the first, and Forgy in the second, lease, the sum of \$1,100 a year, in the form of rent for the real estate, and so much more as he could, with 8 per cent. interest on the \$6,000 mortgage, and upon the "decree foreclosing the second mortgage," until the debt should be reduced one-half; then a deed should be made to Harvey for the land, and he give his mortgage on the land for the balance, with 8 per cent. interest. There were findings tending to excuse Harvey for executing the leases without reading them, and also as tending to establish a fraudulent purpose on the part of Forgy. It was upon these findings that Harvey succeeded in the lower court. It was not found that any other stipulation was omitted, nor that the leases contained any provision not intended by either party. There is no contention but that, in the absence of the agreement included in the above stipulation, the appellant would have been entitled to judgment for possession. The effect of the appellee's contention is to deny title in the appellant, and assert title in himself, subject to a foreclosure, against which he has the right of redemption.

Passing the question, somewhat doubtful, as to whether the above stipulation, if inserted in the lease, would give the right of redemption, or would amount to more than a contract for the purchase of the land, we feel quite certain that the instrument would still create the relation of landlord and tenant. The belief of the appellee that such a contract did not raise that relationship could not change the legal force of the instrument. The appellee knew of the outstanding color of title, and he knowingly contracted in the relation of a lessee and with another in the expressed relation of lessor. It is a well-settled general rule that a tenant is estopped to deny the title of his landlord. 12 Am. & Eng. Enc. Law, p. 701 et seq.; *Gear, Landl. & Ten.* § 165; *Epstein v. Greer*, 78 Ind. 348; *Pouder v. Catterson*, 127 Ind. 434, 26 N. E. 66.

The appellee's learned counsel concede the rule, but insist "that, if one in possession of land under a claim of title is induced to accept a lease through mistake, fraud, or trick of the lessor, the lessee is not estopped from setting up a title superior to that of his lessor." This is probably an exception (12 Am. & Eng. Enc. Law, p. 705); but, in our opinion, it has no application here, since the

fraud, if any, in this case did not affect the character of the instrument as a lease and in recognition of the lessor as the landlord. The omitted provision related to redemption or to purchase, and, when considered as a part of the instrument, does not change the relationship of landlord and tenant. There is no finding or inference that the appellee was overreached when, by the other provisions of the instrument, he assumed the relation of tenant, and acknowledged the appellant's relation of landlord. If the appellee is entitled to redeem under the contract when reformed, or if he may purchase, this is no excuse for denying the possession to which the appellant is entitled under the agreement. Nor do we understand appellee's learned counsel to insist that, under the issues, the instrument was wholly void by reason of the appellant's fraud, or that by reason of the fraud the agreement, including the omitted stipulation, should not prevail. This contention, if made, would leave the appellant in the better attitude of holding title, with no obligation as to sale or redemption, and the appellee with a mere naked possession. In our opinion, the trial court erred in rendering judgment for the appellee. The judgment is reversed, with instructions to sustain the appellant's motion for judgment on the special verdict.

(151 Ind. 505)

SNYDER, Prosecuting Attorney, v. CITIZENS' GAS & OIL MIN. CO.

(Supreme Court of Indiana. Nov. 29, 1898.)

DISSOLUTION OF CORPORATION—QUO WARRANTO.

An information, in the nature of a quo warranto, to dissolve a corporation, under Rev. St. 1894, § 1145 (Horner's Rev. St. 1897, § 1131), providing that such information may be filed against a corporation where it does or omits acts amounting to a forfeiture of its rights as a corporation, or when it exercises powers not conferred by law, which fails to allege that defendant is a corporation incorporated under the laws of the state, is fatally defective on demurrer, since that fact cannot be presumed.

Appeal from circuit court, Randolph county; A. O. Marsh, Judge.

Action in the nature of quo warranto, on relation of Frank H. Snyder, prosecuting attorney, against the Citizens' Gas & Oil Mining Company. From a judgment sustaining a demurrer to the information, relator appeals. Affirmed.

Wm. H. Williamson and Frank H. Snyder, for appellant. David T. Taylor, for appellee.

JORDAN, J. This action was instituted by the state, on the relation of the prosecuting attorney, in the nature of a quo warranto, against appellee, the Citizens' Gas & Oil Mining Company, to seize its franchises and have the same declared forfeited. The suit was commenced upon information filed in the Jay circuit court, and upon application the venue

was changed to the Randolph circuit court, wherein a demurrer was sustained to the information, and judgment was rendered in favor of the appellee thereon; and the only question raised in this appeal is the sufficiency of the information on demurrer. The cause for which the state seeks to destroy the appellee, or wrest from it its corporate powers, as disclosed by the information, arises out of the alleged facts that it has entered into an illegal agreement with an incorporated company, denominated the Portland Natural Gas & Oil Company, by which agreement the rate or price to be charged consumers of gas shall be fixed, and thereby an unlawful restraint placed upon competition in the sale of such products. The information avers the organization, as a corporation under the laws of this state, of the Portland Natural Gas & Oil Company, and alleges that it is engaged in furnishing gas to the public; but it wholly omits to allege the incorporation of the appellee under any law of the state of Indiana, or that it is engaged in the exercise of any corporate rights. Section 1145, Rev. St. 1894 (section 1131, Horner's Rev. St. 1897), provides that: "An information may be filed against any person or corporation in the following causes: * * * Fourth. Or where any corporation do or omit acts which amount to the surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." Certainly, before the court, under an information filed for the purpose of depriving the appellee of its existence, will inquire whether it has forfeited its right to exist as a corporation, by reason of the alleged abuse of its power, it must be shown by proper averments therein that it has been incorporated under the laws of this state; and a failure of the pleading to disclose this essential fact must necessarily render it fatally defective. The information should have informed the court on this question of fact, as the presumption cannot be indulged that appellee is a corporation duly organized under the laws of this state, in the absence of such averments. Danville & W. L. Plank-Road Co. v. State, 16 Ind. 456; State v. Kingan, 51 Ind. 142. Without considering the principal question, which otherwise involves the sufficiency of the information, we are compelled to hold it bad for the reasons stated; and the demurrer was therefore properly sustained, and the judgment is affirmed.

(152 Ind. 698)

HUSTED et al. v. NATIONAL HOME BUILDING & LOAN ASS'N.

(Supreme Court of Indiana. Nov. 29, 1898.)

MECHANIC'S LIEN—ENFORCEMENT—PRIORITY.

Where a mechanic's lien is foreclosed against the owner without making a junior mortgagee a party, the lien and the foreclosure decree based thereon are void as against him after expiration of the time for foreclosing the lien.

Appeal from circuit court, Madison county; Alfred Ellison, Judge.

Action by the National Home Building & Loan Association against Julius B. Husted and others. From the decree, defendants appeal. **Affirmed.**

D. W. Wood, Bagott & Bagott, and John W. Lovett, for appellants. Wagner, Bingham & Long, for appellee.

HOWARD, J. This was an action brought by the appellee to foreclose a mortgage on real estate. It was alleged in the complaint that on the 15th day of March, 1893, the appellant Julius B. Husted, then owner of the land in controversy, and indebted to appellee, executed the mortgage in suit. The appellant George H. Van Riper, receiver of the Alexandria Lumber Company, filed his answer and cross complaint, in which he averred that prior to the execution of the mortgage, in the month of January, 1893, the appellant Husted contracted with the lumber company to furnish material to be used in the construction of a building on the premises described in the complaint; that on the 31st day of the same month said company began furnishing said material, and continued so to do until the following July, when the company filed notice of mechanic's lien, to secure payment for said material; and that afterwards, and before the expiration of one year from the filing of said notice, said lien was foreclosed, all necessary parties being made parties to said proceedings, and the property sold on decree of foreclosure, and purchased by said lumber company for the amount of its judgment. The prayer of the cross complaint was that upon final hearing the court "declare and decree the lien so held by this cross complainant as aforesaid senior to the lien of plaintiff's mortgage set out in the complaint, and for all proper relief." There is no controversy as to the facts of the case. The cross complainant's mechanic's lien was confessedly prior and senior to the lien of appellee's mortgage. The question for decision, as said by counsel for appellee, is "as to the relative rights of the mortgagee and the holder of the title or interest gotten by virtue of the foreclosure of a mechanic's lien on the mortgaged property in suit, brought within the year allowed by law, but without making the mortgagee a party." This exact question was decided against the contention of appellants in *Deming-Colborn Lumber Co. v. Union Nat. Savings & Loan Ass'n* (at this term) 51 N. E. 936. On the authority of the case cited, the judgment in this case is therefore affirmed.

(151 Ind. 488)

CLEVELAND, C., C. & ST. L. RY. CO. v. SCANTLAND et al.

(Supreme Court of Indiana. Nov. 29, 1898.)

FIRE SET BY LOCOMOTIVE—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE.

1. Where a frame warehouse adjoining a railroad was burned by sparks communicated from an engine supplied with a defective spark ar-

rester, it is immaterial, in an action for the damages so caused, whether the warehouse or the railroad was first constructed, since it is not negligence merely to construct a warehouse on land adjoining a railroad track, and to store inflammable material therein.

2. A warehouse adjoining a railroad track was burned by sparks communicated from defendant's engine, which was fitted with a defective spark arrester. Just before the fire, one of the plaintiffs saw the engine passing, and emitting showers of sparks, but he did not stop to see whether or not they would communicate fire to the building. The warehouse was located near other wooden buildings in a business district, the conditions of which defendant knew, and on the day the fire occurred the buildings were wet from recent rains. The fire was discovered almost immediately, when plaintiffs used all available means to save the property. *Held*, that plaintiffs were not guilty of contributory negligence in failing to have kept watch on the building after they saw that the engine passing emitted sparks.

3. Evidence showing that a spark arrester, through which fire was communicated from defendant's locomotive to plaintiffs' warehouse, was not properly fitted or secured, leaving spaces in the nettings one to two inches long and one-fourth to three-eighths inches in width; that a number of the wires had become burned or worn off, so that sparks of the size of large grains of corn, and some as large as the end of a man's finger, were emitted,—*add* sufficient to show negligence rendering defendant liable for the loss of the warehouse.

4. In an action for the burning of a building by sparks communicated from defendant's locomotive, containing a defective spark arrester, defendant showed the screen to the jury, though it was not introduced in evidence, and evidence was offered relating to it on the assumption that it was the same screen that was in the engine from which the fire was communicated. *Held*, that an instruction that it was the jury's duty not to consider any fact which they might have observed while examining the screen as evidence, was properly refused, as misleading; since they might properly consider the facts so disclosed in applying other testimony.

Appeal from circuit court, Randolph county; A. O. Marsh, Judge.

Action by George W. Scantland and others against Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiffs, defendant appeals. **Affirmed.**

Samuel O. Bayless, John T. Dye, and Thompson & Canaday, for appellant. J. J. Cheeney and Engle & Parry, for appellees.

HOWARD, J. It is alleged in the complaint in this case that on January 20, 1896, appellees owned a large warehouse in the town of Lynn, in Randolph county, on grounds adjoining appellant's right of way. The warehouse was used principally for storing and drying "patent coll elm hoops," manufactured by appellees. It is further alleged that the appellant, "in running its locomotive and train of cars on said road, carelessly and negligently omitted to use sufficient and proper spark arresters and proper appliances to keep the same in proper repair and condition to prevent the emission of sparks from said locomotive"; that the appellant's said railroad passed to and within 66 feet of appel-

lees' said storeroom, in which were situate, packed, and stored said patent coil elm hoops and oak lumber aforesaid, which said ware-room and patent coil elm hoops were of inflammable nature, and liable to take fire, which appellant well knew; that on the evening of the day aforesaid appellant's train of cars, drawn by one of its locomotive engines, and controlled by its employes, ran on and along the railroad aforesaid near to said ware-room, and, the appellant having negligently omitted and failed to exercise due care to prevent the escape of sparks of fire from the smokestack, the said smokestack threw out streams of sparks and blazing fragments of coal and wood, which were by force and labor of the locomotive expelled high into the air in large volume at each labor and expulsion of the engine, and carried by the wind towards said warehouse, and set fire to the same and to said patent coil hoops and lumber, whereby they were consumed. The only objection raised to the complaint is that it is not sufficiently specific, in not stating whether the railroad or the warehouse was first constructed. It does not seem that this objection can be well taken. The question is, rather, whether appellant was negligent in using an insufficient spark arrester, and whether appellees were themselves chargeable with contributory negligence in relation to the destruction of the warehouse. It cannot be said to be negligence merely to construct a warehouse upon lands adjoining a railroad right of way, and to store elm hoops there to dry, whether before or after the building of the railroad. Indeed, in a subsequent part of their brief, counsel for appellant admit as much, saying: "We do not, however, insist in this case that the mere fact that appellees located their dry house adjoining the right of way, and at the time of the fire were maintaining it there, filled with dry, combustible material, is such negligence per se as would prevent a recovery." The facts were found by a jury, and a special verdict, by way of answers to nearly 200 interrogatories, was returned by the jury. The only question left in dispute by these answers is whether the appellees were themselves chargeable with negligence contributing to the destruction of their property. The jury find that the spark arrester used on the engine was of the kind known as the "extension front" spark arrester, the best and most approved in general use. They find, however, that the spark arrester in use in this case was not properly adjusted when first put in new; that it was "not properly and securely fastened at the edge of the nettings," and the "door frame at manhole not well fitted, leaving openings at corners"; that it did not "prevent sparks, coals, or cinders from being carried out of the extension front, through the smokestack"; that there were holes and broken places in the nettings; that several of the wires near the top were broken, and a part of them missing, at the time of the fire; that there

were several holes near the top, caused by wires being burned or worn away, from one to two inches long and from one-fourth to three-eighths of an inch wide; that, in consequence, fire was thrown out of the smokestack while passing appellees' property, many of the sparks being of the size of large grains of corn, and some as large as the end of a man's finger; and that these sparks were thrown on top of and into appellees' building, setting fire to the patent coil elm hoops therein. Failure to properly inspect and repair the spark arrester is also found.

It is conceded that these and other findings show negligence on the part of appellant. The contention is, however, made, that appellees were also negligent, since they knew that their building was of wood, and contained dry hoop poles; knew that the building was near to the railroad,—within 59 feet of the track,—and knew that there were open ventilators on the side of the railroad; and since, a little before the fire, one of the appellees saw the engine laboring with a heavy freight train, and saw showers of sparks flying from the smokestack as the engine approached, and yet that he passed on to his supper, a short distance away. This contention seems to take it for granted that it was appellees' duty to keep a constant watch on their building whenever an engine throwing many sparks was passing. Yet the jury also find that appellant likewise knew all the conditions as to appellees' property. It is, besides, found that the warehouse was within the corporate limits of the town, was situated near other wooden buildings,—mills, factories, and residences,—all standing along the railroad track. It is further found that it was raining on that day, and that the ground, railroad track, and buildings were damp and wet from the recent rains. The warehouse had been built about four years, during which time there had been no material change in the grade or situation of the railroad track. No reason, therefore, appears why appellees should suppose their building in more danger of being set fire to by sparks from the engine on this occasion than at any time during the previous four years? Of course, it was barely possible that fire might be communicated to the property at any time. But, as said in *Railroad Co. v. Loop*, 139 Ind. 542, 39 N. E. 306, "all peril may not be averted; it is the immediate and probable, not the remote and barely possible, that we are called upon to guard against." The building was properly constructed for the purposes for which it was used, and was properly located for the making of shipments on the railroad. The fire was discovered almost immediately, and the jury find that appellees used "all available means to put out the fire, and save their property, when, and as soon as, they discovered the fire." If appellees should be held negligent for the reasons urged by counsel, it is difficult to see how property owners who fail to keep a constant watch upon their

buildings could ever collect from insurance companies when these buildings are destroyed by fire.

The only conflict in the evidence is as to the condition of the spark arrester at the time the fire was communicated to the warehouse. Counsel for appellant use 37 closely-printed pages of their brief in arguing that the jury ought to have accepted the evidence adduced by them to show that the spark arrester had frequently been properly inspected previous to that time, and that it was then in good repair, and correctly adjusted to its place in the engine. But even appellant's witnesses, particularly on cross-examination, gave evidence from which the jury were authorized in making the findings complained of as to the defective condition of the netting of the spark arrester. This netting was brought into court by appellant, and a great part of the evidence in regard to it was given to the jury on inspection, as it was examined in their presence by the several witnesses. One of appellant's witnesses, on having his attention called to certain wire, and being asked if it was burned in two, answered, "I don't know whether it is burned in two or broken." His attention being further called to several other wires, and being asked if they also presented "the appearance of having been burned in two," he answered: "Well, they probably came apart where it was pretty warm; that is, subject to considerable heat at all times. The heat of the smokestack under normal conditions is about 800." Asked of other wires if they were nearly in two, and still others as to being "burned off, entirely in two," he said, "Yes, there are several of them through there." Asked of six in a row, if they were not "burned in two," he replied, "Yes, you might find others throughout." It was shown that sparks of the size of large grains of corn had been thrown from the smokestack to a distance of 120 feet; and one of appellant's witnesses answered that with proper spark-arrester appliances, even with the wind blowing in the most favorable condition for carrying sparks, they could not be carried to a distance of more than 30 or 40 feet, and still retain fire enough to kindle combustible material. He further said that in damp atmosphere the tendency of sparks is to fall quicker to the ground. If to the foregoing evidence, given by appellant's witnesses, we add the testimony of appellees' witnesses relating to the same subject, we must conclude that there was competent and sufficient evidence adduced to support the findings returned by the jury. We have also given careful attention to what is said by counsel as to error by the court in its ruling on the admission of evidence, but have found the objections not well taken, and do not deem it necessary to enter into an extended discussion of the questions so raised.

The appellant introduced the screen in question before the jury, and a large part of the

evidence was in regard to the condition of this screen thus exhibited to the jury. While, technically, the screen was not introduced in evidence, it was, in effect, so introduced. Indeed, when counsel for appellant asked an expert whether, in his opinion, certain wires near the top of the screen were broken by reason of any use of it as a spark arrester, and counsel for appellees objected to the question for the reason that the screen was not identified as the defective screen in question, the court overruled the objection, and this question, and others following it, were allowed on the assumption that the screen before the jury was the same used in the locomotive from which the fire was alleged to have been communicated to appellees' building. As relating to this screen, the following instruction was asked by appellant, and refused by the court: "You have been permitted, during this trial, to personally view and examine a certain wire screen or netting, under instructions of the court. You are now instructed that it will be your duty not to consider as evidence any fact which you may have observed or seen while viewing or examining such screen or netting." Whether this instruction was abstractly correct or not, we need not say. It would certainly have been misleading to the jury to have given it. Counsel do not contend that it was error to have allowed the jury to inspect the netting, but they say that "the facts disclosed to the jury by this inspection should not have been taken by the jury as evidence in the cause, but only for the sole purpose of aiding them in applying the evidence of the witnesses who testified with reference to the screen, and the other facts and circumstances." Had the instruction included the explanation so now added by counsel, it would, perhaps, have been proper to give it; but to have given the instruction as requested would doubtless have left upon the mind of the jury the impression that the screen as exhibited before them, and as inspected by them under direction of the court, was nevertheless not to be regarded by them for any purpose. The screen was brought before the jury by appellant, without objection from appellees; and the jury, under sanction of the court, were permitted to examine it. That an instruction should afterwards be given which should practically say to the jury that they must pay no attention to the screen so exhibited to and examined by them, seems very questionable. The instruction was properly refused as misleading. See *Story v. State*, 99 Ind. 413, 416; *Davidson v. State*, 135 Ind. 254, 259, 34 N. E. 972.

Other minor questions raised by counsel need not, as we think, be considered. They are not of a nature to require a reversal of the judgment. Judgment affirmed.

HACKNEY, J., took no part in the decision of this appeal.

HUTER v. UNION TRUST CO.¹

(Supreme Court of Indiana. Nov. 29, 1898.)

INSURANCE COMPANIES—POWERS—ESTOPPEL TO DENY—BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—DISPOSITION OF ASSETS.

1. A corporation organized under Rev. St. 1894, § 4895 (Rev. St. 1881, § 3763; Acts 1865, p. 114), authorizing the formation of corporations for insuring the lives or health of persons, has no power, either express or implied, to transact the business of a building and loan association.

2. Rev. St. 1894, § 4884 (Horner's Rev. St. 1897, § 3753), authorizing mutual life insurance companies to invest or loan their funds, does not authorize them to conduct the business of a building and loan association.

3. A person entering into the relation of a borrowing member of a building and loan association, with a corporation not authorized to conduct such business, is not estopped from denying that his contract imposed on him no other obligation than that of returning the sum borrowed, with interest, since such contract is void.

4. Acts 1893, p. 192, is entitled "An act to legalize the incorporation of the Mutual Life and Endowment Association of Indiana, and to legalize all the acts of said corporation, and all the contracts made by said corporation, to and with all persons whatever," etc. In the body of the act repeated references are made to the business and policies of life insurance, but nothing is found as to building and loan association business. *Held*, that the statute did not legalize business unlawfully transacted by said company as a building and loan association.

5. A corporation, without authority so to do, carried on the business of a building and loan association, and issued a share certificate, which the owner carried as an investment certificate for a time, and on which he paid the dues, when it was canceled, and a new one issued in its stead as of date of the first certificate, on which the holder obtained a loan from the corporation, thereafter paying dues and interest. Before maturity of the shares, the corporation became insolvent. *Held* that, for dues paid on the first certificate, the owner should share in the assets of the corporation pro rata with other investing shareholders, and that payments made on the second certificate should be applied on the loan.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

In proceedings for the appointment of a receiver of the Mutual Life Insurance Company of Indiana, insolvent, Frank S. Huter, intervener, asked that a bond and mortgage given by him to the insolvent be canceled. From a decree for the Union Trust Company, receiver, intervener appeals. *Reversed*.

P. W. Bartholomew and D. H. Bowlus, for appellant. Albert J. Beveridge, for appellee.

HOWARD, J. The Mutual Life Insurance Company of Indiana is an insolvent corporation, in the hands of the appellee, receiver. The appellant, an intervener in the receivership case, filed his petition asking that a bond and mortgage for \$600, given by him to the insurance company, be found paid and be ordered canceled. The facts specially found by the court, and within the issues made by the pleadings, are substantially as follows:

(1) The Mutual Life Insurance Company of

Indiana, formerly the Mutual Life & Endowment Association of Indiana, was incorporated February 13, 1882, under the act for the incorporation of mutual life and accident insurance companies approved December 20, 1865 (Acts 1865, p. 114; section 4895, Rev. St. 1894; section 3763, Rev. St. 1881).

(2) It was provided in the articles of incorporation that the business of the company should be the issuing of "policies of insurance on the lives of person or persons applying for insurance during the life of such applicant or for any determinate period, or upon the endowment plan, and upon such amounts, values, and upon such conditions as may be agreed upon and stipulated for in any policy issued"; and also that all policies or certificates should be upon any plan or system of business adopted by the board of directors.

(3) It was further provided in said articles that "said corporation might loan all moneys belonging to it, except expense funds, in any manner provided for in the policies or certificates of said corporation."

(4) On August 1, 1891, the company issued to the intervener a policy or certificate, a copy of which is attached to the first paragraph of his petition.

(5) Under said certificate the intervener made 13 monthly payments, of \$4.80 each, amounting in all to \$62.40, from which on the books of the company, in accordance with the terms of the certificate, one-tenth of 1 per cent. of the face value of the certificate was deducted each month for expenses, amounting to \$7.80, and leaving \$54.60 as the net amount paid in by said intervener on said certificate.

(6) On August 30, 1892, the intervener surrendered the above-mentioned certificate, and on said date a second certificate was issued to him in lieu thereof, a copy of which is also attached to the first paragraph of his petition. This last-named certificate was dated back to August 1, 1891, the date of the original certificate.

(7) Under said second certificate, the intervener made 56 monthly payments, of \$7.80 each, amounting in all to \$436.80, from which one-fifth of 1 per cent. of the face value of the policy was deducted each month for expenses, leaving \$369.60 as the whole amount for which he was given credit on the books of the company under said certificate. At the time of issuing the last certificate, a fractional monthly payment was made of \$6.40, from which one-fifth of 1 per cent. of the face of the policy was in like manner deducted for expenses, leaving \$5.25 as the net amount credited on this payment; making total amount credited under second certificate, less expenses, \$374.85. The total amount, in gross, paid under both certificates, prior to appointment of receiver, and not considering interest as hereinafter found, was \$505.65.

(8) That the funds of the corporation were derived from payments made by the certificate or policy holders under their several cer

¹ Superseded by opinion, 54 N. E. 755.

tificates and policies, similar to the said certificates of the intervener, besides from interest on moneys loaned; and all loans to the certificate or policy holders, including the loan made to the intervener hereinafter referred to, were made out of moneys paid in by certificate holders under their certificates in the building and loan department, no loans being made in the life insurance department. Separate books were kept, though all the cash was deposited in one bank account, and checks were drawn on this account for loans.

(9) On May 9, 1892, the intervener applied to the company for a loan of \$600 on the land described in his petition, and on August 30, 1892, such loan, evidenced by a bond and secured by mortgage on the land, was made to him.

(10) In accordance with the terms of the bond, monthly payments of interest on the loan, in the sum of \$3 each, were made from the date of the loan to the date of the appointment of the receiver, amounting in all to \$169.65. No other payment was made on the loan during this time.

(11) After the appointment of the receiver, \$39 was paid to him by the intervener, which sum was credited on the principal of the loan. The money paid, other than interest and expenses, had been credited as paid on installments due on said certificates of shares.

(12) On March 7, 1895, an act was passed by the general assembly changing the name of the company from the Mutual Life & Endowment Association of Indiana to its present name, the Mutual Life Insurance Company of Indiana, saving all rights. Acts 1895, p. 150.

(13) On March 3, 1893, the general assembly passed an act entitled "An act to legalize the incorporation of the Mutual Life & Endowment Association of Indiana, and to legalize all the acts of said corporation, and all the contracts made by said corporation, to and with all persons whatever, and all the official acts of the board of directors thereof, and declaring an emergency therefor." Acts 1893, p. 192.

(14) On May 3, 1897, the Union Trust Company of Indianapolis was by the court below appointed temporary receiver of said Mutual Life Insurance Company; and on July 14, 1897, said life insurance company was in said court adjudged insolvent, and said trust company appointed permanent receiver, and instructed to collect the debts and preserve the assets of the insurance company; and said receiver at once qualified and entered into the discharge of its duties.

(15) The assets of the insurance company consist in part of cash, but chiefly of loans made to certificate holders, similar to that made to the intervener, all of said assets being derived from moneys paid in by certificate holders. Part of the certificate holders borrowed from the funds so paid in, while others borrowed nothing. Some of said certificates were for paid-up or prepaid

shares, and some were assessment, straight life, or endowment policies of insurance.

(16) The creditors consist almost exclusively of the certificate holders, some of whom are borrowers and some not borrowers, and practically all of whom have filed with the receiver their claims for the amounts paid in by them.

(17) A large number of certificate holders who were borrowers have paid their loans in full.

(18) Before bringing his action, the intervener demanded of the receiver the cancellation of his mortgage, which the receiver refused; and thereafter, and before the bringing of the action, the intervener tendered to the receiver the difference between the face of his loan and the amount which he had paid in under his certificate as herein-after described, and demanded thereupon the cancellation of said bond and the satisfaction on the record of said mortgage. The receiver, however, refused to accept the money on such condition, but offered to apply any sum paid as a credit on said loan.

(19) About August 1, 1891, at the suggestion of a friend, who had taken similar stock at the instance of an agent of the company, and also at the suggestion of the agent himself, who informed the intervener that the company did a building and loan business, the intervener called at the office of the company, where one of the trustees in charge of the business of the company told him that the company had a building and loan department and did a building and loan business. Relying on this information, and induced thereby, the intervener subscribed for six shares of stock in the company, supposing and believing that he was investing in running or investment stock in a building and loan association. Thereupon the company issued to the intervener a pass book, reading on the cover as follows: "Six shares, No. 15,107. Six shares, \$600.00. Building and Loan Department of the Mutual Life & Endowment Association of Indiana. Incorporated February 7, 1882. Charter perpetual. Frank S. Huter, No. — street, Brightwood. Date of certificate, August 1, 1891. Monthly dues, \$7.80; monthly interest, \$3.00; total, \$10.80. Always send this book with your remittance. To avoid paying fines, all dues must be paid by the 15th of each month." The certificate at the same time issued to the intervener was on its face styled: "Building & Loan Department of the Mutual Life & Endowment Association of Indiana. Share certificate No. 15,107. \$600.00. Age, 43." It was provided in the certificate that, on the making of the required monthly payments for the term of 72 months, the company should pay to the holder \$100 on each share, the "shares to become due and payable when the monthly dues paid thereon, together with all profits on the same, shall equal the sum of \$100 for each share." A further provision was

that, in case of the intervenor's death within the six years, his wife, as beneficiary, should receive such proportion of \$100 on each share as the time the certificate was in force bore to the whole time. Articles were also set out on the face of the certificate providing for the manner of making loans; also for fines, dues, expenses, and other like matters,—not differing materially from ordinary rules of building and loan associations. The intervenor never made any examination of the articles of association on file in the public records, or any further investigation into the character of the company, and never took any part in the management of its business. The second certificate issued to him at the time of making the loan did not differ from the first except as to the amount of the monthly payments. All payments were made by him as required. In the bond executed on receiving the loan, the intervenor acknowledged his indebtedness to the company in the sum of \$600, with interest at 6 per cent. per annum, payable in advance, in monthly installments. And he therein further agreed to make all payments monthly on his certificate, "until said share certificate matures as therein provided, and upon maturity of said share certificate this bond shall mature, and each shall operate as a payment of the other, in full satisfaction thereof, as concurrent mutual obligations." The mortgage given to secure the performance of the conditions of the certificate and bond is also set out, and it is found that all the conditions of the several contracts were performed as agreed to.

(20) The company has not credited the intervenor with any dividends, interest, or earnings on the sums paid in by him, and the evidence does not show that the company made any profits upon the stock.

(21) The company was never incorporated under the building and loan laws of Indiana. In its building and loan department it issued various kinds of certificates. As a mutual insurance company, it never took any premium notes.

(22) Although all moneys received were paid into a common treasury, yet the individual accounts with shareholders disclose the amount belonging to the building and loan department. The books of the insurance department show that all moneys received in that department were paid out for expenses.

The conclusions of law on the foregoing facts were: (1) That the intervenor was not entitled to have any of the payments made on his certificate credited upon the principal of his loan until the amount of such payments, exclusive of interest and expense, should equal the amount due on account of such loan. (2) That as such payments, at the date of the appointment of the receiver, had not equaled the amount due on the loan, he was not then entitled to any credit on the principal of the loan. (3) That he was

not entitled to set off the amount of the payments made by him on his certificate as against the amount due on his loan. (4) That he should be required first to pay to the receiver the full amount of his loan, in discharge of his obligation as a borrower, and should thereafter be entitled to share pro rata with other certificate holders in the distribution of the assets of the company. (5) That he should take nothing by his petition, except that the same should be treated as a claim filed by him asserting his interest in the assets of the company.

The first finding of the court shows that the company was incorporated under the "Act for the incorporation of mutual life insurance companies"; and in the twenty-first finding it is expressly stated "that said insurance company was never incorporated under the building and loan laws of Indiana." These findings are admitted to be correct by counsel on both sides.

The first question, therefore, which presents itself, is whether an insurance company can do business as a building and loan association. The mere suggestion of such a proposition seems absurd. Yet counsel for appellee gravely contends that an insurance company might engage in such building and loan business. It is not pretended that the charter of this insurance company gives it any such power. But if it does not, why then need there be any charter for the organization of a building and loan association in any case? Why might not a banking association, a railroad corporation, or a telegraph company do a building and loan business? The receiver in this case is a trust company, with powers as such expressly defined by statute. Does this receiver contend that it, too, might engage in the building and loan business? Or, indeed, is it necessary that a building and loan company should be organized under any law? The people have, however, in this and other states, seen fit to enact statutes for the organization of building and loan associations, as also for insurance companies and various other corporations; and it has been the accepted law that all such corporations must look to their charters, or to the statutes providing for their organization, for such powers and rights as they may exercise. Chancellor Kent (2 Kent, Comm. 298) says: "The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other;" and this is the uniform holding of our decisions. Nor can a contract take the place of a charter. A corporation, it was said in *Insurance Co. v. Nunnemacher*, 15 Ind. 294, is a creature existing, not by contract, but by statute. "There may be a contract among individuals to enter into a corporation," said the court in that case, "but when they have become a corporation the charter, not contract, deter-

mines their rights." Said Chief Justice Marshall, in speaking of corporations, in *Head v. Insurance Co.*, 2 Cranch, 127: "The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and, when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." In *Leonard v. Insurance Co.*, 97 Ind. 299, where it was held that an incorporated insurance company is dependent on its charter for the powers which it may exercise, the statement is cited from 1 Phil. Ins. p. 9, that such insurance company is "the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from the act, and to be capable of exercising its faculties only in the manner which the act authorizes."

The business which this insurance company might engage in is clearly set forth in the statute under which it was organized, cited in the first finding of the court, namely: "For the insurance of the lives or health of persons, or against accident to persons, upon the same conditions, and subject to the same duties and liabilities, now regulating mutual fire insurance companies, so far as the same may be applicable." Certainly there is no room here for a "building and loan department," particularly when the business of building and loan associations is itself provided for in 40 sections of the statute. Sections 4444-4483, Rev. St. 1894.

There could be no implied power to enter into such a contract as that made with the intervener. It is clearly the law, as held in *Road Co. v. Slaughter*, 33 Ind. 185, that "a corporation can make no valid contract except such as relates to the business and objects of the corporation." The sole business and objects of this corporation were "for the insurance of the lives and health of persons, or against accident to persons." Under such powers a building and loan business could no more be done than could manufacturing or banking. So it was recently held by this court, in *Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, that a corporation organized under the laws for the incorporation of manufacturing and mining companies is not authorized to engage in the business of a private warehouseman, or to issue warehouse receipts.

It is true that this insurance company had power to invest or loan its funds, as authorized by section 4884, Rev. St. 1894 (section 3753, Horner's Rev. St. 1897); but this gave no right to enter into a building and loan contract, and collect monthly dues, fines, interest, expenses, and other charges, as provided for building and loan associations. Nor can the intervener be estopped from denying that the contract imposed upon him no obligation except to pay the money borrowed, with lawful interest. As said in *Pettis v. Johnson*, 56 Ind.

139, "an illegal and void contract cannot be the groundwork of an estoppel." State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, is not in conflict with anything in the cases cited. There it was said that corporations possess such powers as are expressly conferred by their charters, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others. But it was held that, where a contract entered into by a corporation was not in violation of its charter or of any law, the corporation, having induced a party to rely upon its promise and to expend money on the faith thereof, could not afterwards repudiate the obligation so assumed, and refuse to make payment to the party as agreed.

In the case at bar the intervener is not refusing to pay his debt. He insists only that the money paid by him to this insurance company shall be applied on his debt. He is not repudiating, but seeking to make good, his obligation. He is asking only that illegal fines, dues, and other unauthorized charges against him be set aside. The intervener is, indeed, in no different situation from that of any other person who should have borrowed money from the insurance company. He must pay his debt, with interest. But the money which he has already paid into the treasury of the company, whether called monthly dues, interest, fines, or by any other name, should first be applied on this debt. If any balance then remain unpaid, the intervener will be a debtor as to that, but as to that only, and, on the payment by him of such balance, his bond should be canceled and surrendered and his mortgage satisfied of record.

But counsel says that by the act of March 3, 1893, supra, all acts of the company, including the contract in this case, were legalized. A reference to that statute, however, including also the title and preamble, will make it plain that the legislature there had its mind solely on the company as an insurance corporation, and on its due organization as such under the general act of December 20, 1865. There is not a word in the legalizing act, nor in its title or preamble, as to any building and loan business or contracts. Repeated references are there made to the business and policies of life insurance, but nothing is found as to building and loan contracts.

Had the legislature, indeed, intended to do what counsel here asserts, it would have been necessary to amend the mutual insurance laws so as to authorize insurance companies to do a building and loan business; and then, perhaps, the general assembly might have legalized the acts of insurance companies that had theretofore engaged in the building and loan business. But, however that may be, the act in question did not, and did not purport to, legalize any building and loan business, but only the life insurance business of the company.

Finally, counsel insists that, as the compa-

ny has become insolvent and is in the hands of a receiver, all those who have paid money into the concern are mutually interested in the fund thereby created. Even granting this to be true, in a general sense, it does not follow that one who has borrowed money from the company and has made payments on his debt should not have such payments applied on his obligation. The intervener, as we have seen, by reason of the unlawful contract of the company, is a simple debtor for the money borrowed by him, and should therefore be given credit for the payments which he has made. Had the company loaned its money to a stranger, as it might have done under the statute, it could certainly not be contended that payments made from time to time by such stranger ought not to be credited to him as against the money so borrowed. The intervener, as the borrower, occupies no different position. Had all those who paid money to the company been simple contributors, undoubtedly they would have borne mutual relations to one another, and on the insolvency of the company, and the appointment of a receiver, would have been entitled to their pro rata shares of what was left of the money contributed by them. But the company had a right to lend its money, and, if it did so, the money paid on any sum borrowed must be credited on the debt so incurred. For the purposes of this case, we must consider the company to be, what it actually was, a life insurance company, with the right to loan its money. But a life insurance company loaning its funds, any more than any other company or individual, cannot refuse to give the borrower credit on the sum borrowed for all sums paid to the company by the borrower.

It is true, however, that as to the amount paid by the intervener under his first certificate, shown in the fifth finding to be \$62.40, he is a shareholder, and not a borrower; and as to that sum there is a mutuality between him and all others who are simple shareholders, and, as such, interested pro rata in the distribution of what balance there may be left for division among those who have paid such fund into the treasury of the company. But, as shown in the sixth and seventh findings, the intervener surrendered this first certificate, and took a loan certificate in its place, borrowing \$600, and paying thereon \$413.20. To this were added payments of interest, as shown in the tenth finding, amounting to \$169.65, and \$39 on principal, paid to the receiver, as shown in the eleventh finding. These payments on the loan amount in all to \$651.85, and as to that sum there is no question of mutuality with shareholders or any other persons; it is a sum paid on a sum borrowed. The court, therefore, erred in its conclusions of law. As to amounts paid by the intervener under his first certificate, he should share pro rata in the assets of the company, being mutually interested therein with others who have contributed to the fund so created. His loan of \$600 should be paid, with lawful

interest; and all sums paid by him to the company since the taking out of said loan, the items amounting to \$651.85, as found by the court, should be credited on said loan, as in other cases of partial payments. *Wasson v. Gould*, 3 Blackf. 18; *Markel's Adm'r. v. Splitter's Adm'r.*, 28 Ind. 488; *McCormick v. Mitchell*, 57 Ind. 248. On payment of remainder, if any, found due the company, the bond should be canceled and surrendered, and the mortgage satisfied of record. The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to enter judgment for the intervener accordingly.

(173 Mass. 196)

COOK v. HAYWARD et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1898.)

WILLS—CONSTRUCTION—LEGACIES—WHEN EFFECTIVE—INTEREST.

1. Testator bequeathed a sum of money to a son, payable out of the life estate of his wife at her death. The son died before testator's wife, but after testator. *Held*, that as the bequest vested at testator's death, though its payment was postponed until the wife's death, it would not lapse, but should be paid to legatee's representatives.

2. Where, by a will, a bequest is to be paid at the death of testator's wife, the legatee would be entitled to interest from the date of such death.

Appeal from supreme judicial court, Worcester county; Charles Allen, Judge.

Application to probate court by Clifford Cook, administrator with will annexed of Bainbridge Hayward, deceased, against Henry J. Hayward, Henry W. King, administrator of W. B. Hayward, and others, for the construction of decedent's will. There was a decree, from which defendants appeal. Affirmed.

W. S. B. Hopkins and F. B. Smith, for appellants. H. W. King and C. M. Rice, for appellee H. W. King.

KNOWLTON, J. The testator, Bainbridge Hayward, by his will gave legacies of \$200 each to his sons Henry J. Hayward and William B. Hayward, and gave to his wife, Martha Hayward, all the remainder of his personal estate, with the real estate which he occupied as a homestead. He then gave her a life estate in all the remainder of his real estate. His will then proceeds as follows: "Furthermore, at the decease of my said wife, I hereby give, devise, and bequeath to my son William B. Hayward the sum of five thousand dollars, to be paid to him at the decease of my said wife, Martha Hayward. Furthermore, after the decease of my said wife, Martha Hayward, and after the payment of five thousand dollars to my son William B. Hayward, out of my estate, in the which the life estate is given to my said wife, I hereby give, devise, and bequeath the use, occupation, and improvement of what shall

then remain thereof in equal shares to my said children Henry J. Hayward and William B. Hayward, for and during their lifetime, and at the decease of my son Henry J. Hayward one-half in fee to his heirs, and after the decease of William B. Hayward the other undivided half part to his heirs." His wife and two sons survived him, and his son William B. Hayward died before his wife, Martha Hayward, who has since deceased. The only question in the case is whether the legacy of \$5,000 payable to William B. Hayward after the decease of Martha Hayward lapsed, or whether it goes to William B. Hayward's representatives.

We think it pretty plain that it vested on the death of the testator, although the payment of it was postponed until after the decease of the testator's widow. It seems to be the ordinary case of a gift of a remainder after a life estate, and it should be held to have vested at the death of the testator, unless he plainly indicated an intention that it should not vest until the happening of the later event, on which it was to become payable. *Wardwell v. Hale*, 161 Mass. 396-399, 37 N. E. 196; *Eldridge v. Eldridge*, 9 Cush. 516; *Shattuck v. Stedman*, 2 Pick. 467; *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; *Loring v. Carnes*, 148 Mass. 223-225, 19 N. E. 343. The grounds on which it is argued that the legacy of \$5,000 could not vest until after the death of the widow would furnish a foundation for an argument no less strong that the gift of the residue to Henry J. Hayward and William B. Hayward could not take effect because of the death of William B. Hayward before the decease of his mother, which made it impossible to pay him the legacy of \$5,000, without the payment of which the residuary clause could not take effect. Evidently the testator never contemplated such a result. By the terms of the will, the legacy is made payable at the decease of Martha Hayward, and the representatives of the legatee are entitled to interest upon it from that time. Inasmuch as the payment is to be made from the proceeds of the real estate, it is the duty of the administrator de bonis non with the will annexed to sell so much of the real estate as may be necessary to produce thus sum, with interest, and to make payment thereof to the administrator of the estate of William B. Hayward. Decree of probate court affirmed.

(172 Mass. 223)

GOLDING v. TOWN OF NORTH ATTLEBOROUGH.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1898.)

STATE HIGHWAYS—CHANGE OF GRADE—EXCLUSIVE REMEDY—LIABILITY OF TOWN.

The remedy provided by St. 1894, c. 497, § 3, for compensation to owners of lands ad-

joining a state highway for injury to such lands therefrom, to be paid by the commonwealth, after being determined in the manner provided in that section, is exclusive, and does not authorize a suit against a town which, in pursuance of a contract with the state highway commissioners, has done work on a state highway, as authorized by section 4.

Appeal from superior court, Bristol county.

Action by Mary E. Golding against the town of North Attleborough. From a judgment for defendant, plaintiff appeals. Affirmed.

R. P. Coughlin, for appellant. W. H. Fox and F. B. Byram, for appellee.

HAMMOND, J. This is a petition by a landowner to recover compensation for injuries to her property by reason of a change of grade in the adjoining highway. The way was laid out as a state highway, by the Massachusetts highway commission, and the work for which compensation is sought was done under the direction and control of the commission, acting under the authority of St. 1894, c. 497. The defendant town, under the authority originally given in St. 1893, c. 473, re-enacted in St. 1894, c. 497, § 4, contracted with the state highway commission to do the work, just as any individual contractor might have done. St. 1894, c. 497, § 3, provides that compensation to owners of adjoining lands for injury to such lands is to be paid by the commonwealth, after being determined in the manner provided in that section. This remedy is adequate and complete, and excludes all other remedies. This is not an action of tort in which the injured party may sue either the servant who has caused the injury or his master. The work was done under authority of law, and only the statute remedy can be pursued. Judgment affirmed.

(172 Mass. 185)

MACK v. NEW YORK, N. H. & H. R. CO.
(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 21, 1898.)

ACTION AGAINST CORPORATION—NOTICE.

In an action against a railroad company, the secretary provided by Gen. St. Conn. § 3455, and not the president, is the one to whom notice should be given, under section 2673, making the right to maintain an action against a corporation conditional on notice to its "clerk."

Exceptions from superior court, Hampden county.

Action by Alexander Mack against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

D. E. Leary and J. L. Doherty, for plaintiff.
W. S. Robinson, for defendant.

HOLMES, J. This is an action for personal injuries sustained by the plaintiff while crossing the defendant's road upon a highway in the state of Connecticut. The plaintiff's case is that he fell and was hurt because the

planks of the crossing were rotten, that the statutes of Connecticut made it the defendant's duty to keep the planks in repair, and that they give him an action for injuries caused by the defendant's failure to obey the law. Gen. St. Conn. §§ 2673, 3499. But by section 2673 the right to maintain the action against a corporation is made conditional upon giving written notice within a certain time to the clerk of such corporation. The judge before whom the case was tried ruled that the action could not be maintained, because notice had not been given as required by law. The plaintiff excepted.

No written notice was given by the plaintiff, except a letter from his lawyers, addressed and sent to the president of the defendant company. The lawyer testified that before sending the letter he examined the reports of the defendant, and also of the railroad commissioners, and made inquiries, and found no officer of the company called the "clerk." But it did appear that there was a secretary, William D. Bishop, Jr., at Bridgeport, in the state. The only question raised by the ruling which it is necessary to consider is whether this secretary was the clerk of the corporation, within the meaning of section 2673. A majority of the court is of opinion that the two words have the same meaning, so far as this case is concerned. By section 3453 it is provided that the direction of the affairs of such companies shall be in a board of directors, who shall elect a president, "and may also choose a secretary who shall also be secretary of the company, and be sworn to a faithful discharge of his duty." There is no other provision for a clerk. Yet there is no doubt that section 2673 applies to railroad companies. *Shalley v. Railway Co.*, 64 Conn. 381, 386, 387, 30 Atl. 135; *Mack v. Railroad Co.*, 164 Mass. 393, 41 N. E. 653. It is not to be supposed that the legislature would have required the notice to be given to the clerk of such companies, if it did not assume that they must have a "clerk"; taking that word in the sense in which it was used in section 2673, making the requirement. We are aware of no difference between the duties of the secretary of a corporation—at least, where there is no officer distinctively called "clerk"—and those of one called "clerk." No difference is suggested by the counsel for the plaintiff or by the dictionaries. "Clerk" and "secretary" seem to be regarded as synonymous in a recent learned work. 4 *Thomp. Corp. c.* 98, § 4693. It is said that the statute should be liberally construed. We do not get much light from such generalities, but surely it would be a very illiberal construction, under the circumstances which we have stated, to say that a notice to the secretary did not satisfy the words of the act. Yet, if the words of the act can be satisfied, they must be. Leaving on one side the case where they cannot be complied with, compliance with them is a condition precedent to the right of action given by the law. *Gardner v. City of New Lon-*

don, 63 Conn. 267, 269, 28 Atl. 42; *Fields v. Railroad Co.*, 54 Conn. 9, 4 Atl. 105; *Veginan v. Morse*, 160 Mass. 143, 146, 35 N. E. 451. It is not enough that the corporation has had actual notice, however full and complete, if the form prescribed by the statute could have been followed, but was not. If, for instance, the defendant had had an officer called a "clerk," we suppose that no one would contend that the notice in this case was good, under the act. If that be so, and there is a synonymously named officer, who is a clerk in functions and attributes, a service upon whom would satisfy the requirement of the statute, we think it follows that the failure to give notice to him cannot be excused by showing that the corporation had actual notice, and suffered no harm. *Crocker v. City of Hartford*, 66 Conn. 387, 390, 391, 34 Atl. 98. See *Amy v. Watertown*, 130 U. S. 301, 316, 317, 9 Sup. Ct. 530; *McCall v. Manufacturing Co.*, 6 Conn. 428, 435.

Exceptions overruled.

(172 Mass. 206)

RAYMOND v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Middlesex. Nov. 23, 1898.)

TAXATION—OWNERSHIP OF PROPERTY—EVIDENCE.

A finding that plaintiff had such an interest in a certain stock of goods as to make him liable for the tax thereon was supported by the evidence, though plaintiff testified that they belonged to his wife, where the business had been carried on under the name of a firm in which plaintiff appeared, and where he admitted that he had formerly carried on business in such name; that he went into insolvency; that his business was closed, and thereafter conducted in his wife's name; that they afterwards had other stores, and subsequently purchased the stock in question, and continued the business at the same store; and that he hired such store, and engaged a local manager, and afterwards disposed of the business, without disclosing any interest therein on the part of his wife; and where it appeared, from other evidence, that plaintiff had acted, in regard to such business, as if he was the sole proprietor, and where his wife had filed no certificate, under Pub. St. c. 147, § 11, stating that she was doing business as a married woman on her separate account.

Exceptions from superior court, Middlesex county; J. B. Richardson, Judge.

Action by George J. Raymond against the city of Worcester. There were findings in favor of defendant, and plaintiff excepts. Exceptions overruled.

C. W. Bartlett and E. R. Anderson, for plaintiff. A. P. Rugg, for defendant.

KNOWLTON, J. At the close of the evidence the plaintiff requested the court to rule that he had made out his case, and that the defendant had established no defense. The court refused so to rule, and found that the plaintiff was the owner of the stock of goods, or had such an interest in them as to be liable for the tax. The only question presented by the bill of exceptions is whether upon the

evidence the judge was bound, as matter of law, to find for the plaintiff. It was an undisputed fact that the goods belonged to some one who did business under the name of George J. Raymond & Co. The plaintiff testified that his wife, Hattie D. Raymond, was the sole proprietor of the business, and owner of the property of the firm of that name. The contention of the defendant was that this testimony was untrue. The plaintiff admitted that for about 10 years prior to 1882 he had carried on business in the name of George J. Raymond & Co. in selling clothing and men's furnishing goods; that in 1882 he had a store in Tremont Row, in Boston, and went into insolvency; that his business was closed, and that on account of that the business was afterwards conducted in his wife's name; that they began to have stores outside of Boston three or four years before they went to Worcester; that in 1891 they bought out a firm in Worcester that was doing business as the Bay State Clothing Company, and he continued to do business at the same store; that he made the arrangements about hiring the store, and engaged a local manager; that he helped to sell the business to some one else; that he represented the owner largely in the sale, perhaps fully; that he did not think he said anything to Taylor, of whom he hired the store, or to Dalrymple, whom he engaged as local manager, about Hattie D. Raymond. There was other evidence tending to show that in doing the business, and making the arrangements in regard to the business, he talked and acted as if he was the sole proprietor, and made no representation or disclosure that his wife had any interest in the property or business. His wife never filed a certificate in Worcester stating that she was doing business as a married woman on her sole and separate account, under the provisions of Pub. St. c. 147, § 11. Upon all the evidence in the case, the judge might well disbelieve the plaintiff's testimony in regard to his wife's ownership of the property, and find that his mode of dealing with the property truly represented his ownership of it. Exceptions overruled.

(172 Mass. 222)

GOVIN v. WAMPANOAG MILLS.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1898.)

INJURY TO EMPLOYEE—ORDER OF SUPERINTENDENT.

An employer is not liable for injury to one of two employes moving cotton, caused by the other throwing down a bale while the one injured was rolling away a bale with his back turned to him, though the superintendent had shortly before told him to "throw down cotton," as this will not be considered a direction to throw it down in any particular way, without regard to the safety of the co-employee.

Exceptions from superior court, Bristol county; John W. Hammond, Judge.

Action by one Govin against the Wampanoag

Mills. Verdict for defendant. Plaintiff excepts. Exceptions overruled.

J. W. Cummings and C. R. Cummings, for plaintiff. Jackson, Slade & Borden, for defendant.

KNOWLTON, J. The plaintiff and a man called Pat were engaged in moving cotton in the defendant's cotton house. Pat was on the top of a pile of cotton bales in a room about 60 feet long and 40 feet wide, and the plaintiff was on the floor, near the bottom of the pile. They were moving the cotton out towards the door. The space was about half filled with cotton. The work was simple, both of the men were familiar with it, and neither of them could be supposed by the defendant to need instructions in regard to it. As the plaintiff was rolling a bale of cotton with his back towards Pat, another bale, which was thrown down by Pat, struck him, and broke his leg. The only ground on which the plaintiff seeks to hold the defendant is that its superintendent, Robinson, who was eating his breakfast not far away from the pile when the accident happened, had told Pat a short time before to "throw down cotton." The plaintiff testified differently in different parts of his testimony as to whether the order to throw down cotton was given when Robinson first ordered them to do this work or later, just before the bale came down. However that may have been, the order can only be interpreted as directing Pat to throw down cotton in a proper way, and in a proper place, and not as telling him to throw it down upon the plaintiff when he was standing underneath. It cannot properly be interpreted as a direction to throw down a particular bale in a particular way, without regard to the plaintiff's safety. The burden being upon the plaintiff, we do not find that there was evidence of any order of the superintendent that was more than a command or request to hurry on the work in a proper way, or which made the superintendent or his employer responsible for Pat's negligence in throwing down the bale upon the plaintiff. Exceptions overruled.

(172 Mass. 180)

SHELDON v. BOSTON & A. R. CO.

SHELDON et al. v. SAME.

(Supreme Judicial Court of Massachusetts.
Middlesex. Nov. 21, 1898.)

EMINENT DOMAIN—DAMAGES—CHANGING GRADE AT RAILROAD CROSSING—DRAINING WELLS.

One whose well, situated on land separated by that of another from land taken by a railroad, under St. 1890, c. 428, and St. 1891, c. 123, for the purpose of changing its grade at a crossing, is permanently drained by the excavation made by the railroad, is entitled to damages, which such statutes provide shall be assessed in such cases "in the same manner, and under like rules of law as damages may be determined when occasioned by the taking of land for locating and laying out railroads and public ways."

Exceptions from superior court, Middlesex county; H. N. Sheldon, Judge.

Petitions—one by Sheldon, and the other by Sheldon and others—to recover damages of the Boston & Albany Railroad Company for draining petitioners' wells in excavating in changing the grades of its roadbed. The court ruled that petitioners could not recover, and they except. Exceptions sustained.

F. M. Forbush, for petitioners. P. H. Cooney and H. C. Mulligan, for respondent.

KNOWLTON, J. The respondent took land, under St. 1890, c. 428, and St. 1891, c. 123, for the purpose of changing its grade at a crossing, in accordance with the report of commissioners appointed under the provisions of the statutes. It excavated the land along the line of the new location to the depth of about 15 feet below the level of its former roadbed, and thereby permanently drained the wells of the petitioners on their lands, a short distance away from the land taken, and separated from it by the land of other persons. These petitions are brought by the petitioners, respectively, to recover damages for the loss of their respective wells, and no other damage is claimed. Damages in such cases are to be assessed "in the same manner, and under like rules of law as damages may be determined when occasioned by the taking of land for locating and laying out railroads and public ways, respectively, in such city or town." St. 1890, c. 428, § 5; St. 1891, c. 123, § 1. If any part of the land of the petitioners had been taken, there is no doubt, upon all the authorities, that in assessing their damages an allowance would have been made for the draining of their wells upon the land that remained. First Church in Boston v. City of Boston, 14 Gray, 214; Geraghty v. City of Boston, 120 Mass. 416; Murphy v. City of Boston, Id. 419; Brady v. City of Fall River, 121 Mass. 262-264; Lane v. City of Boston, 125 Mass. 519; Sisson v. City of New Bedford, 137 Mass. 255. There are many cases in which the statute giving damages occasioned by the taking of land for railroads has been discussed, and in which it has been said that the right of one who has suffered special and peculiar damages to his property, occasioned by the taking of land for a railroad, to recover damages for his injury, does not depend upon the question whether any part of his land is taken. Dodge v. Commissioners, 3 Metc. (Mass.) 380; Ashby v. Railroad Co., 5 Metc. (Mass.) 368; Parker v. Railroad Co., 3 Cush. 107; Babcock v. Western R. Corp., 9 Metc. (Mass.) 553, 555; Proprietors of Locks & Canals v. Nashua & L. R. Corp., 10 Cush. 385; Curtis v. Railroad Co., 14 Allen, 55. Parker v. Railroad Co., supra, was almost identical with the case at bar, except that the land was taken for the construction

of a new railroad, instead of for the alteration of an old one. It was held that the petitioner, no part of whose land was taken, might recover damages for the draining of his well. In Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. 796, it was held, after full consideration and a citation of the authorities, that one might recover damages to his land caused by the construction of a sewer, although no part of the land was taken or entered upon. In Dana v. City of Boston, 170 Mass. 593, 49 N. E. 1013,—the latest case considered by this court,—the petitioners, no part of whose land abutted upon the highway, were allowed to recover damages to their property from the changing of the grade in making specific repairs upon a highway. The language of the statutes under which these decisions were made, as construed by the court, seems to show a purpose on the part of the legislature, when land is taken for the construction of a railroad, a highway, or a sewer, not only to make compensation to owners for the land taken, but also, when one suffers special and peculiar damages to his property by the taking of land for such a use, to compensate him for the injury. These cases show that the principle applies, without reference to the question whether any part of the petitioner's land is taken, so as also to give him the right to payment for property which passes to the public. These principles and authorities control the present case, unless a distinction is to be made between cases which arise under these statutes in regard to railroad crossings and those that arise under the Public Statutes authorizing the taking of land for the construction of new railroads and highways. Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application, and in the results which they accomplish. There can be no doubt that these enactments in regard to changes at railroad crossings look to damages caused by the use to which the land is to be put, as well as the analogous sections of the Public Statutes to which they refer. In terms, they give compensation for damages occasioned by the taking of lands for these public uses. The provisions of the Public Statutes go no further. The questions involved in the present case were considered in Rand v. City of Boston, 164 Mass. 354, 41 N. E. 484, and the decision was made to turn upon the distinction between the language of the statute and the provisions of the Public Statutes in regard to taking lands for sewers and for railroads. Whether there is or is not a sound distinction between this case and the present cases, a majority of the court are of opinion that the present cases should be decided as if the land had been taken under the provisions of the Public Statutes for locating new railroads. Exceptions sustained.

(172 Mass. 201)

BLAIR v. TELEGRAM NEWSPAPER CO.
et al.(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1898.)**CORPORATIONS—STOCKHOLDER'S SUIT—SUFFICIENCY OF BILL.**

1. A stockholder's bill against the corporation and its president alleged that salaries were fixed at the time of incorporation, without, however, stating the manner in which it was done, and that afterwards the president, who was also treasurer and manager, began to appropriate to himself a larger salary, and kept such fact and all financial transactions of the corporation concealed from plaintiff, and that, when plaintiff did learn of it, he protested, and the president called a meeting, and, as controlling director, caused to be voted to himself the increased salary for the future, same to relate back to the time when said appropriations began. Held sufficient, as against a general demurrer, to require an answer as to the alleged overpayment of salary prior to the time it was fixed at the increased amount.

2. An allegation in a stockholder's bill against the corporation and its president, for an accounting, that the president has appropriated a large amount of corporate funds to his own private use, of which plaintiff is unable to state particulars, because defendants concealed the books and financial transactions of the corporation, is too general and vague, as showing no knowledge on plaintiff's part of the facts stated.

3. Allegations that plaintiff stockholder demanded that the president of the corporation should repay salary wrongfully paid to himself, and that the president refused to do so, and being a controlling stockholder and director, and the other directors hence refusing to take any action, it was impossible for plaintiff to obtain any remedy in the name of the corporation, may be construed as an allegation that, before bringing a stockholder's suit against the corporation and its president, plaintiff had exhausted all practicable means to induce the corporation to sue.

Report from superior court, Worcester county.

Bill by Frank W. Blair against the Telegram Newspaper Company and another for an accounting of moneys alleged to have been appropriated by the defendants to the detriment of plaintiff's rights as a stockholder. Defendants' demurrers to the bill were overruled, and the case was reported to the full court. Demurrers overruled.

Paragraph 7 of the bill is as follows: "(7) The plaintiff has demanded of said Cristy that he should pay back into the corporation the said back pay and salary in excess of the amount fixed at the time of the incorporation of the company, which he has refused to do; and the said A. P. Cristy owning a majority of the stock, and the said Henry Bassett being completely under the control and direction of said Cristy, and refusing to take any action in the matter, it is impossible for the plaintiff to obtain any remedy in the name of the said corporation."

F. P. Goulding and W. C. Mellish, for plaintiff. S. L. Whipple, D. Manning, and H. W. Ogden, for defendants.

FIELD, C. J. The allegations of the plaintiff's bill are so meager that it is impossible to decide upon demurrer the most important questions which have been argued. The bill alleges that "at the time of the incorporation, to wit, in June, 1890, the salaries of said Cristy and plaintiff were fixed at fifty and thirty dollars per week, respectively, and remained at that rate thereafter until the 6th day of June, 1896." It is not alleged in what manner or by what authority the salaries were so "fixed," but we are inclined to construe this averment to mean that the salaries were fixed at these sums by some lawful authority, and that the salaries remained so fixed until June 6, 1896, which is undoubtedly a mistake for May 6, 1896. The bill alleges as follows: "(4) On the 1st day of June, 1891, without the knowledge of the plaintiff, and without any vote of the directors, or any knowledge of the directors, except the knowledge of said Austin P. Cristy, the said Cristy began to appropriate to himself, under the pretense of salary, the sum of one hundred dollars each week, and continued to appropriate that sum of money up to May in the year 1896, the time of the passing of the vote hereinafter referred to. (5) Inasmuch as the said Austin P. Cristy kept all the financial transactions of the said corporation concealed from the other members of the corporation, the plaintiff had no knowledge until long after said 1st day of June, 1891, that the said Cristy was appropriating said sum of money to himself as his salary, and did not learn of the same until long afterwards; and as soon as he learned thereof he at once protested to said Cristy against the said act, as illegal and unjust, and as a fraud upon him, as a minority stockholder in said corporation. (6) Thereupon, upon the 6th day of May, 1896, the said Austin P. Cristy called a meeting of the directors of said corporation, and procured the majority of said directors to pass the following vote, to wit: 'Voted, that the salary of A. P. Cristy, as president, treasurer, manager, and editor, be one hundred dollars each week, the said salary to begin with June 1, 1891; and that the said salary of one hundred dollars per week which A. P. Cristy has already received from this company since June 1, 1891, is hereby expressly approved and confirmed by this board of directors, its said approval to be entered upon its records.' At the same time the plaintiff offered the following protest in writing, and spread it upon the records of said corporation, to wit: 'Frank W. Blair, a stockholder and director of the Telegram Newspaper Company, protests against the action of the directors in voting to pay back salary to Austin P. Cristy from June 1, 1891, to date, on the ground that it is illegal and in violation of justice and equity.'"

It does not appear by the bill whether the corporation has or ever had any by-laws. Pub. St. c. 105, § 4, provides that "Every corporation * * * may * * * elect in such manner as it may determine all necessary of-

ficers, fix their compensation and define their duties and obligations," etc. It does not appear by the bill that the directors had been given by the stockholders any authority to fix the compensation of officers. The plaintiff, however, complains of the vote of the directors only on the ground, as we understand the bill, that "it is illegal and in violation of justice and equity," in "voting to pay back salary to Austin P. Cristy from June 1, 1891, to date" of the vote. As it does not appear that there were any by-laws, or that any action of the stockholders had been taken on the subject of salaries, it is impossible to say that it appears on the face of the bill that this vote of the directors was authorized by the stockholders, although it is equally true that it does not appear that the stockholders never authorized the directors to pass such a vote. The bill merely alleges that the vote, so far as it relates to the back salary, was illegal, but the plaintiff apparently admits that the vote was legal as to future salary. The bill is certainly "vague and uncertain" on the subject. The bill, as originally filed, complained only of the receipt by Cristy of a salary at the rate of \$100 per week from June 1, 1891, to May 6, 1896. The only suggestion in the bill of any other misappropriation of the funds of the corporation by Cristy appears in the prayer of the bill, which is "that an account may be taken of the applications and appropriations said defendant Cristy has made of the funds of the corporation for other purposes for his own private use," etc. The plaintiff amended the bill by alleging "that the said defendant Cristy has appropriated a large amount of the funds of said corporation to his own private use, the details and particulars of which the plaintiff is unable to state, because the said Cristy conceals from him the financial affairs and the books of said corporation," etc. Such a charge, we think, is too general and vague. *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402. It is consistent with the plaintiff's having no definite knowledge, even by way of information, on the subject, and the bill cannot be maintained simply for the purpose of fishing for information on subjects on which the plaintiff has no definite knowledge or information. The demurrers, however, are not to a part of the bill.

The allegations of the seventh paragraph of the bill, perhaps, may be so construed as to show that the plaintiff had taken, under the circumstances stated, before bringing this suit, all practicable steps to induce the corporation to bring a suit.

Assuming, as we must, in a hearing on demurrer after the amendment of the bill, that it is true that Cristy has concealed from the plaintiff "the financial affairs and the books of the corporation," we are inclined to the opinion that enough has been alleged to make it necessary for the defendants to answer the bill in regard to the salary of \$100 per week received by Cristy from June 1, 1891, to May

6, 1896. Sufficient facts are not set out in the bill as amended to enable us to determine the questions whether the stockholders have authorized, or legally could have authorized, the directors to pass the vote of May 6, 1896, or whether the defendant Cristy can lawfully retain the \$50 per week alleged to have been received by him, beyond his salary as originally established, from June 1, 1891, to May 6, 1896. Demurrers overruled.

(172 Mass. 225)

BRAYDEN v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1896.)

RIGHT OF WAY—PRESCRIPTION—EVIDENCE.

1. The running of the statute, so as to give by prescription a right of way across a railroad, is interrupted by the company obstructing the opening through its fence, though the obstruction is torn down soon after.

2. Plaintiff, claiming a right of way by prescription across a railroad, is not entitled to go to the jury on the question of whether the company obstructed an opening in the fence, so as to interrupt the running of the statute, though his witnesses did not say in terms, as the company's witnesses did, that it put up the obstructions; their testimony showing that what was done was to close an opening in the fence along the railroad, and there being in the evidence no suggestion, or ground for supposing, that any third person did it.

Exceptions from superior court, Bristol county.

Action by Brayden against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

J. W. Cummings and E. Higginson, for plaintiff. T. S. Hall, for defendant.

HOLMES, J. This is an action for personal injuries suffered by the plaintiff, while crossing the defendant's track, in consequence of the explosion of a track torpedo. The plaintiff was traveling along a pathway which crossed the railroad, and which, he attempted to maintain, was a way by prescription. At the time of the accident there was an opening in the fence, through which the plaintiff passed; but it appeared by the testimony of all the witnesses, and was not disputed, that this opening had been obstructed within 20 years, although there was evidence that the obstructions were torn down soon after they were put up. At the trial the judge directed a verdict for the defendant, and the plaintiff excepted.

We are of opinion that such an assertion of right on the part of the railroad company was sufficient to prevent the gaining of a right of way. A landowner, in order to prevent that result, is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an asser-

tion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that the acquiescence was not a fact. *Powell v. Bagg*, 8 Gray, 441, 443; *Weld v. Brooks*, 152 Mass. 297, 306, 25 N. E. 719. There is no question here on the disputed point whether a merely verbal protest would have an equal effect. *Washb. Easem.* (4th Ed.) 112, 113; *Jones, Easem.* §§ 193, 194. We shall not consider even such cases as *Connor v. Sullivan*, 40 Conn. 26, where the overt act was stopped in its very beginning.

When this view was intimated by us at the argument, the counsel for the plaintiff argued that he had a right to go to the jury on the question whether the obstructions were put up by the railroad company. This seems to us plainly an afterthought, and without any fair foundation. It is true that the plaintiff's witnesses did not say in terms, as the defendant's witnesses did, that the railroad company put up the obstructions.

But their testimony shows that what was done was to nail up or close an opening in the fence along the railroad, and in the evidence there is no suggestion or ground for supposing that any third person officiously interfered.

There was no evidence of an invitation on the part of the defendant, or of a right of action on the part of the plaintiff without one, if there was no right of way. *Chenery v. Railroad Co.*, 160 Mass. 211, 35 N. E. 554. See, also, *Wright v. Railroad*, 142 Mass. 296, 7 N. E. 866; *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50. Our decision makes the questions of evidence immaterial.

Exceptions overruled.

(172 Mass. 214)

COMMONWEALTH v. MAGOON.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1898.)

CRUELTY TO ANIMALS—INSTRUCTIONS—EVIDENCE OF GUILT.

1. Where one was tried for cruelty to a sick horse while transporting it to his home, and he contended it was his purpose to cure it, an instruction that a person's motive in inflicting pain on an animal may be material in determining his guilt, and that severe pain, inflicted for a lawful purpose and with justifiable intent, does not come within the statute, was properly refused, since it was calculated to make the verdict turn on the question whether he intended to cure the horse, and not on whether he was cruel in the transportation.

2. A requested instruction was properly refused, where it was substantially included in those given.

3. The guilt of one charged with cruelty to animals does not depend on whether he thought he was unnecessarily cruel, but whether he was so in fact, and did unnecessarily cruel acts knowingly.

Exceptions from superior court, Worcester county; Justin Dewey, Judge.

Anson C. Magoon was convicted of cruelty to animals, and he brings exceptions. Exceptions overruled.

H. Parker and G. S. Taft, for the Commonwealth. Marvin M. Taylor, for defendant.

BARKER, J. The defendant, having bought a sick horse, carried it upon a wagon some eight or ten miles from the place where he had purchased the horse, to his home. He concedes that there was evidence that in carrying the horse it was greatly and unnecessarily injured and wounded, and that from the evidence his intent to be cruel, and his knowledge that he was cruel, might both be inferred. On the other hand, there was evidence that the horse, although injured and sore when purchased, lay comfortably while being carried, was not injured or wounded by being carried, and gave no signs of suffering while being carried; also, that he did all he could for its comfort while carrying it, and that his purpose in buying the horse and carrying it to his home was to cure the horse, and that he did not intend to be cruel to it or to hurt it unnecessarily, and that, in the honest exercise of his judgment, he did not think he was unnecessarily cruel in carrying the horse as he did, but thought he was good to the horse, and did not want to hurt it. He took no exception to the instructions given to the jury, but excepted to the refusal to give the following rulings which he requested: "(1) The motive of a person who inflicts pain upon an animal, in determining the criminality of the act, may be material. Pain inflicted for a lawful purpose and with a justifiable intent, though severe, does not come within the statute meaning of 'cruel.' (2) If a defendant, in the proper exercise of his own judgment, honestly thinks he is not being unnecessarily cruel, he must be acquitted. (3) It must appear that the defendant, knowingly and willingly, was unnecessarily cruel."

The first request is founded upon language used by Mr. Justice Hoar in *Com. v. Lufkin*, 7 Allen, 579, at page 582, in dealing with the right to inflict pain as part of, or as incident to, an attempted cure; and while it might properly be given as an instruction, if the acts causing pain were part of an attempted cure, it would have been misleading to the jury in the case at bar. The defendant's contention here was that his purpose and intent were to cure the horse, and the ruling requested was calculated to make the verdict turn upon the question whether he intended to cure the horse, while the real issue was whether his transportation of the horse, which was not necessarily any part of an attempted cure, was lawful or criminal. If his acts, intended as part of a cure, inflicted unnecessary pain, he might be found guilty. The request was rightly refused; the instructions given and not excepted to having dealt properly with the defendant's intention, though not in the terms of the request.

The other requests were also properly re-

fused. The defendant's guilt did not depend upon whether he thought he was unnecessarily cruel, but upon whether he was so in fact. It need not appear that he knew that he was cruel, and that he was willing to be so, but only that he intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain, and so were unnecessarily cruel. *W—— v. W——*, 141 Mass. 495, 6 N. E. 541; *Com. v. Gilbert*, 165 Mass. 45, 59, 42 N. E. 336. The proper exercise of one's own judgment must, as is pointed out in *Com. v. Wood*, 111 Mass. 408, 411, be distinguished from wantonness or recklessness of consequences. Exceptions overruled.

(172 Mass. 211)

CLARE v. NEW YORK & N. E. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1898.)

**JUDGMENTS—RES JUDICATA—DEATH BY WRONGFUL
ACT—INJURIES TO EMPLOYEES.**

1. A judgment under St. 1887, c. 270, for personal injuries suffered by an employé, is no bar to a subsequent action, under Pub. St. c. 112, § 212, for death caused by such injuries.

2. A judgment for an administrator in an action by him under St. 1887, c. 270, for personal injuries suffered by his intestate, is a bar to a second action by him to recover for such injuries under the common law.

Exceptions from superior court, Worcester county; Daniel W. Bond, Judge.

Action by Maurice P. Clare, as administrator, against the New York & New England Railroad Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

W. A. Gile and Francis M. Morrison, for plaintiff. F. P. Goulding and W. C. Mellish, for defendant.

FIELD, C. J. The declaration contains two counts,—the first at common law, for personal injuries suffered by the plaintiff's intestate; and the second under Pub. St. c. 112, § 212, for the death of the plaintiff's intestate. The judgment in the former action between the same parties¹ was rendered on a declaration under St. 1887, c. 270, for personal injuries suffered by the plaintiff's intestate, and not for his death. It is obvious that such a judgment is not a bar to the prosecution of the present action on the second count, as the causes of action are different. The writ in the present action is dated May 17, 1897, and by the exceptions it appears that the plaintiff's intestate died on July 20, 1891, and that he received the injuries which caused his death on July 19, 1891. Pub. St. c. 112, § 212, requires the action under that section to be "commenced within one year from the injury causing the death." This defense that the action was not commenced within said year is set up in the answer of

the defendant, and is plainly a good defense to the action on the second count.

St. 1887, c. 270, does not take away any cause of action at common law which an employé had against his employer for personal injuries. The employé, or, if he has died after conscious suffering, his administrator, can bring an action for personal injuries, either at common law or under the statute, and, by our practice, he is permitted to join a count or counts at common law with a count or counts under the statute. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 768. The declaration in the former action between these parties contained no count at common law, but it was at the option of the plaintiff whether, in that action, he would sue at common law or under the statute, or join counts under both. When such counts are joined, it may be that the trial court, at some stage of the trial, can, in its discretion, compel the plaintiff to elect on which of the two classes of counts he will proceed, although this court has held that an election ought not to be compelled when all the counts are under the statute. *Beauregard v. Construction Co.*, 160 Mass. 201, 35 N. E. 555. Plainly, a plaintiff should not be permitted to retain verdicts both at common law and under the statute for the same personal injuries, and have judgment for the sum of the two verdicts. A verdict under the statute cannot exceed the sum of \$4,000, while at common law there is no fixed limit to the amount of the verdict; and the statutory notice must be given in order to maintain an action under the statute, while no notice is required to maintain an action at common law. It may happen that the proof is such that there is no evidence to maintain an action at common law, although there is evidence to maintain an action under the statute; or the converse may be true, or there may be evidence for the plaintiff both at common law and under the statute. *Coffee v. Railroad Co.*, 155 Mass. 21, 28 N. E. 1128; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550.

The fact, if it be a fact, that the plaintiff, at some time or other in the trial, may be compelled by the trial court to elect whether he will proceed at common law or under the statute, does not prevent the former adjudication from being a bar to another action between the same parties to recover compensation for the same injury. The alleged cause of action at common law could have been tried in the former action if the plaintiff had chosen to join a count at common law with a count or counts under the statute, and, if compelled by the trial court to elect, he had elected to go to the jury on the count at common law. The parties are concluded by the judgment in the former action, not only upon the issues actually tried and determined, but upon all issues which might have been tried and determined, in that action. *Bassett v. Railroad Co.*, 150 Mass. 178, 22 N. E. 890; *Foye v. Patch*, 132 Mass. 105. There are

¹ 167 Mass. 39, 44 N. E. 1054.

opinions of this court which tend to show that the trial court, in its discretion, may compel a plaintiff in this class of cases to elect, at the close of the evidence, whether he will go to the jury on the counts at common law or the counts under the statute. Whether a plaintiff can be compelled to elect before the close of the evidence has not been decided; neither has it been decided that in every case of this class the trial court can or ought to compel the plaintiff to elect. *Brady v. Manufacturing Co.*, 154 Mass. 468, 28 N. E. 901; *Murray v. Knight*, 156 Mass. 518, 31 N. E. 646; *Conroy v. Inhabitants of Clinton*, 158 Mass. 318, 33 N. E. 525. It is settled that when "a person having a choice of inconsistent remedies for the same injury has once elected one of them he cannot afterwards seek the other." *Whiteside v. Brawley*, 152 Mass. 133, 134, 24 N. E. 1088. But, in an action like the present, the two classes of remedies for personal injuries, viz. at common law and under the statute, are not necessarily inconsistent, but the plaintiff cannot have both remedies against the same defendant for the same injury. When the facts will support an action at common law as well as under the statute, the remedies, as was said in *Connihan v. Thompson*, 111 Mass. 270, "are alternative remedies, but not inconsistent, and remedy in both forms might be sought in one and the same action. If the plaintiff institute separate actions, he cannot carry both to judgment and satisfaction." See *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301. There was in the present case but one cause of action for personal injuries. This could not be split by the plaintiff into two separate causes of action. The judgment in that action is conclusive, as between the parties, upon the whole cause of action for personal injuries which could have been tried and determined in that action. *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895. Exceptions overruled.

(172 Mass. 240)

WHITING v. PRICE et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1898.)

FALSE REPRESENTATIONS — CORPORATE BONDS — ACTION OF DECEIT — QUESTION FOR JURY — INSTRUCTIONS.

1. A statement in a bond was that it was secured by first mortgage on all the corporation's property, rights, and franchises. One seeking to sell it falsely stated that it was secured by a mortgage of realty of half a million in value. *Held*, that there was no contradiction preventing the buyer from recovering as for deceit, though he knew the contents of the bond.

2. One seeking to sell a corporate bond stated to the buyer what he had been told by several living in the latter's town, and known to him, and advised him to consult with them. *Held*, in an action for deceit based on these statements, that the question whether the buyer ought to have inquired of the persons named was properly submitted to the jury.

3. In an action for deceit based on a false statement, in the sale of a corporate bond, that

it was secured by a mortgage on realty, it was not error to permit the jury, in measuring the damages, to consider what had transpired since the sale in determining the bond's value, and what it would have been had it been as represented.

4. In an action for deceit based on a false representation in the sale of a bond, the right to sue does not depend on a return of the bond.

Exceptions from superior court, Bristol county; J. B. Richardson, Judge.

Action by Alvin H. Whiting against Edward R. Price and others. There was a judgment for plaintiff, and defendants except. Exceptions overruled.

G. A. Perkins, for plaintiff. H. J. Fuller, for defendants.

HOLMES, J. This is an action for false representations, which has been before the court already upon a demurrer to the declaration. 160 Mass. 576, 48 N. E. 772. It now comes up upon exceptions taken at the trial.

The bond respecting which the representations were made stated that payment was "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)." The representation proved was that the bond was secured by a mortgage of real estate of the value of half a million dollars. In fact the company owned no real estate, and the bond was not secured by a mortgage of real estate. An exception was taken to a ruling allowing the plaintiff, even if he had read the bond, to recover for this further statement about the security. We see no reason for the exception, and none is offered for it. The alleged representations did not contradict the bond; they made specific and definite what the bond left vague.

The defendant Parker stated to the plaintiff, at North Attleborough, what he alleged he had been told by several persons, named, living in the town, and known to the plaintiff. The defendant advised the plaintiff to see and consult with them. The defendant asked a ruling to the effect that the plaintiff could not recover for such statements when he was referred to the sources of the defendant's alleged information. This was refused, the judge intimating that it depended on the circumstances, and seemingly leaving it to the jury whether the plaintiff ought to have inquired of the persons named. So far as appears, this was the proper course. It is true that in cases of representations as to quality, correspondence to sample, etc., of goods exhibited in the buyer's presence, the court has ruled that, if the buyer had full means of ascertaining the truth for himself, he could not set up that he was imposed upon by fraud (*Rubber Co. v. Adams*, 23 Pick. 256, 263; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Long v. Warren*, 68 N. Y. 426), and that a verdict has been directed partly on that ground (*Poland v. Brownell*, 131 Mass. 138). See Bayly v.

Merrel, Cro. Jac. 386. But the requirement, as it has been worked out, does not call for more than reasonable diligence (Holst v. Stewart, 161 Mass. 516, 522, 37 N. E. 755; Brown v. Leach, 107 Mass. 364, 368; Nowlan v. Cain, 8 Allen, 261, 264); and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury (Holst v. Stewart, 161 Mass. 516, 522, 523, 37 N. E. 755). See Burns v. Lane, 138 Mass. 350, 355, 356; Whiteside v. Brawley, 152 Mass. 133, 24 N. E. 1088. The matter may have been confused a little by not distinguishing between sellers' talk as to value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning which even sellers may be held liable for fraud, and as to which the buyer may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases.

The judge, at the defendants' request, instructed the jury that the measure of damages was the difference between the actual value of the bond at the time of the purchase and its value if it had been what it was represented to be, secured as represented. Morse v. Hutchins, 102 Mass. 439, 440; Nash v. Trust Co., 163 Mass. 574, 587, 40 N. E. 1039. He then instructed them, further, that they "would inquire what the value of the bond was at that time, in view of the circumstances which have transpired," and what it would have been if it had been secured as according to the plaintiff's evidence the defendant said it was, adding: "You will take into account what has happened since, in order to determine what the value of the bond was and what it is now." The defendants excepted to the further instruction. With some hesitation, we have come to the conclusion that this exception should be overruled with the rest. The reference to the present value of the bond in the last words quoted cannot be taken to have overruled the express direction as to how the damages were to be measured. We think that what was added to that express direction merely amounted to allowing the jury to take subsequent events into account in arriving at the two values at the time of the purchase, which the jury were directed to compare. We cannot say that this was wrong. The market value of the bond at the time of the sale may have been illusory, because the public also may have been deceived. The statement which we have quoted, appearing in the bond of an electric light company, certainly conveys the impression that it has a plant and property, which naturally would include land. Or, if it be answered that the public, which makes market prices generally, looks a little further than such vague words, the question remains, what would have been the value of a bond adequately

secured, when the public were willing to pay for one depending so far upon speculation for its value that subsequent events have shown it to be worthless? The subsequent events may be likened to the coming out of a latent disease existing in a horse at the time of a fraudulent sale, to take an example put by Cockburn, C. J., in Twycross v. Grant, 2 C. P. Div. 469, 544. It was intimated that subsequent events might be considered in Coffing v. Dodge, 167 Mass. 231, 241, 45 N. E. 928; and it was decided that they might be, in order to determine the worth of stock, in Peek v. Derry, 37 Ch. Div. 541, 591, et seq., a decision not affected by the subsequent reversal by the house of lords, on the ground that fraud was not made out. 14 App. Cas. 337. See, also, Hubbell v. Meigs, 50 N. Y. 480, 492; 1 Sedg. Meas. Dam. (8th Ed.) § 257. We may follow these cases without regard to the possible conflict between the measure of damages in this state and that adopted elsewhere. It would seem probable that in the present case the jury found the bond to have been worthless, and gave the plaintiff no more than he paid, but with that we have nothing to do.

The plaintiff did not offer to return the bond to the defendants. He was not bound to do so. The action is for false representations, and proceeds upon an affirmation of the purchase. Whiteside v. Brawley, 152 Mass. 133, 134, 24 N. E. 1088. The dictum in the case of Hedden v. Griffin, 136 Mass. 229, cited for the defendants, has no bearing. There the plaintiff was induced by the defendant's false representations to take a contract of insurance from a third person. The insurance company was solvent, and the policy was a good policy. The representations went to collateral matters. The plaintiff had a right to rescind, however, which he exercised. It was intimated in the course of the decision that, if he had chosen to keep the contract, his damages would have been only nominal, which very likely was true, as the plaintiff got what he expected. Here the ground of complaint is that the plaintiff did not get what he expected. Exceptions overruled.

(172 Mass. 227)

SMITH v. AMERICAN LINEN CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1898.)

INSOLVENCY—PREFERENCE.

Pub. St. c. 157, § 33, declaring that a person who has accepted a preference "shall not prove the debt or claim on account of which the preference was made or given," does not prevent the proving of one claim merely because the claimant has been given a preference on another claim.

Appeal from supreme judicial court, Bristol county; James M. Barker, Judge.

Bill by William R. Smith against the American Linen Company. Bill dismissed, and plaintiff appeals. Dismissed.

Lem. Le B. Holmes, for appellant. Jennings & Morton, for appellee.

HOLMES, J. This is a bill in equity, brought under Pub. St. c. 157, § 15, by the assignees in insolvency of one Barlow, to revise the refusal of the court of insolvency to expunge the proof of the defendant's claim; the ground of the bill being that the defendant has accepted a preference. Pub. St. c. 157, § 33. The material facts are these: In November, 1893, Barlow was insolvent, and his creditors gave him an extension of time, that he might continue in business; it being hoped that by doing so he would be able to pay them in full. The creditors accepted notes for the amount of their claims. In November, the following year, the defendant sold Barlow waste from its mills, by what are called "cash transactions,"—that is, upon the understanding that it was to be paid for the goods in 10 days,—and it was paid for the same at the end of 10 days, in November, while Barlow still was going on. The last of these transactions was after notice that Barlow would not be able to pay his debts at the end of the extension. In December, 1894, Barlow went into insolvency. The payments just mentioned constitute the alleged preference. The claim which the defendant was allowed to prove was for the old, extended debt alone.

It is unnecessary to consider whether, as against later creditors, if not as against those who agreed to give time, the credit given upon what merchants call a "cash sale" stands differently from any longer or other credit, in respect of the right of the creditor to accept payment without accepting a preference. *Upton v. Cotton Mills*, 111 Mass. 446. For we are of opinion that the debt on account of which the preference, if any, was given, was distinct from the claim upon the note which was proved. The prohibition of section 33 is only that the person who has accepted the preference, etc., "shall not prove the debt or claim on account of which the preference was made or given." This language plainly implies that there may be another debt or claim, as, of course, there may be, and that the prohibition does not extend to such other debt or claim. We see nothing in the creditor's oath to change the construction, and the meaning of the words cannot be shaken by putting cases where the difference between one claim and two becomes nice. Any distinction, no matter how sensible and how plain, leads at last to a line which is worked out by the contact of decisions clustering around the opposite poles, and which may seem arbitrary, if we attend only to it, and not to the nature of the groups which it divides. As no preference was given on account of the note, the section does not apply. Similar words in the last bankrupt act before the present were construed as we construe the Massachusetts statute. *In re Lee*, 14 N. B. R. 89, 92, Fed.

Cas. No. 8,179; *In re Holland*, 8 N. B. R. 190, Fed. Cas. No. 6,604; *In re Richter's Estate*, 4 N. B. R. 221, 232, Fed. Cas. No. 11,803. Bill dismissed.

(172 Mass. 230)

GALLAGHER v. HATHAWAY MFG. CO.

(Supreme Judicial Court of Massachusetts.

Bristol. Nov. 23, 1898.)

MASTER AND SERVANT—STATUTORY REGULATION—
WEAVERS—FINES—PAYMENT OF
WAGES—SET-OFF.

1. A manufacturer posted notices in the shop, specifying the wages to be paid for weaving a piece of cloth of first quality, and a less sum for one of second quality,—the difference being known as a "fine"; and plaintiff, not knowing the difference between first and second quality work, accepted employment, acquiescing in the terms of the notice. *Held*, that there was an agreement on the amount of the fine, within St. 1894, c. 508, § 55, requiring the amount of fines for imperfections in work to be agreed on between manufacturer and employe.

2. An agreement by a manufacturer to pay employes a stated sum for weaving a piece of cloth of the first quality, and a certain less sum for one of the second quality, does not cover cases where poor yarn makes the cloth of second quality, and hence is not repugnant to St. 1894, c. 508, § 55, limiting an agreement for fines between manufacturers and employes to fines for imperfections in their work.

3. Under St. 1894, c. 508, § 55, prohibiting the imposition of a fine on a weaver, unless the amount thereof be agreed on between him and the master, an agreement to pay for weaving a piece of cloth according to first or second quality, as fixed by the manufacturer's superintendent, is not invalid for failure to determine what constitutes first or second quality, though the servant himself be unaware of the difference, since the superintendent cannot make an arbitrary classification, but must abide by the standards in vogue in the market for which the goods are made.

4. Under said provisions a weaver may, by acquiescence in similar conduct, expressly agree that, where he is paid in full for one week's work, fines for imperfections in the work of that week may be deducted from the succeeding week's wages.

5. An agreement between a manufacturer and an employe that the weekly payment of wages shall be provisional, and that fines due for any week shall be deducted from the wages of the week following, is not repugnant to St. 1894, c. 508, § 51, requiring manufacturers to pay their employes weekly.

6. A fine incurred by a weaver under St. 1894, c. 508, § 55, authorizing fines for imperfections in work where agreed on, may be set off against his claim for wages.

Appeal from superior court, Bristol county.

Action by Jane Gallagher against the Hathaway Manufacturing Company for wages. There was a finding for defendant, and plaintiff excepted and appealed. Exceptions overruled, and appeal dismissed.

When plaintiff went to work for defendant, and prior thereto, there was posted in a conspicuous place in the room in which she was employed a notice specifying the wages to be paid for weaving described styles of cloth of first quality, and the wages for weaving the same styles of second quality,—the quality to be determined by defendant's superintendent,—which notice stated with the de-

tall required by law the different kinds of cloth to be woven, and the different rates of compensation to be paid therefor. It was the manufacturer's custom to pay wages as for first quality work, and, if any of it was found to be of second quality, to deduct the difference from the succeeding week's wages. Plaintiff was aware of this when she accepted employment.

J. W. Cummings, E. Higginson, and C. R. Cummings, for appellant. Crapo, Clifford & Clifford, for appellee.

HOLMES, J. In this case, since it was before the court upon an agreed statement of facts (169 Mass. 578, 48 N. E. 844), there has been a trial, and the judge has found that the plaintiff contracted to work for the defendant upon the terms of a written notice by which the plaintiff was to be paid a certain sum for weaving a described "cut" of cloth of the first quality, and half the amount for a cut of the second quality; the quality to be determined by the defendant's superintendent. The plaintiff wove a cut which was of the second quality, and which was determined to be so by the superintendent. The difference in the pay was deducted from her next week's wages, and she brings this suit to recover the amount. The judge who tried the case found for the defendant, subject to the facts stated by him, and the plaintiff accepted and appealed.

Both parties intended to produce only work of the first quality, and it is found that the difference of amount in the stipulated payments was a fine. It is found that this difference was commonly known as a "fine," and that the plaintiff understood the agreement, although she did not know what defects would constitute second quality work; and therefore we feel bound to assume, against a part of the argument for the plaintiff, that her contract was an agreement upon the amount of the fine, within St. 1894, c. 508, § 55, subject only to the question whether the amount was fixed definitely enough to satisfy the act.

It is suggested, but is not much pressed, that the agreement covers cases where the cloth is of second quality because of the poor quality of the yarn, or other cause not an imperfection in the weaver's own work, to which last fines are limited by the section cited. But we think that the agreement must be construed with the law, and taken to refer only to a difference of quality for which the plaintiff was responsible.

The more serious objection is that the standard of first and second quality might not be constant, that it is determined by the market, and that the result is the same to the weaver whether the fine is left in terms to vary, or is kept nominally the same, but is imposed by a measure which varies from time to time. It is a well-known device of dealers, who do not want to say they change the price of a liquid,

to change the size of the receptacle, while keeping the old name of "quart," "pint," or "glass." But it is not argued that the superintendent may determine the quality arbitrarily. Both sides agree that his determination must be reasonable. The plaintiff puts this part of her case on the oscillations of the market,—the changes in grading which may be necessary in order to get customers. Taking the argument as thus limited, we cannot say that the agreement is not reasonably certain. The very section relied on seems to contemplate a fine as determined by "the system of grading their work * * * used by manufacturers." No mode of determination can give a changeless result. All things change,—the dollars as well as others. If we accept the principle of the plaintiff's argument, it still is a question of degree whether the certainty is sufficient. We should suppose, and, so far as anything goes which is disclosed, we must assume, on the finding for the defendant, that the difference between the first and second quality of a given kind of cloth in a given market would be a tolerably permanent as well as certain criterion. Whether the plaintiff knew in what the difference consisted is immaterial, so long as the superintendent, in judging, was bound to refer to external standards, and could not decide by his own whim. It is not argued that the fine must be agreed on separately in each particular case. The language of the statute implies, in accordance with good sense, that the agreement should precede the imposition of the fine. If so, it naturally would be a general agreement in advance.

At the end of the week when the work in question was done, the plaintiff received full pay as for first-class work, and the sum in question was deducted from the next week's wages. This was due to the impossibility of the superintendent's personally examining all the work during the week, and was in accordance with the previous practice between the plaintiff and the defendant. The court found that the plaintiff, by implication, agreed that the first payment was provisional, and that such overpayment as this might be withheld the next week. It is urged that, if the plaintiff could make such an agreement, at least it should have been expressed. The agreement found by the court is express, none the less that it was expressed by conduct, and not by words. It was not implied in the sense that it was a legal fiction, such as often has been set up in order to bring a cause of action within the sphere of assumpsit or debt. Apart from statute, it does not matter what mode of expression is used, and there is no statute about it.

It is argued also that such an agreement, however made, is contrary to St. 1894, c. 508, § 51, requiring manufacturing corporations, and some others, "to pay weekly each employé engaged in its business the wages earned by such employé to within six days of the date of such payment." We do not perceive

how. The plaintiff has been paid all that is due to her. She was overpaid one week, and was bound to repay the amount. We see nothing to prevent her agreeing that such an overpayment should go into a mutual account for the next week, and reduce the sum due. It surely would not encounter either the words or spirit of the law if an employer should lend his workman money to be set against his next week's wages. If the fine was lawful, as we have decided that it was, the payment of it might be arranged for in the same way.

As the fine went into a mutual account, or dinarily the claim could be proved under a general denial, as the plaintiff's real cause of action, if any, was only for the balance. The difference between a mutual account and a statutory set-off has been pointed out heretofore. *Goldthwait v. Day*, 149 Mass. 185, 187, 21 N. E. 359; *Dewing v. Dewing*, 165 Mass. 230, 231, 42 N. E. 1128. The only objection which can be urged to the application of this principle to the present case is that at the time of the deduction the superintendent, in person, had not passed upon the plaintiff's work. It might be urged, by an extreme technicality, that although in fact there had been an overpayment, which the plaintiff would be bound to refund, and which she had agreed to have charged against her wages, yet the occasion for bringing it into the account did not arise until the superintendent had given his judgment. This would be a very technical and strict application of the law in a case like this, where the examination by the superintendent was delayed only because, when his agent pointed out the defects to the plaintiff, she said nothing, and made no complaint until the amount of the fine was withheld. But it is unnecessary to pass upon the point, since it is enough to say that if the judge was not warranted in finding for the defendant, irrespective of the declaration in set-off, then the defendant was entitled to recover in set-off, and, one way or the other, is entitled to judgment.

Exceptions overruled. Appeal dismissed.

(172 Mass. 244)

RILEY v. LALLY.

(Supreme Judicial Court of Massachusetts.
Middlesex. Nov. 23, 1898.)

TENANT—EXPULSION—EVIDENCE.

There is not sufficient evidence to show expulsion of tenant by the landlord from part of the premises, with the intention of depriving the tenant of the enjoyment of the same, to which the tenant yielded, and in consequence abandoned possession of the premises, where there is testimony merely that some one barred the cellar door at the foot of the bulkhead, and that the landlord refused to open it without a certain payment, and nothing from which it could in any way be inferred that the tenant abandoned the premises because of the barring of the door, except the testimony of a person that the landlord came to him when he was moving the tenant out, and said the cellar door was open.

Exceptions from superior court, Middlesex county; Edgar J. Sherman, Judge.

Action by Riley against Lally for illegal eviction from leased premises. Verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

J. F. Manning, for plaintiff. B. D. O'Connell and D. J. Murphy, for defendant.

FIELD, C. J. These exceptions are almost unintelligible. They recite that the pleadings may be referred to. The defendant, it seems from the pleadings, let a certain store, and the cellar under it, to one John Lamb, by an indenture of lease, for the term of three years from June 1, 1894. The lease provided that the lessee should not "permit any other person or persons to occupy or improve the same [the premises], or make or suffer to be made any alteration therein, but with the approbation of the lessor thereto in writing having been first obtained." It is alleged that John Lamb, by an indenture, assigned this lease to the plaintiff, which assignment was assented to in writing by the defendant. The exceptions recite that this lease and assignment, with the written assent of the defendant thereto, were put in evidence. The plaintiff also introduced certain oral evidence, and, when she rested, on motion of the defendant's counsel the court directed the jury to return a verdict for the defendant. The court, in its discretion, could at this stage of the case entertain such a motion. The declaration alleged that on August 6, 1894, the plaintiff "took lawful possession of the premises named in said lease and assignment, by virtue thereof, and held peaceable and quiet possession of said premises until on or about September 7, A. D. 1894, when she was unlawfully and without right evicted from all parts of said premises for the space of about three days by the said defendant, or by his authority, connivance, and consent; and, further, the plaintiff says that from on or about the said 7th day of September, A. D. 1894, the said defendant ousted and evicted her, unlawfully and without right, from the cellar named in said lease and assignment, and illegally deprived her of the peaceable and quiet enjoyment of said cellar (and broke his implied covenant for the same) for a long space of time thereafter, to her great damage and injury. And the plaintiff further says that, in consequence of said illegal eviction and deprivation by the said defendant, she was forced and compelled to abandon her tenancy under said lease, and that she did abandon the same, in consequence of the said illegal acts of the defendant, to her great damage and injury." It seems that the store above the cellar was closed by somebody from Wednesday to Saturday, after the assignment of the lease, and that the door to the cellar from the bulkhead on the outside of the premises was fastened at or about the same time by a bar on the inside, and remained fastened for a longer period of time. It is assumed in the brief of

the plaintiff's counsel that the plaintiff could not get into the cellar from the store except by going outside and down this bulkhead through this door, but the exceptions do not distinctly show this. There is no evidence that the defendant closed the store, as distinguished from the cellar. The evidence is that he refused to open the cellar door at the foot of the bulkhead; that he said he would not open it until he got \$300. The conclusion of the exceptions is as follows: "Q. (to John A. Carroll) by Mr. Manning: Did you hear Mr. Michael Lally say anything about it? A. The last Saturday we were moving out, he come to me and told me that his cellar door was open, if Mr. Lamb wanted to use it. I told him I had nothing to do with it.' The bulkhead was open, but the door at the foot of the stairs was closed and fastened. Mr. Lamb testified that he never received any key to this door from Mr. Lally, or anybody representing him, and it was always open before the date they say it was closed. Neither Mr. Lamb nor Mrs. Riley saw Mr. Lally close the door or fasten it, and don't know who did fasten it. No issue is raised as to the inside cellar door, or the entrance to the store from the street upstairs." No evidence is recited that the plaintiff abandoned the possession by reason of the cellar door being barred, unless that is to be inferred from the testimony of Mr. Carroll above stated; and we think that this testimony is not sufficient to support such an inference. We are of opinion that, on the evidence recited in the exceptions, it does not appear that the ruling of the court was wrong. There is not sufficient evidence recited to show an expulsion of the tenant by the landlord from a part of the premises, done with the intention of depriving the tenant of the enjoyment of such part, to which the tenant yielded, and in consequence of which she abandoned possession of the premises. See *Bartlett v. Farrington*, 120 Mass. 284. Exceptions overruled.

MEMORANDUM DECISIONS.

ANDERSON, Appellant, v. DICKINSON, Respondent. (Court of Appeals of New York. Nov. 22, 1898.) F. D. Wright, for appellant. Herbert Green, for respondent. No opinion. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs, on opinion below. 88 Hun, 614, 34 N. Y. Supp. 610. All concur, except HAIGHT, J., not sitting.

BAKER et al., Appellants, v. BAKER et al., Respondents. (Court of Appeals of New York. Oct. 11, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the Second judicial department, entered June 10, 1897 (18 App. Div. 189, 45 N. Y. Supp. 870), reversing an interlocutory judg-

ment of partition and sale and dismissing the complaint. The motion was made upon the grounds that the parties interested have consented to a dismissal, and that a decision of the appeal could have no practical effect. Charles H. Otis, for the motion. No opinion. Appeal dismissed, without costs.

BARKER, Respondent, v. CUNARD S. S. CO., Limited, Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Joseph Kling and William M. Ivins, for appellant. Franklin Pierce and Abraham Gruber, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except PARKER, C. J., not sitting. See 91 Hun, 495, 38 N. Y. Supp. 254.

BARROWS, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Oct. 4, 1898.) Charles A. Pooley, for appellant. Frank C. Ferguson, for respondent. No opinion. Judgment affirmed, with costs. All concur, except O'BRIEN, J., absent. See 13 Misc. Rep. 780, 38 N. Y. Supp. 1121.

BINGHAMTON TRUST CO., Appellant, v. WESTON et al., Respondents. (Court of Appeals of New York. Nov. 22, 1898.) C. S. Cary, for appellant. J. H. Waring, for respondents. No opinion. Judgment affirmed, with costs. All concur, except GRAY and O'BRIEN, JJ., dissenting. See 90 Hun, 605, 35 N. Y. Supp. 1103.

BRIEL, Respondent, v. CITY OF BUFFALO, Appellant. (Court of Appeals of New York. Oct. 4, 1898.) W. H. Cuddeback and C. V. Neilany, for appellant. Wallace Thayer, for respondent. No opinion. Order and judgment affirmed, with costs. All concur, except O'BRIEN, J., absent. See 90 Hun, 93, 35 N. Y. Supp. 359.

BUFFALO CEMENT CO., Limited, Appellant, v. McNAUGHTON et al., Respondents. (Court of Appeals of New York. Oct. 4, 1898.) George C. Miller, for appellant. William B. Hoyt, for respondents. No opinion. Judgment affirmed on opinion below, with costs. 10 Hun, 74, 35 N. Y. Supp. 453. All concur.

CALLAHAN, Respondent, v. CROW, Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Franklin Bien, for appellant. C. N. Bovee, Jr., and John McG. Goodale, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except PARKER, C. J., not sitting. See 91 Hun, 846, 36 N. Y. Supp. 225.

CLARK, Respondent, v. NATIONAL SHOE & LEATHER BANK OF CITY OF NEW YORK, Appellant. (Court of Appeals of New York. Nov. 29, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the Second judicial department, entered July 16, 1898 (32 App. Div. 316, 52 N. Y. Supp. 1064), affirming a judgment in favor of plaintiff entered upon the decision of the court at a trial term, a jury having been waived. The motion was made upon the ground that the judgment is not appealable under sections 190, 191, Code Civ. Proc.; that no question of law is involved; that the findings of fact were unanimously approved by the appellate division; and that the appeal has not been allowed by the appellate division or a judge of the court of appeals. O. B. Gould, for the motion. Putney & Bishop, opposed. No opinion. Motion denied, with costs.

DAVIS, Respondent, v. GRAND RAPIDS FIRE INS. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Adelbert Moot, for appellant. Moses Shire, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 15 Misc. Rep. 263, 36 N. Y. Supp. 792.

DAVIS, Respondent, v. HILTON BRIDGE CONST. CO., Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Charles S. Baker, for appellant. George D. Reed, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 2 App. Div. 615, 37 N. Y. Supp. 1145.

DE LOGE, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Purcell, Walker & Burns, for appellant. Smith & Smith, for respondent. Judgment and order affirmed, with costs. All concur, except O'BRIEN, J., not voting, and MARTIN, J., not sitting. See 92 Hun, 149, 36 N. Y. Supp. 697.

DE VAN, Respondent, v. COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA, Appellant. (Court of Appeals of New York. Nov. 22, 1898.) M. W. Van Auken, for appellant. S. M. Lindsley, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 92 Hun, 256, 36 N. Y. Supp. 931.

DOHN, Respondent, v. DAWSON et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) Charles M. Earle, for appellants. Edward J. McGuire, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except PARKER, C. J., not sitting. See 90 Hun, 271, 35 N. Y. Supp. 984.

DUFFUS, Respondent, v. SCHWINGER et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) George W. Cothran, for appellants. Walter S. MacGregor, for respondent. No opinion. Judgment affirmed, with costs. All concur, except MARTIN and VANN, JJ., not sitting. See 92 Hun, 70, 36 N. Y. Supp. 342.

DUTTON, Appellant, v. SMITH et al., Respondents. (Court of Appeals of New York. Oct. 11, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the Second judicial department, entered January 6, 1898 (23 App. Div. 188, 50 N. Y. Supp. 784), affirming a judgment in favor of defendants entered upon a decision of the court on trial at special term. The motion was made upon the grounds that the appellate division unanimously decided that the findings of fact are supported by evidence; that no questions of law are raised by the appeal which can be reviewed by the court of appeals; and that the exceptions are frivolous. Gruber & Bonyne, for the motion. Henry Daily, Jr., opposed. No opinion. Appeal dismissed, with costs.

EARLE, Respondent, v. ROBINSON et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) George M. Pinney, Jr., and Aaron C. Thayer, for appellants. A. J. Dittenhoefer and David Gerber, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 91 Hun, 363, 36 N. Y. Supp. 178. All concur, except PARKER, C. J., not sitting.

FERGUSON, Appellant, v. BRUCKMAN et ux., Respondents. (Court of Appeals of New York. Oct. 25, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the Second judicial department, entered April 1, 1898 (26 App. Div. 628, 51 N. Y. Supp. 1141; 18 App. Div. 358, 46 N. Y. Supp. 23), modifying, and, as modified, affirming, a judgment in an action for an accounting between partners entered upon the report of a referee; also an appeal from an order of the same appellate division, entered July 7, 1897, modifying an order of special term vacating a previous judgment in the same action and directing a new trial before another referee. Sidney V. Lowell, for the motion. Josiah T. Mearns, opposed. No opinion. Motion denied, with costs.

FIRST NAT. BANK OF CHAMPLAIN, Appellant, v. WOOD et al., Respondents. (Court of Appeals of New York. Nov. 22, 1898.) Royal Corbin, for appellant. G. H. Beckwith, for respondents. No opinion. Judgment affirmed, with costs. All concur. See 86 Hun, 491, 33 N. Y. Supp. 777.

FOX, Appellant, v. RURAL HOME CO., Limited, Respondent. (Court of Appeals of New York. Oct. 25, 1898.) Herbert H. Walker, for appellant. C. A. de Gersdorff and Charles Steele, for respondent. No opinion. Order affirmed, and judgment absolute ordered for the defendant on the stipulation, with costs, on opinion below. 90 Hun, 365, 35 N. Y. Supp. 898. All concur.

FRANKLIN NAT. BANK OF CITY OF NEW YORK, Respondent, v. NEWCOMBE et al., Appellants. (Court of appeals of New York. Nov. 22, 1898.) Treadwell Cleveland, for appellants. Philip Carpenter and Jonathan C. Ross, for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 1 App. Div. 294, 37 N. Y. Supp. 271. All concur.

FRANKLIN BANK-NOTE CO., Respondent, v. MACKEY, Appellant. (Court of Appeals of New York. Oct. 11, 1898.) No opinion. Motion for reargument granted. See 155 N. Y. 685, 50 N. E. 1117; 51 N. E. 178.

In re GIBSON'S WILL. (Court of Appeals of New York. Oct. 25, 1898.) Mead & Stranahan, for appellant. James C. Smith, for respondents James M. Smith and others. Walter H. Knapp, for respondent Louis H. Gibson. D. G. Lapham, for respondent Josephine E. Gibson. Wynkoop & Rice, for respondents Livingston Lansing and others. Frank H. Hamlin, for respondents Catherine O. Lansing and others. John A. Barbite, for respondents Richard R. Gibson and others. Henry H. Man, for respondents William Watts Sherman and others. No opinion. Order affirmed, with costs, on the ground that this case is governed by the decision in the Seaman Case, 147 N. Y. 69, 41 N. E. 401. The amendment to the transfer act (chapter 284, Laws 1897) did not operate to so change it as to warrant the giving now of a different construction. All concur. See 53 N. Y. Supp. 1104.

GILBERT et al., Respondents, v. WARREN et al., Appellants. (Court of Appeals of New York. June 24, 1898.) Motion to dismiss an appeal from an order of the appellate division of the supreme court in the First judicial depart-

ment, made April 22, 1898 (28 App. Div. 630, 52 N. Y. Supp. 1142), affirming an order of special term granting an order for discovery. The motion was made upon the ground that the order was not appealable, under section 190, Code Civ. Proc. Tyler & Durand, for the motion. Warren, Boothby & Warren, opposed. No opinion. Appeal dismissed, with costs, and \$10 costs of motion.

HACKETT et al., Appellants, v. CAMPBELL et al., Respondents. (Court of Appeals of New York. Nov. 29, 1898.) Motion to prefer an appeal from a judgment of the appellate division of the supreme court in the Second judicial department, entered December 14, 1898 (10 App. Div. 523, 42 N. Y. Supp. 47), affirming a judgment entered upon a decision of the court on trial at special term. The motion was made upon the ground that, since the appeal was taken, one of the appellants has died, and that the appeal was entitled to a preference, under subdivision 4, § 791, Code Civ. Proc. R. E. & A. J. Prime, for the motion. No opinion. Motion denied, upon the authority of Colton v. Railroad Co., 151 N. Y. 266, 45 N. E. 546, without costs.

HALL, Respondent, v. HERTER BROS., Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Julius H. Seymour, for appellant. C. N. Bovee, Jr., for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 90 Hun, 280, 35 N. Y. Supp. 769. All concur, except PARKER, C. J., not sitting.

HENRIQUES et al., Appellants, v. MIRIAM OSBORN MEMORIAL HOME ASS'N, Respondent, et al. SAME, Appellants, v. YALE UNIVERSITY, Respondent, et al. (Court of Appeals of New York. Oct. 11, 1898.) Motions to dismiss appeals from final judgments of the appellate division of the supreme court in the First judicial department, rendered at the April term, 1898 (28 App. Div. 354, 51 N. Y. Supp. 284; 28 App. Div. 626, 51 N. Y. Supp. 1143), affirming judgments of the special term sustaining demurrers to replies to affirmative defenses contained in the answers, on the ground that the appeals are frivolous and vexatious, the complaint having been previously dismissed as to the defendant trustee. See *Henriques v. Sterling*, 156 N. Y. 684, 50 N. E. 1118. Joseph H. Choate and Thomas G. Shearman, for the motion. McCurdy & Yard, opposed. No opinion. Appeals dismissed, with costs.

HOLLINGSWORTH, Respondent, v. LONG ISLAND R. CO., Appellant. (Court of Appeals of New York. Oct. 4, 1898.) William J. Kelly, for appellant. Augustus N. Weller and Jacob Fromme, for respondent. No opinion. Judgment affirmed, with costs. All concur, except O'BRIEN, J., absent. See 91 Hun, 641, 36 N. Y. Supp. 1126.

HONSINGER et al., Respondents, v. MULFORD, Appellant. (Court of Appeals of New York. Oct. 18, 1898.) T. F. Conway, for appellant. L. L. Shelden, for respondents.

PER CURIAM. We think this case should be affirmed upon the prevailing opinion below, and upon our decision in *Matthews v. Matthews*, 154 N. Y. 288, 48 N. E. 531, an authority precisely in point upon the necessity of pleading the defense of the statute of frauds, in order that it may be available upon the trial to defeat the validity of the contract sued upon by the plaintiff upon that ground. Judgment and order affirmed, with costs. All concur. See 90 Hun, 589, 35 N. Y. Supp. 986.

In re HOWARD'S ESTATE. (Court of Appeals of New York. Nov. 22, 1898) W. S. Thrasher and Wentworth & Wentworth, for appellant. D. E. Powell, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 92 Hun, 607, 36 N. Y. Supp. 1126.

JACQUIN, Respondent, v. BOUTARD et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) George A. Strong, for appellants. Charles E. Hughes and Edward F. Dwight, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 89 Hun, 437, 35 N. Y. Supp. 496. All concur, except PARKER, C. J., not sitting, and O'BRIEN, J., dissenting.

JOHNSON, Respondent, v. SYNETT et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) Charles H. Noxon, for appellants. J. A. Young, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 89 Hun, 192, 35 N. Y. Supp. 79. All concur.

KEISTER, Respondent, v. RANKIN, Appellant. (Court of Appeals of New York. June 24, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the First judicial department, entered June 6, 1898 (29 App. Div. 539, 51 N. Y. Supp. 634), affirming a judgment in favor of plaintiff, entered upon a verdict. The motion was made upon the ground that the court of appeals has no jurisdiction to entertain the appeal by virtue of the provisions of subdivision 2, § 181, Code Civ. Proc. Frederick S. Duncan, for the motion. Chas. De Hart Brower, opposed. No opinion. Motion granted, without costs.

KLENG, Appellant, v. CITY OF BUFFALO, Respondent. (Court of Appeals of New York. Oct. 4, 1898.) Wallace Thayer, for appellant. C. V. Nellany and W. H. Cuddeback, for respondent. No opinion. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs. All concur. See 72 Hun, 541, 25 N. Y. Supp. 445.

LEOPOLD, Respondent, v. HALLHEIMER, Appellant, et al. (Court of Appeals of New York. Nov. 22, 1898.) M. Hallheimer, for appellant. Fernando Solinger, for respondent. No opinion. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs, on opinion below. 1 App. Div. 202, 37 N. Y. Supp. 154. All concur.

LINDO et al., Appellants, v. MURRAY, Respondent. (Court of Appeals of New York. Nov. 22, 1898.) Samuel Greenbaum, for appellants. John H. Rogan, for respondent. No opinion. Judgment and order affirmed, with costs, upon the ground that the judgment construing the will is conclusive upon the parties. All concur, except PARKER, C. J., not sitting. See 91 Hun, 335, 36 N. Y. Supp. 231.

MANNING, Respondent, v. ATLANTIC AVE. R. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Eugene Lamb Richards, Jr., for appellant. F. L. Backus, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 91 Hun, 279, 36 N. Y. Supp. 201.

MARKELL, Respondent, v. NESTER, Appellant. (Court of Appeals of New York. Nov. 29, 1898.) Motion to dismiss an appeal from an order of the appellate division of the supreme court in the Fourth judicial department, entered May 18, 1898 (29 App. Div. 55, 51 N. Y. Supp. 852), affirming an order of the special term substituting attorneys, and substituting the administratrix of the plaintiff in the place of the plaintiff. The motion was made upon the ground that the order was not appealable. *Hammond & Hammond*, for the motion. No opinion. Motion granted, and appeal dismissed, with costs.

In re MAYOR, ETC., OF CITY OF NEW YORK; In re EAST ONE HUNDRED AND SIXTY-EIGHTH ST. (Court of Appeals of New York. June 7, 1898.) Theodore Connolly and John P. Dunn, for appellant. James A. Deering, in pro. per. No opinion. Appeal dismissed on argument, with costs. See 23 App. Div. 143, 52 N. Y. Supp. 588.

MILLARD, Respondent, v. HOLLAND TRUST CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) James L. Bishop, for appellant. L. Lafin Kellogg and Alfred C. Petté, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. 90 Hun, 607, 35 N. Y. Supp. 948. All concur, except GRAY and MARTIN, JJ., not voting.

MOORE, Respondent, v. COOLEY, Appellant. (Court of Appeals of New York. Oct. 4, 1898.) Frank H. Robinson, for appellant. A. M. Burrell, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 88 Hun, 66, 84 N. Y. Supp. 624.

MOSES, Appellant, v. CITY OF KEY WEST, Respondent. (Court of Appeals of New York. Nov. 22, 1898.) William F. Randel, for appellant. Burton N. Harrison, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 15 Misc. Rep. 15, 36 N. Y. Supp. 979.

In re MURPHY. (Court of Appeals of New York. Oct. 25, 1898.) John H. Kemble and George K. Jack, for appellant. Robert B. Bach, for respondent. No opinion. Order affirmed, with costs. All concur. See 32 App. Div. 627, 53 N. Y. Supp. 1110.

NEW YORK LIFE INSURANCE & TRUST CO. et al., Appellants, v. CUTHBERT et al., Respondents. (Court of Appeals of New York. Nov. 29, 1898.) Motion to prefer an appeal from a judgment of the appellate division of the supreme court in the First judicial department, entered August 16, 1898 (31 App. Div. 191, 52 N. Y. Supp. 653), modifying, and, as modified, affirming, a judgment entered upon the report of a referee. The motion was made upon the ground that one of the defendants died after the action was at issue, and that the appeal was entitled to a preference, under subdivision 4, § 791, Code Civ. Proc. R. E. & A. J. Prime, for the motion. No opinion. Motion denied, upon the authority of *Colton v. Railroad Co.*, 151 N. Y. 266, 45 N. E. 546, without costs.

NEW YORK, L. & W. RY. CO., Respondent, v. ERIE R. CO., Appellant, et al. (Court of Appeals of New York. Oct. 11, 1898.) Motion to dismiss an appeal from a judgment of the appellate division of the supreme court in the

Fourth judicial department, rendered at the June term, 1898 (31 App. Div. 378, 52 N. Y. Supp. 318), reversing a judgment in favor of defendant entered upon a decision of the Monroe special term dismissing a petition under the condemnation law (Code Civ. Proc. §§ 3357, 3360) to condemn a portion of defendant's railroad. The motion was made upon the ground that the judgment is not appealable, under subdivision 1, § 190, Code Civ. Proc. John G. Milburn, for the motion. Adelbert Moot, opposed. No opinion. Appeal dismissed, with costs.

NEW YORK SECURITY & TRUST CO., Respondent, v. SARATOGA GAS & ELECTRIC LIGHT CO. et al., Appellants. REYNOLDS, Appellant, v. NEW YORK SECURITY & TRUST CO. et al., Respondents. (Court of Appeals of New York. Nov. 22, 1898.) Edward Winslow Paige, for appellant William V. Reynolds. William B. Hornblower, for respondents New York Security & Trust Co. and Walter Stanton. No opinion. Judgments and orders affirmed, with costs, on opinion below. 88 Hun, 569, 34 N. Y. Supp. 890. All concur, except O'BRIEN, J., not voting.

NUGENT, Respondent, v. BREUCHARD et al., Appellants. (Court of Appeals of New York. Oct. 25, 1898.) Charles F. Cantlie, for appellants. Howard Chipp, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 91 Hun, 12, 36 N. Y. Supp. 102.

OAKES, Respondent, v. KIMMEL, Appellant. (Court of Appeals of New York. No. 22, 1898.) James M. E. O'Grady, for appellant. George M. Williams, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 86 Hun, 617, 35 N. Y. Supp. 1113.

In re OPENING OF LEXINGTON AVE. DEERING, Appellant, v. SCHREYER, Respondent. (Court of Appeals of New York. Oct. 25, 1898.) Clarence L. Barber, for appellant. Alex. Thain, for respondent. No opinion. Order affirmed, with costs, on opinion below. 30 App. Div. 602, 52 N. Y. Supp. 203. All concur, except HAIGHT and MARTIN, JJ., not voting.

PEOPLE, Appellant, v. STOCK, Respondent. (Court of Appeals of New York. Oct. 25, 1898.) Appeal from an order of the appellate division of the supreme court in the Second judicial department, entered April 14, 1898 (28 App. Div. 564, 50 N. Y. Supp. 483), affirming an order of special term discharging the respondent from custody under a writ of habeas corpus. The respondent was convicted of a misdemeanor in having sold liquor without having obtained a liquor tax certificate, and sentenced to pay a fine of \$300, or, in default thereof, be confined in the Dutchess county jail for a term not exceeding one day for each dollar of the fine. N. N. Stranahan, for appellant. Charles A. Hopkins, for respondent. No opinion. Order affirmed, on opinions below. All concur, except MARTIN and VANN, JJ., not voting.

PEOPLE ex rel. CATHOLIC UNION OF CITY OF ALBANY, Appellant, v. SAYLES et al., Assessors of City of Albany, Respondents. (Court of Appeals of New York. Oct. 25, 1898.) John T. McDonough and James F. Tracey, for appellant. John A. Delehanty, for respondents. No opinion. Order affirmed, with costs, on opinion below. 32 App. Div. 208, 53 N. Y. Supp. 65. All concur.

PEOPLE ex rel. CITY OF ROCHESTER. Appellant, v. COE et al., Surviving Assessors of Town of Livonia, Respondents. (Court of Appeals of New York. Oct. 25, 1898.) John F. Kinney, for appellant. William F. Cogswell, for respondents. No opinion. Judgment and order affirmed, with costs, on opinion in *People ex rel. City of Amsterdam v. Hess* (decided October 18, 1898) 157 N. Y. 42, 51 N. E. 410. All concur.

PEOPLE ex rel. DOODY, Respondent, v. BISHOP et al., Appellants. (Court of Appeals of New York. Oct. 18, 1898.) William H. Cuddeback and Henry W. Killen, for appellants. Frederick Haller, for respondent. No opinion. Order affirmed, with costs. All concur. See 15 Misc. Rep. 273, 36 N. Y. Supp. 411.

PEOPLE ex rel. LUCKINGS, Appellant, v. BOARD OF R. R. COM'RS OF STATE OF NEW YORK et al., Respondents. (Court of Appeals of New York. June 24, 1898.) John McDonald, for appellant. G. D. B. Hasbrouck, for respondents. No opinion. Order affirmed, with costs, on opinion below. See 30 App. Div. 69, 51 N. Y. Supp. 781. All concur, except VANN, J., not voting.

PEOPLE ex rel. NEW YORK CENT. & H. R. R. CO., Appellant, v. ROBERTS, State Comptroller, Respondent. (Court of Appeals of New York. Oct. 25, 1898.) David Willcox and Willard Brown, for appellant. T. E. Hancock, for respondent. No opinion. Order affirmed, with costs, on opinion below. 32 App. Div. 113, 52 N. Y. Supp. 859. All concur.

PEOPLE ex rel. NEW YORK & N. J. TEL. CO., Relator, v. NEFF et al., Assessors of City of Brooklyn, Defendants. (Court of Appeals of New York. Oct. 4, 1898.) Alexander Cameron, Melville Eggleston, and Henry Yonge, for relator. Almet F. Jenks, for defendants. No opinion. Order affirmed, with costs, on opinion below. 15 App. Div. 8, 44 N. Y. Supp. 46. All concur.

PEOPLE ex rel. NIAGARA RIVER HYDRAULIC CO., Respondent, v. ROBERTS, State Comptroller, Appellant. (Court of Appeals of New York. Oct. 25, 1898.) G. D. B. Hasbrouck, for appellant. Edward C. Perkins and J. Burnet Nash, for respondent. No opinion. Order affirmed, with costs, on opinion below. 30 App. Div. 180, 51 N. Y. Supp. 771. All concur, except MARTIN, J., not sitting.

PEOPLE ex rel. QUINN, Appellant, v. FEITNER et al., Board of Taxes, Respondents. (Court of Appeals of New York. June 24, 1898.) Joseph A. Burr, for appellant. Almet F. Jenks and William J. Carr, for respondents. No opinion. Order affirmed, with costs, on opinion below. 30 App. Div. 241, 51 N. Y. Supp. 1094. All concur.

PEOPLE ex rel. SPEIGHT, Respondent, v. COLER, City Comptroller, Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Almet F. Jenks and William J. Carr, for appellant. Joseph A. Burr, for respondent. No opinion. Order affirmed, with costs, on the ground that it does not appear from the record that the position is a strictly confidential one, within the meaning of the statute. All concur. See 31 App. Div. 523, 52 N. Y. Supp. 197.

PEOPLE ex rel. WESTERN UNION TEL. CO., Appellant, v. ROBERTS, Comptroller, Respondent. (Court of Appeals of New York. June 24, 1898.) Samuel Foster, for appellant. T. E. Hancock, for respondent. No opinion. Order affirmed, with costs, on opinion below. See 30 App. Div. 78, 51 N. Y. Supp. 747. All concur, except GRAY and VANN, JJ., not sitting.

PEOPLE ex rel. WHITE, Respondent, v. BOARD OF ALDERMEN OF CITY OF BUFFALO et al., Appellants. (Court of Appeals of New York. Oct. 11, 1898.) Motion to place on the calendar and advance an appeal from a judgment of the appellate division of the supreme court in the Fourth judicial department, entered June 14, 1898 (31 App. Div. 438, 52 N. Y. Supp. 643), affirming an order of special term granting a peremptory writ of mandamus. The motion was made upon the ground that the appeal involved questions of public importance, and was entitled to speedy consideration. Seward A. Simons, for the motion. Albert Hessberg, opposed. No opinion. Motion denied, without costs.

PEOPLE ex rel. YOUNG MEN'S ASS'N FOR MUTUAL IMPROVEMENT IN CITY OF ALBANY, Appellant, v. SAYLES et al., Assessors of City of Albany, Respondents. (Court of Appeals of New York. Oct. 25, 1898.) William P. Rudd, for appellant. John A. Delehanty, for respondents. No opinion. Order affirmed, with costs, on opinion below. 32 App. Div. 197, 53 N. Y. Supp. 67. All concur.

PORTER, Respondent, v. SWAN, Appellant. (Court of Appeals of New York. Oct. 4, 1898.) William N. Dykman, for appellant. Daniel Cameron, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 14 Misc. Rep. 406, 35 N. Y. Supp. 1037.

PRINGLE, Respondent, v. LONG ISLAND R. CO., Appellant. In re BIDDELL. (Court of Appeals of New York. Oct. 11, 1898.) Motion to dismiss an appeal by certification from an order of the appellate division of the supreme court in the First judicial department, entered April 14, 1898 (27 App. Div. 144, 50 N. Y. Supp. 536), reversing an order of special term denying a motion to substitute James S. Biddell as administrator with the will annexed of the estate of James E. Pringle, deceased, as plaintiff herein, and granting the motion. This motion was made upon the ground that the appeal was not taken or perfected within the time prescribed by the Code of Civil Procedure. James E. Davis, for the motion. William J. Kelly, opposed. No opinion. Motion denied, without costs.

REYNOLDS CARD MFG. CO., Respondent, v. NEW YORK BANK-NOTE CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Edward P. Lyon, for appellant. Lorenz Zeller, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except PARKER, C. J., not sitting. See 91 Hun, 463, 36 N. Y. Supp. 756.

SCHNEIDER, Appellant, v. CITY OF ROCHESTER, Respondent. (Court of Appeals of New York. Nov. 29, 1898.) Motion to prefer an appeal from a judgment of the appellate division of the supreme court in the Fourth judicial department, entered October 14, 1898 (33

App. Div. 458, 53 N. Y. Supp. 931), affirming a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at special term. The motion was made upon the ground that the appeal involved questions of public importance, which should be speedily determined. Elbridge L. Adams, for the motion. No opinion. Motion denied, without costs.

SEYMOUR, Appellant, v. SPRING FOREST CEMETERY ASS'N et al., Respondents. (Court of Appeals of New York. Nov. 22, 1898.) Edward K. Clark, for appellant. Israel T. Deyo and H. Fred Lyon, for respondents. No opinion. Judgment and order affirmed, with costs, on opinion below. 4 App. Div. 359, 38 N. Y. Supp. 726. All concur, except MARTIN, J., not sitting.

SHAFARMAN, Appellant, v. JACOBS, Respondent. (Court of Appeals of New York. Nov. 22, 1898.) Louis Manheim, for appellant. Max Altmayer, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 15 Misc. Rep. 10, 36 N. Y. Supp. 428.

SHERIDAN, Respondent, v. SCOTT, Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Charles O. Nadal and Edward P. Mowton, for appellant. John A. Dutton, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 14 Misc. Rep. 658, 38 N. Y. Supp. 1149.

SIMPSON, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1898.) Thomas L. Hughes and Charles A. Collin, for appellant. Frederick E. Crane, for respondent. No opinion. Judgment affirmed, with costs. All concur, except GRAY, J., not voting. See 14 Misc. Rep. 645, 35 N. Y. Supp. 674.

SPANN et al., Respondents, v. ERIE BOATMEN'S TRANSP. CO., Limited, Appellant. (Court of Appeals of New York. Nov. 22, 1898.) George Clinton, for appellant. Moses Shire, for respondents. No opinion. Judgment affirmed, with costs. All concur. See 15 Misc. Rep. 701, 36 N. Y. Supp. 1133.

SPRING, Respondent, v. DELAWARE, L. & W. R. CO., Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Robert T. Turner, for appellant. Judson A. Gibson, for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 88 Hun, 385, 34 N. Y. Supp. 810. All concur, except MARTIN, J., not sitting.

STOTT, Respondent, v. CHURCHILL et al., Appellants. (Court of Appeals of New York. Nov. 22, 1898.) Thomas S. Moore and Herbert C. Smyth, for appellants. John A. Dutton, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 15 Misc. Rep. 80, 36 N. Y. Supp. 476.

TOWN OF FT. COVINGTON, Respondent, v. UNITED STATES & C. R. CO. et al., Appellants. (Court of Appeals of New York. Oct. 4, 1898.) William P. Cantwell, for appellants. John P. Kellas, for respondent. No opin-

ion. Judgment affirmed, with costs, on opinion below. 8 App. Div. 223, 40 N. Y. Supp. 313. All concur.

TURROSHKE, Respondent, v. FRIEDERICH et al., Appellants. (Court of Appeals of New York. Nov. 22, 1898.) George F. Yeoman, for appellants. Norris Bull, for respondent. No opinion. Judgment and order affirmed, with costs. All concur, except GRAY, J., absent. See 2 App. Div. 616, 37 N. Y. Supp. 1150.

UNITED STATES LIFE INS. CO., Appellant, v. SALMON et al., Respondents. (Court of Appeals of New York. Oct. 25, 1898.) Oliver P. Buel, for appellant. J. B. M. Stephens, for respondents. No opinion. Judgment affirmed, with costs, on opinion below. 91 Hun, 535, 36 N. Y. Supp. 830. All concur, except O'BRIEN and HAIGHT, JJ., not voting.

VAN INGEN, Respondent, v. STAR CO., Appellant. (Court of Appeals of New York. Nov. 22, 1898.) John Notman, for appellant. Walter S. Logan, for respondent. No opinion. Judgment and order affirmed, with costs, on opinion below. 1 App. Div. 429, 37 N. Y. Supp. 114. All concur, except MARTIN, J., not sitting.

WILSON, Respondent, v. WEBBER et al., Appellants. (Court of Appeals of New York. Nov. 22, 1898.) Edward C. Hart, for appellants. William H. Vicary, for respondent. No opinion. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs, on opinion below. 92 Hun, 466, 36 N. Y. Supp. 550. All concur.

WOOD, Respondent, v. THIRD AVE. R. CO., Appellant. (Court of Appeals of New York. Nov. 22, 1898.) Eugene Treadwell and Henry L. Scheuerman, for appellant. Isaac M. Kapper, for respondent. No opinion. Judgment and order affirmed, with costs. BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. PARKER, C. J., and GRAY and O'BRIEN, JJ., dissent. See 91 Hun, 276, 36 N. Y. Supp. 253.

WYNNE, Respondent, v. ATLANTIC AVE. R. CO. OF BROOKLYN, Appellant. (Court of Appeals of New York. Oct. 4, 1898.) James R. Soley, for appellant. Charles J. Patterson, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 14 Misc. Rep. 394, 35 N. Y. Supp. 1034.

ZIMMERMANN, Appellant, v. HEIL, Respondent. (Court of Appeals of New York. Oct. 4, 1898.) Edward B. Hill, for appellant. Henry L. Scheuerman and Herbert R. Limburger, for respondent. No opinion. Order and judgment affirmed, with costs, on opinion below. 86 Hun, 114, 33 N. Y. Supp. 391. All concur, except O'BRIEN, J., absent.

ILLINOIS VAL. & N. R. CO. v. PEOPLE. (Supreme Court of Illinois. Oct. 24, 1898.) Appeal from LaSalle county court; W. H. Johnson, Judge. Proceeding by the people against the Illinois Valley & Northern Railroad Company and others to enter a judgment for delinquent taxes. Defendant railroad company appealed. Reversed. Samuel Richolson, for appellant. Haskins & Panneck, for appellee.

PER CURIAM. The questions involved in this case are the same as the questions involved in Greenwood v. Gmelich, 175 Ill. 526, 51 N. E.

505. The decision of this case is governed by the decision in that case. Accordingly, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views expressed in the case of *Greenwood v. Gmelich*, supra. Reversed and remanded.

PEOPLE ex rel. AKIN, Atty. Gen., v. MARTIN, City Collector. (Supreme Court of Illinois. Oct. 24, 1898.) Proceeding for mandamus, on the relation of Edward C. Akin, attorney general, against Joseph S. Martin, city collector. Writ awarded. Edward C. Akin, Atty. Gen., in pro. per. Tenney, McConnell, Coffeen & Harding, for respondent.

PER CURIAM. This is an original proceeding for mandamus by the plaintiff against the city collector of the city of Chicago to compel the city collector to obey the civil service act in the same respects as are set forth in the case of *People v. Loeffler*, 51 N. E. 785. The prayer of the petition here is the same as the prayer of the petition in the *Loeffler* Case, with the exception that the respondent there was the city clerk, and the respondent here is the city collector. The questions involved in this case are the same as the questions involved in the *Loeffler* Case, and the decision there disposes of the rights of the parties here. Accordingly, the mandamus is awarded against the city collector in accordance with the prayer of the petition. Writ awarded.

DEMING-COLBORN LUMBER CO. et al. v. UNION NAT. SAVINGS & LOAN ASS'N. (Supreme Court of Indiana. Nov. 22, 1898.) Appeal from circuit court, Lake county; J. H. Gillett, Judge. Action by the Union National Savings & Loan Association against the Deming-Colborn Lumber Company and others. From a judgment for plaintiff, defendants appeal. Affirmed. *Ibach & Ibach*, for appellants. *Olds & Griffin*, for appellee.

HOWARD, J. The questions for decision in this case are the same as in the case with the same title, No. 17,959, decided at this term. 51 N. E. 936. On the authority of the latter case, the judgment in this case is therefore affirmed.

HAY v. MARSH et al.¹ (Supreme Court of Indiana. Nov. 29, 1898.) Appeal from circuit court, Clark county; Jacob Herter, Special Judge. Action by James K. Marsh and others against Charles S. Hay. From a judgment in favor of plaintiffs, defendant appeals. Affirmed. *Burt & Taggart*, for appellant. *W. H. Watson, J. W. Fortune, and L. A. Douglass*, for appellees.

HACKNEY, J. This case, in its essential features, is like that of *Hay v. Marsh* (No. 18,529) 51 N. E. 1053. The evidence, upon the question here presented, is identical with that referred to in the case cited, and authorizes the conclusion of fraud on the part of the appellant as the grantee of the property conveyed. On the authority of that case, the judgment herein is affirmed.

MARKLEY v. STUDABAKER et al.¹ (Supreme Court of Indiana. Nov. 22, 1898.) Appeal from circuit court, Wells county; O. J. Lots, Special Judge. Action between Henry C. Markley and George W. Studabaker and others. There was a judgment for the latter, and the former appeals. Affirmed. *Mock & Sons*, for appellant. *Dailey, Simmons & Dailey*, for appellees.

JORDAN, J. This is an action to enjoin the collection of an assessment of taxes for the construction of a public ditch. The same ditch proceedings and the same questions are involved as

were in *Studabaker v. Studabaker* (No. 18,496, decided at this term) 51 N. E. 933; and, upon the authority of that decision, the judgment below ought to be affirmed. Judgment affirmed.

SMITH et al. v. BOARD OF COMRS OF HUNTINGTON COUNTY.¹ (Supreme Court of Indiana. Nov. 1, 1898.) Appeal from circuit court, Huntington county; Robert Lowry, Judge. Remonstrance by Edward Smith and others in proceedings for assessment instituted by the board of commissioners of Huntington county. Judgment for the commissioners, and remonstrators appeal. Affirmed. *B. M. Cobb*, for appellants. *Whitelock & Cook*, for appellee.

JORDAN, J. This is an appeal from the judgment of the Huntington circuit court, in a proceeding instituted by the appellee to obtain an additional assessment to meet a deficit in the cost arising out of the improvement of a certain highway, under sections 5091 and 5092, Rev. St. 1881 (sections 6855 and 6856, Rev. St. 1894; sections 5091 and 5092, *Horner's Rev. St.* 1897). There was a remonstrance filed by appellants, a trial by the court, and a special finding of facts, and conclusions of law thereon, in favor of appellee, and judgment was rendered accordingly. The same questions are involved in this case, and are presented in like manner, as in the appeal of *Kline v. Board* (No. 18,627, decided at this term) 51 N. E. 476; and, upon the authority of the decision in that case, the judgment below must be, and is, affirmed.

TULEJA v. BEAUVAIS et al. (Supreme Judicial Court of Massachusetts. Hampden. Oct. 21, 1898.) Appeal from superior court, Hampden county. Bill by Joseph Tuleja against Trede Beauvais, Jr., and another, to restrain defendants from further maintaining a fence across a street in front of complainant's premises. From a decree granting complainant an injunction, defendants appeal. Modified. *J. T. Moriarty and Tom Fitz Gibbon*, for appellants. *J. B. Carroll, W. H. McClintock, and J. F. Stapleton, Jr.*, for appellee.

HAMMOND, J. This case is before us upon an appeal from the decree of the superior court after a hearing. The evidence not being reported, the only question is whether the decree is justified by the record. Upon comparing the decree with the record, we are of opinion that the second paragraph of the decree, to wit, that part after "*Marie D. Beauvais*," and before the paragraph relating to costs, is not justified by the record, and should be stricken out. The decree, as thus modified, may stand. The defendants contend that, in any event, the decree is wrong, because the bill states the frontage of the Beauvais lot to be 274 feet, while the decree seems to fix it at 174 feet. But, the evidence not being reported, we cannot tell which is correct. Perhaps the error, if there be any, is merely clerical. If so, it can be corrected. Let the decree be modified by the superior court in accordance with this opinion.

ALDRICH et al. v. ENDSLEY et al. (No. 5,297.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Defiance county. *Harris & Cameron and Hubbard & Hockman*, for plaintiffs in error. *L. B. Leaslee*, for defendants in error. No opinion. Judgment affirmed.

ALEXANDER et al. v. GROESHEN et al. (No. 5,065.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Hamilton county. *William G. Roberts and R. C. Taylor*, for plaintiffs in error. *Mallon, Coffey & Mallon, J. J. Glidden, Rob P. Hargitt, and Outcalt, Granger & Hunt*, for defendants in error. No opinion. Judgment affirmed.

¹ Rehearing denied.

¹ Rehearing denied.

AMERICAN LAMP & BRASS CO. v. BALDWIN. (No. 5,264.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Lucas county. W. H. A. Read, for plaintiff in error. A. Farquharson, for defendant in error. No opinion. Judgment affirmed.

ATHEY et al. v. COOPER. (No. 5,402.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Cuyahoga county. Wilcox & Collister, for plaintiffs in error. Willson & David, for defendant in error. No opinion. Judgment reversed by consent, and cause remanded.

BARNES v. STATE. (No. 5,784.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Lucas county. Hamilton & Kirby and L. M. Murphy, for plaintiff in error. Charles E. Sumner, for the State. No opinion. Judgment affirmed.

BICKNELL et al. v. DIDWAY et al. (No. 5,084.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit, Hancock county. Ross & Kinder, for plaintiffs in error. John Poe, for defendants in error. No opinion. Judgment affirmed.

BOARD OF EDUCATION v. BOARD OF EDUCATION. (No. 5,109.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Monroe county. McCammon & Ketterer, for plaintiff in error. Mallory, Jeffers & Sears, for defendant in error.

PER CURIAM. On consideration thereof, it is ordered and adjudged, this court proceeding to render the judgment which said circuit court should have rendered, that the judgment of said court of common pleas in favor of the board of education of Washington township be modified by reducing it to the sum of \$123, as of the date of said original judgment in the court of common pleas, and that said defendant in error recover that sum, with interest thereon from said date, and that each party pay half the costs in this court and in the circuit court.

BRICKER v. ELLIOTT. (No. 5,789.) (Supreme Court of Ohio. June 14, 1898.) Error to circuit court, Knox county. John Adams and J. B. Wright, for plaintiff in error. Charles H. Follett and Critchfield & Graham, for defendant in error.

PER CURIAM. On consideration thereof, the court finds that there is error therein apparent on the record, to the prejudice of plaintiff in error, in this, to wit: The circuit court found and adjudged that there was due the defendant in error from the plaintiff in error, as the proportionate share of Indiana Bricker in the insurance fund mentioned by the parties in their respective pleadings, the sum of \$500, with interest from the 20th day of July, 1883, up to the first day of the term of said circuit court at which judgment was rendered, to wit, October 5, 1897; whereas said finding and judgment, in respect to said insurance fund, should have been that there was due the defendant in error from the plaintiff in error, as the distributive share of Indiana Bricker in said insurance fund, the one-half only thereof less the premium paid, to wit, the sum of \$357.50, with interest thereon from the 20th day of July, 1883, to the 5th day of October, 1897, amounting to the sum of \$674.77, instead of \$926.25, as found by the circuit court. And the court finds that there is no other error apparent on the record and proceedings in said case. The court finds that the judgment of said circuit court in favor of the defendant in error, and against the plaintiff in error, should have

been for \$2,230.55, instead of \$2,482.03; and this court, in proceeding, by consent of parties, to render the judgment that the circuit court should have rendered in said case, found, determined, considered, and adjudged that the defendant in error recover from the plaintiff in error the sum of \$2,230.55, with interest thereon since the 5th day of October, 1897, and that the defendant in error recover from the plaintiff in error his costs in this case made in the court of common pleas and in the circuit court, taxed at \$—, and that plaintiff in error pay his own costs in said courts, and that each of said parties pay one-half the costs of this case in this court, taxed at \$—. It is further ordered that this case be remanded to the circuit court of Knox county, for execution. See 45 N. E. 1045.

BROWN et al. v. HULL. (No. 5,439.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Hancock county. John Poe, for plaintiffs in error. S. P. Harrison, for defendant in error. No opinion. Judgment affirmed. See 48 N. E. 1110.

CANFIELD v. SWANK et al. (No. 5,244.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Hancock county. H. F. Burket and George H. Phelps, for plaintiff in error. John Poe, for defendant in error. No opinion. Judgment affirmed.

CARLIN v. HOSLER, Treasurer. (No. 5,050.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Hancock county. Jason, Blackford & Byal, for plaintiff in error. Theodore Totten, for defendant in error.

PER CURIAM. It is argued and adjudged by this court that the judgment of said circuit court be, and the same is hereby, reversed, on the ground that the commissioners of Hancock county and of Seneca county, in joint session, had no jurisdiction to establish said ditch, which lies wholly in Hancock county, and upon the further ground that the county commissioners could not legally establish a ditch over the lands of said Maude Carlin, she being a minor, and could not legally make an assessment on her lands for such ditch without first assessing and paying to her compensation for the lands taken for such ditch; and for these reasons the petition and supplemental petition state facts sufficient to constitute a cause of action, and the injunction case, having been dismissed by the plaintiff, was not an adjudication of her rights. It is further ordered that this cause be, and the same is, remanded to the circuit court of Hancock county for further proceedings according to law. Judgment reversed.

CITY OF ALLIANCE et al. v. HARTZELL et al. (No. 5,028.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Stark county. J. W. Craine, for plaintiffs in error. Day, Lynch & Day, for defendants in error. No opinion. Judgment affirmed.

CITY OF CLEVELAND v. GORMAN. (No. 5,550.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Cuyahoga county. Miner G. Norton and Ford, Boyd & Crowl, for plaintiff in error. Kerruish, Chapman & Kerruish, for defendant in error. No opinion. Judgment affirmed.

CITY OF FINDLAY v. FINDLAY ST. RY. CO. (No. 5,760.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Hancock county. William F. Duncan, for plaintiff in er-

ror. J. A. & E. V. Bope, for defendant in error. No opinion. Judgment affirmed. MINSHALL, J., dissents.

CITY OF MANSFIELD v. MEWS. (No. 5,060.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Richland county. T. R. Robison, City Sol., and Seward & Bricker, for plaintiff in error. Bowers & Black and J. C. Laser, for defendant in error. No opinion. Judgment affirmed.

OLARK et al. v. ELLIOTT. (No. 5,078.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Licking county. J. B. Jones, for plaintiffs in error. Kibler & Kibler, for defendant in error. No opinion. Judgment affirmed.

CLEVELAND CITY RY. CO. v. MILITZER. (No. 5,629.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Cuyahoga county. Squire, Sanders & Dempsey, for plaintiff in error. Kerruish, Chapman & Kerruish, for defendant in error. No opinion. Judgment affirmed. **SPEAR, C. J., and SHAUCK and BURKETT, JJ.,** dissent.

COMMISSIONERS OF WOOD COUNTY v. COMMISSIONERS OF OTTAWA COUNTY. (No. 5,766.) (Supreme Court of Ohio. March 8, 1898.) Error to circuit court, Ottawa county. Parker & Fries and E. G. Love, for plaintiff in error. C. I. York and William Gordon, for defendant in error. No opinion. Judgment affirmed on the grounds stated in Board of Com'rs of Fulton Co. v. Board of Com'rs of Lucas Co., 12 Ohio Cir. Ct. R. 563. **MINSHALL, J.,** dissents.

COOKMAN et al. v. WELSH. (No. 5,119.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Franklin county. G. J. Marriott, for plaintiffs in error. G. F. Castle and H. E. Bradley, for defendant in error. No opinion. Judgment affirmed.

DAVIS v. ANDERSON. (No. 5,257.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Allen county. I. R. Longworth, for plaintiff in error. Ridenour & Halfhill, for defendant in error. No opinion. Judgment affirmed.

DAVIS v. COFFMAN et al. (No. 5,062.) (Supreme Court of Ohio. March 29, 1898.) Error to circuit court, Muskingum county. Charles M. Vandembark and Simeon M. Winn, for plaintiff in error. Achauer & Gates and J. T. Crew, for defendants in error. No opinion. Judgment affirmed. See 45 N. E. 707.

DAVIS v. VILLAGE OF NORWOOD et al. (No. 5,977.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Hamilton county. Frederick Hertenstein, for plaintiff in error. W. E. Bundy and Edward Barton, for defendants in error. No opinion. Judgment affirmed.

DAY et al. v. BERRY et al. (No. 5,260.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Belmont county. Danford & Danford and Rees & Hollingsworth, for plaintiffs in error. Tallman & Armstrong, for defendants in error. No opinion. Judgment affirmed.

DICE et al. v. DRAPER, Treasurer. (No. 5,206.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiffs in error. A. C. Woodrow, City Sol., and J. W. Bannon, for defendant in error. No opinion. Judgment affirmed.

DOTY v. SWING et al. (No. 5,071.) (Supreme Court of Ohio. March 29, 1898.) Error to circuit court, Hancock county. A. Blackford, R. J. Kibler, and John N. Doty, for plaintiff in error. Franklin T. Cahill, John E. Betts, Thomas Meehan, and El. T. Dunn, for defendants in error. No opinion. Judgment affirmed. **BURKETT, J.,** did not participate.

FARMERS' MUT. FIRE INS. CO. v. BACHMAN. (No. 5,048.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Darke county. Meeker & Gaskill and Allread & Teegarden, for plaintiff in error. Anderson & Bowman, for defendant in error. No opinion. Judgment affirmed.

FOEHL et al. v. WHITE. (No. 5,325.) (Supreme Court of Ohio. June 21, 1898.) Error to circuit court, Tuscarawas county. John S. Graham and Welty & Albaugh, for plaintiffs in error. M. V. Ream and J. F. Wilkin, for defendant in error. No opinion. Judgment affirmed.

FREDERICK v. CITY OF COLUMBUS. (No. 5,102.) (Supreme Court of Ohio. June 21, 1898.) Error to circuit court, Franklin county. J. T. Holmes, F. A. Davis, and Cyrus Huling, for plaintiff in error. Selwyn N. Owen, El. C. Irvine, and Charles J. Pretzman, for defendant in error. No opinion. Judgment affirmed on the authority of *Frederick v. City of Columbus*, 58 Ohio St. 538, 51 N. E. 35.

GARDNER v. STATE ex rel. PERIN. (No. 5,204.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Sandusky county. Richards & Heffner and M. B. Lemmon, for plaintiff in error. George Kinney and M. L. Shackelford, for defendant in error. No opinion. Judgment affirmed.

GILCHRIST v. STOCKING. (No. 5,221.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Cuyahoga county. Gilbert & Hills, for plaintiff in error. Kline, Carr, Tolles & Goff, for defendant in error. No opinion. Judgment affirmed.

GINN v. BOARD OF COUNTY COM'RS et al. (No. 5,045.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Logan county. West & West, for plaintiff in error. James A. Odor, Pros. Atty., and Howenstine, Huston & Miller, for defendants in error. No opinion. Judgment affirmed.

GINN v. BOARD OF COUNTY COM'RS et al. (No. 5,046.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Logan county. West & West, for plaintiff in error. James A. Odor, Pros. Atty., and Howenstine, Huston & Miller, for defendants in error. No opinion. Judgment affirmed.

GIRARD FIRE & MARINE FIRE INS. CO. v. BOYLE. (No. 5,129.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court,

Lawrence county. Lot Davis and Jed B. Bibbee, for plaintiff in error. W. D. Corn and J. O. Yates, for defendant in error. No opinion. Judgment affirmed.

HARRIS v. BATTELS et al. (No. 5,091.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Hancock county. A. F. P. & R. A. Blackford, for plaintiff in error. E. T. Dunn, George H. Phelps, and Seney, Johnson & Friedman, for defendants in error. No opinion. Judgment affirmed.

HENKEL v. CITY OF CINCINNATI. (No. 5,712.) (Supreme Court of Ohio. June 14, 1898.) Error to circuit court, Hamilton county. Donaldson & Tussing and Louis J. & Charles F. Dolle, for plaintiff in error. Ellis G. Kinkead and John V. Campbell, Corp. Counsel, for defendant in error. No opinion. Judgment affirmed, on authority of City of Cleveland v. Wick, 18 Ohio St. 304.

HENNE v. SNELL et al. (No. 5,329.) (Supreme Court of Ohio. June 21, 1898.) Error to circuit court, Darke county. Elliott & Chenoweth and Anderson & Bowman, for plaintiff in error. A. C. Robeson, for defendants in error. No opinion. Judgment affirmed.

HIGBEE et al. v. CAULKINS. (No. 5,099.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Cuyahoga county. Charles F. Morgan, for plaintiffs in error. E. T. & W. J. Hamilton, for defendant in error. No opinion. Judgment affirmed.

HIGGINS v. MARION STEAM-SHOVEL CO. (No. 5,759.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Marion county. D. R. Crissinger and Finley & Gallingier, for plaintiff in error. J. A. Wolford and W. Z. Davis, for defendant in error. No opinion. Judgment affirmed.

HOFSTETLER v. STATE. (No. 5,754.) (Supreme Court of Ohio. March 15, 1898.) Error to circuit court, Wayne county. Rieder & Morr and H. R. Smith, for plaintiff in error. F. S. Monnett, Atty. Gen., W. E. Weygandt, Pros. Atty., and Ross W. Funck, for the State. No opinion. Judgment affirmed.

HOLCOMB v. GIBSON et al. (No. 5,024.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Scioto county. Thompson & Newman, for plaintiff in error. J. J. Harper, T. C. Anderson, Harry Ball, Evans & Livingstone, and Harry W. Miller, for defendants in error. No opinion. Judgment affirmed.

HOUSTON v. MANSFIELD et al. (No. 5,036.) (Supreme Court of Ohio. March 8, 1898.) Error to circuit court, Hamilton county. Tugman & Baker, for plaintiff in error. W. T. Porter, Skiles & Skiles, and L. Brucker, for defendants in error. No opinion. Judgment affirmed.

JEFFERSON v. DRAPER, Treasurer. (No. 5,211.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiff in error. A. C. Woodrow, City Sol., and J. W. Baunon, for defendant in error. No opinion. Judgment affirmed.

KEAR v. GARRISON et al. (No. 5,133.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. A. T. Holcomb and Duncan Livingstone, for plaintiff in error. Jonathan S. Dodge, for defendants in error. No opinion. Judgment affirmed.

KEIL v. THOMAS. (No. 5,255.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Allen county. Brotherton & Brotherton, for plaintiff in error. O. W. Smith and J. G. Lamison, for defendant in error. No opinion. Judgment affirmed.

KELLEY et al. v. KERNs et al. (Nos. 5,142-5,200.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Lawrence county. A. C. Thompson, H. S. Neal, John Hamilton, and F. N. Ross, for plaintiffs in error. J. W. Bannon, A. R. Johnson, E. F. Williams, Corn & Yates, and John M. Walsh, for defendants in error. No opinion. Judgment affirmed.

KELLEY et al. v. OHIO OIL CO. et al. (No. 5,425.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Hancock county. A. Blackford and George H. Phelps, for plaintiffs in error. John Poe and M. F. Elliott, for defendants in error. No opinion. Judgment affirmed. See 49 N. E. 399.

KENDALL v. COOK. (No. 5,307.) (Supreme Court of Ohio. June 14, 1898.) Error to circuit court, Greene county. M. J. Hartley, for plaintiff in error. J. A. Cook, for defendant in error. No opinion. Judgment affirmed.

KIGHT v. STATE. (No. 5,797.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Franklin county. Barger & Barger and Cyrus Huling, for plaintiff in error. Charles W. Voorhees, Pros. Atty., J. H. Dyer, Henry A. Williams, Asst. Pros. Atty., and Florizel Smith, for the State. No opinion. Judgment affirmed.

LAGONDA NAT. BANK v. JENNEY. (No. 5,086.) (Supreme Court of Ohio. April 12, 1898.) Error to circuit court, Clark county. Kiefer & Kiefer, for plaintiff in error. Frank W. Geiger and D. F. Reinoehl, for defendant in error. No opinion. Judgment affirmed.

LAMBERT et al. v. TROY BENDING CO. (No. 5,076.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Darke county. Theodore Shockney and Sater & Robeson, for plaintiffs in error. Thomas & Thomas, J. I. Allread, and John Tiley Knox, for defendant in error. No opinion. Judgment affirmed.

LAWSON v. DRAPER, Treasurer. (No. 5,207.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiff in error. A. C. Woodrow, City Sol., and J. W. Bannon, for defendant in error. No opinion. Judgment affirmed.

LEHMAN v. STATE. (No. 5,755.) (Supreme Court of Ohio. March 15, 1898.) Error to circuit court, Wayne county. Reider & Morr and H. R. Smith, for plaintiff in error. F. S. Monnett, Atty. Gen., W. E. Weygandt, Pros. Atty., and Ross W. Funck, for the State. No opinion. Judgment affirmed.

LEMMAX et al. v. ROBERTSON et al. (No. 5,033.) (Supreme Court of Ohio. March 22, 1893.) Error to circuit court, Noble county. McGinnis & Leland, for plaintiffs in error. D. S. Spriggs, for defendants in error. No opinion. Judgment affirmed.

LION DRY-GOODS CO. v. DANIELS. (No. 5,066.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Lucas county. George H. Beckwith, for plaintiff in error. Kinney & Newton, for defendant in error. No opinion. Judgment affirmed on grounds stated in Daniels v. Lion Dry-Goods Co., 11 Ohio Cir. Ct. R. 351.

McBETH v. RICHEY. (No. 5,278.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Brown county. McBeth & Harrison and S. H. Stevenson, for plaintiff in error. H. B. Whiteman and Young & Barnes, for defendant in error. No opinion. Judgment affirmed.

McFARLAND et al. v. DRAPER, Treasurer. (No. 5,208.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiffs in error. A. C. Woodrow, City Sol., and J. W. Bannon, for defendant in error. No opinion. Judgment affirmed.

McFARLAND et al. v. DRAPER, Treasurer. (No. 5,209.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiffs in error. A. C. Woodrow, City Sol., and J. W. Bannon, for defendant in error. No opinion. Judgment affirmed.

McFARLAND et al. v. DRAPER, Treasurer. (No. 5,210.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Scioto county. N. W. Evans and Duncan Livingstone, for plaintiffs in error. A. C. Woodrow, City Sol., and J. W. Bannon, for defendant in error. No opinion. Judgment affirmed.

McNEAL et al. v. ROSS. (No. 5,124.) (Supreme Court of Ohio. May 8, 1898.) Error to circuit court, Darke county. Theodore Shockney, H. M. Cole, and Sater & Robeson, for plaintiffs in error. George A. Jobes and Anderson & Bowman, for defendant in error. No opinion. Judgment affirmed on authority of Manuel v. Manuel, 13 Ohio St. 458.

MARTIN v. SAINT et al. (No. 5,188.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Miami county. James Knight and H. H. Williams, for plaintiff in error. J. A. Davy, for defendants in error. No opinion. Judgment affirmed.

MEEHAN v. BURR et al. (No. 4,867.) (Supreme Court of Ohio. March 8, 1898.) Error to circuit court, Franklin county. J. T. Holmes and George S. Peters, for plaintiff in error. T. J. Keating, M. R. Patterson, Eugene Lane, and Charles E. Burr, for defendants in error. No opinion. Judgment of the circuit court reversed on the authority of Donley's Adm'r v. Shields, 14 Ohio, 359, and judgment for plaintiff in error.

MILES v. HALLEY. (No. 5,187.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Franklin county. A. J. Greene, for plaintiff in error. Frank P. Jackson, for defendant in error. No opinion. Judgment affirmed.

MILLER et al. v. RYAN et al. (No. 5,501.) (Supreme Court of Ohio. May 8, 1898.) Error to circuit court, Hamilton county. S. A. Miller and Gustav Tafel, for plaintiffs in error. Thomas McDougall and Harmon, Colston, Goldsmith & Hoadley, for defendants in error. No opinion. Judgment affirmed.

MORRIS v. STATE. (No. 5,792.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Franklin county. Merrick & Tompkins and S. C. Jones, for plaintiff in error. Charles W. Voorhees, Pros. Atty., Florizel Smith, Joseph H. Dyer, and William J. Ford, for the State. No opinion. Judgment affirmed. **SPEAR, C. J.**, dissents on the ground that a jury, 11 of whom sat as jurors in the trial and conviction of another charged with the stealing of the same goods, and necessarily involving testimony in the main identical with that in the case about to be tried, is not an impartial jury, within the meaning of our constitution.

MT. ADAMS & E. P. INCLINED R. CO. v. TUFTS. (No. 5,655.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Hamilton county. Kittredge & Wilby and J. W. Warrington, for plaintiff in error. Goebel & Bettinger and D. C. Keller, for defendant in error. No opinion. Judgment affirmed.

MYERS v. CONNECTICUT MUT. LIFE INS. CO. (No. 5,126.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Wayne county. Alfred J. Thomas, H. R. Smith, and John C. McClarren, for plaintiff in error. Jenner, Jenner & Weldon, for defendant in error. No opinion. Judgment affirmed.

MYERS v. RODGERS, McDONALD & CO. (No. 5,310.) (Supreme Court of Ohio. June 14, 1898.) Error to circuit court, Franklin county. M. B. Earnhart, for plaintiff in error. Donaldson & Tussing, for defendants in error. No opinion. Judgment affirmed.

NATIONAL BANK OF COLUMBUS v. OHIO COAL EXCHANGE et al. (No. 5,038.) (Supreme Court of Ohio. March 15, 1898.) Error to circuit court, Franklin county. E. B. Jewett and J. V. Lee, for plaintiff in error. Arnold, Morton & Guerin and Booth & Keating, for defendants in error. No opinion. Judgment affirmed.

NORTHWESTERN OHIO NATURAL GAS CO. v. SLMON. (No. 5,220.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Wood county. Doyle & Lewis and Troop & Dunn, for plaintiff in error. George H. Phelps and Baldwin & Harrington, for defendant in error. No opinion. Judgment affirmed.

O'CONNELL v. GENERAL ELECTRIC CO. (No. 5,117.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Franklin county. G. J. Marriott, S. N. Ross, and J. H. Anderson, for plaintiff in error. A. R. Johnson and A. J. Greene, for defendant in error. No opinion. Judgment affirmed.

OHIO FARMERS' INS. CO. v. KUMNICK. (No. 5,203.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Williams county.

ty. Lee Elliott and Potter & Emery, for plaintiff in error. John M. Calkins and Bowersox & Starr, for defendant in error. No opinion. Judgment affirmed.

OSBORN et al. v. HUFFMAN, Treasurer, et al. (No. 5,104.) (Supreme Court of Ohio. April 12, 1898.) Error to circuit court, Montgomery county. McMahon & McMahon, for plaintiffs in error. Edwin P. Matthews, City Sol., for defendants in error. No opinion. Judgment affirmed.

POWELL et al. v. BENSTER. (No. 5,118.) (Supreme Court of Ohio. June 25, 1898.) Error to circuit court, Lucas county. E. W. Tolerton, for plaintiffs in error. Hird, Brumback & Thatcher, for defendant in error. No opinion. Judgment of the circuit court reversed, and that of the common pleas affirmed.

PURDY v. MARSHALL. (No. 5,266.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Brown county. Young & Barnes and White & Campbell, for plaintiff in error. John Q. Waters and Eli B. Parker, for defendant in error. No opinion. Judgment affirmed.

RAILROAD CO. v. BAIN et al. (No. 5,051.) (Supreme Court of Ohio. March 15, 1898.) Error to circuit court, Belmont county. J. H. Collins, for plaintiff in error. Tallman & Armstrong, for defendants in error. No opinion. Judgment affirmed.

RAILROAD CO. v. BOARD OF COM'RS OF SENECA COUNTY. (No. 5,058.) (Supreme Court of Ohio. April 19, 1898.) Error to circuit court, Seneca county. Dore & Dore, for plaintiff in error. George E. Shroth, for defendant in error. No opinion. Judgment affirmed.

RAILROAD CO. et al. v. MOLT. (No. 5,229.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Cuyahoga county. Miner G. Norton, Phillips, Ford & Crowl, and Squire, Sanders & Dempsey, for plaintiffs in error. J. M. Jones and W. C. McFarland, for defendant in error. No opinion. Judgment affirmed.

RAILROAD CO. v. READ. (No. 5,289.) (Supreme Court of Ohio. June 14, 1898.) Error to circuit court, Tuscarawas county. J. M. Lessick and Healea & Greene, for plaintiff in error. Bailey & Douthitt, for defendant in error. No opinion. Judgment affirmed.

RAILROAD CO. v. WOODS. (No. 5,125.) (Supreme Court of Ohio. May 10, 1898.) Error to circuit court, Ashtabula county. S. E. Williamson and Theodore Hall, for plaintiff in error. Hoyt & Munsell, George A. Allen, and L. Rosenzweig, for defendant in error. No opinion. Judgment affirmed.

RAILWAY CO. v. HOGLE. (No. 5,141.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Delaware county. Squire, Sanders & Dempsey and J. S. Jones & Sons, for plaintiff in error. Marriott & Wickham, for defendant in error. No opinion. Judgment affirmed.

RAILWAY CO. v. JAMISON. (No. 5,122.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Tuscarawas county. J. Dun-

bar, for plaintiff in error. T. H. Loller, for defendant in error. No opinion. Judgment affirmed.

RAILWAY CO. et al. v. POWELL. (No. 5,218.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Wood county. King & Tracy and Parker & Fries, for plaintiffs in error. Dodge & Canary and James C. Troup, for defendant in error. No opinion. Judgment affirmed.

ROBINSON v. STATE. (No. 5,858.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Fayette county. Harper & Harper, for plaintiff in error. C. A. Reid, Pros. Atty., and Hidy & Sanderson, for the State. No opinion. Judgment affirmed. WILLIAMS, J., not sitting.

ROYAL INS. CO. v. SOCKMAN. (No. 5,131.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Wood county. James & Beverstock and Paxton, Warrington & Boutet, for plaintiff in error. Parker & Fries, for defendant in error. No opinion. Judgment affirmed.

ROYAL INS. CO. v. SOCKMAN. (No. 5,248.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Wood county. James & Beverstock and Paxton, Warrington & Boutet, for plaintiff in error. Parker & Fries, for defendant in error. No opinion. Judgment affirmed.

RUSH v. PLUMMER et al. (No. 5,029.) (Supreme Court of Ohio. March 15, 1898.) Error to circuit court, Holmes county. Stillwell & Bailey and John Huston, Jr., for plaintiff in error. Alfred J. Thomas and M. G. Pauley, for defendants in error. No opinion. Judgment affirmed.

SAUNDERS et al. v. LEARMAN. (No. 5,620.) (Supreme Court of Ohio. March 22, 1898.) Error to circuit court, Cuyahoga county. Hamilton, Hamilton & Smith, for plaintiffs in error. Foran & McTighe and J. P. Dawley, for defendant in error. No opinion. Judgment affirmed.

SCHMIDT v. TREBEIN. (No. 5,256.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Greene county. Charles H. Kyle and F. P. Cunningham, for plaintiff in error. Little & Spencer, for defendant in error. No opinion. Judgment affirmed.

SEARCH v. ANSELMANT. (No. 5,319.) (Supreme Court of Ohio. June 21, 1898.) Error to circuit court, Marion county. W. Z. Davis, for plaintiff in error. G. E. Mouser and Scofield, Durfee & Scofield, for defendant in error. No opinion. Judgment affirmed.

SEBELIN v. PAYNE. (No. 5,035.) (Supreme Court of Ohio. March 8, 1898.) Error to circuit court, Cuyahoga county. Winch & Wolcott, for plaintiff in error. Clark & Thompson, for defendant in error. No opinion. Judgment affirmed on authority of Maholm v. Marshall, 29 Ohio St. 611.

SELLS et al. v. APPEL. (No. 5,072.) (Supreme Court of Ohio. March 29, 1898.) Error to circuit court, Seneca county. Clayton W. Ev-

erett and Powell & Minahan, for plaintiffs in error. Hurd, Brumback & Thatcher, for defendant in error. No opinion. Judgment affirmed.

SHEA v. RAILROAD CO. (No. 5,841.) (Supreme Court of Ohio. March 1, 1898.) Error to circuit court, Lucas county. Scribner, Waite & Wachenheimer, for plaintiff in error. E. D. Potter, Jr., for defendant in error. No opinion. Judgment affirmed, one ground of reversal being that the verdict is against the weight of the evidence.

SILBERMAN v. CORRIGAN et al. (No. 5-121.) (Supreme Court of Ohio. May 3, 1898.) Error to circuit court, Cuyahoga county. W. C. Rogers and Ed. S. Meyer, for plaintiff in error. Orestes C. Pinney and Foran & Dawley, for defendants in error. No opinion. Judgment affirmed.

SPARKS v. MURPHY et al. (No. 5,248.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Hancock county. H. F. Burkett and George H. Phelps, for plaintiff in error. John Poe and Pendleton & Whitely, for defendants in error. No opinion. Judgment affirmed.

STATE v. COLE. (No. 5,879.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Crawford county. P. W. Poole, Pros. Atty., and E. B. Finley, Asst. Pros. Atty., for the State. Dan Babst, Jr., and A. Wickham, for defendant in error. No opinion. Judgment affirmed.

STATE ex rel. ADDYSTON PIPE & STEEL CO. v. CITY OF CLEVELAND et al. (No. 5,900.) (Supreme Court of Ohio. May 10, 1898.) Webster, Angel & Cook and Paxton, Warrington & Boutet, for plaintiff. M. G. Norton and Burke & Ingersoll, for defendants. No opinion. Demurrer sustained and petition dismissed.

STATE ex rel. ATTORNEY GENERAL v. LEEPER, Auditor. (No. 5,884.) (Supreme Court of Ohio. May 17, 1898.) F. S. Monnett, Atty. Gen., and W. Stiwell, for plaintiff. Sam H. Nicholas, L. R. Critchfield, John McSweeney, Reed & Hanna, and H. R. Smith, for defendant. No opinion. Demurrer sustained and petition dismissed on authority of *State v. McLain*, 58 Ohio St. 313, 50 N. E. 907.

STATE ex rel. ATTORNEY GENERAL v. McMAKEN. (No. 5,988.) (Supreme Court of Ohio. June 24, 1898.) F. S. Monnett, Atty. Gen., J. W. Warrington, James E. Neal, W. S. Giffin, and Daniel J. Ryan, for plaintiff. Morey, Andrews & Morey, George K. Nash, John A. McMahon, George B. Okey, and Millikin, Shotts & Millikin, for defendant. No opinion. Demurrer to answer overruled, and judgment for defendant. **SHAUCK, J.**, dissents.

STATE ex rel. ATTORNEY GENERAL v. MOLYNEAUX et al. (No. 5,881.) (Supreme Court of Ohio. June 26, 1898.) On rehearing. Frank S. Monnett, Atty. Gen., Burke & Ingersoll, Herrick & Hopkins, H. M. Farnsworth, and Morton W. Cope, for plaintiff. P. H. Halser, County Sol., Minor G. Norton, Corp. Counsel, and Lawrence & Estep, for defendants. No opinion. Demurrer to answer sustained, and judgment of ouster.

STATE ex rel. ATTORNEY GENERAL v. RAILROAD CO. (No. 2,240.) (Supreme Court

of Ohio. June 24, 1898.) F. S. Monnett, Atty. Gen., for plaintiff. Harrison, Olds & Henderson, for defendant. No opinion. Judgment of ouster. By consent costs to be paid by relator.

STATE ex rel. ATTORNEY GENERAL v. RATTERMAN et al. (No. 6,043.) (Supreme Court of Ohio. June 24, 1898.) F. S. Monnett, Atty. Gen., John Warrington, J. B. Foraker, W. M. Ampt, and Daniel J. Ryan, for plaintiff. Follett & Kelley, Peck & Shafer, and Goebel & Bettinger, for defendants. Demurrer to answer overruled, and judgment for defendants.

SPEAR, C. J. I concur in the judgment rendered for the reason that the main objections to the statute, and the only ones presenting difficulty, are answered by previous decisions of this court, and especially by the case of *State v. Smith*, 48 Ohio St. 211, 26 N. E. 1069.

MINSHALL, J. I have no apology to make for the decision. I think it is rightly decided on the principle. But, if it were otherwise, it is dictated by the force and effect of numerous previous decisions of this court.

BRADBURY, J. I do not concur in the decision reached by the court in so far as it may be regarded as sanctioning the doctrine that the general assembly may require that a mayor of a city of the first grade of the first class, in appointing a board of city affairs, at the first appointment of such members, shall designate "two each of different political parties" to serve "one year," "two each of different political parties to serve two years, and two each of different political parties for three years." * * * The general assembly, in my opinion, is without power to make affiliation with some recognized political party an essential qualification for an appointment to an official position even in a municipal corporation. Discrimination in favor of or against any elector, in this respect, founded on political belief or adhesion to a political party, violates the principles on which our government rests, and it seems to me this is clearly attempted in the statute just recited. Nor should the case of *State v. Smith*, 48 Ohio St. 211, 26 N. E. 1069, be regarded as authority in support of that power. The syllabus does not announce the existence of such power in the general assembly, neither was the question discussed in the body of the opinion. I concurred in the decision in that case, but, in thus concurring, did not suppose that the court was committed to any proposition not found in the syllabus. I then had doubts whether the question of the power of the general assembly to thus restrict the mayor in his right of selection was raised by the record in that case. The same doubt arises as to the effect of the record in that respect to this case. It seems to me that the only ground upon which it can be successfully claimed that the constitutionality of this restriction arose in the record in the case of *State v. Smith*, 48 Ohio St. 211, 26 N. E. 1069, or arises in this case, is the assumption that this restriction is so interwoven with the scheme of government with which it is connected as to constitute an essential part of that scheme, the whole of which must stand or fall together. If it is not so connected, if the scheme of government in all other respects may be segregated from these restrictive provisions, and in those other respects is in harmony with our constitution and therefore valid, then the title of the defendants to their offices would be valid, although these provisions were invalid. This would be so, because, if an invalid provision of a statute may be separated from its other parts, the latter part will stand, notwithstanding the fall of the invalid provision. If the scheme of government is thus severable, the question under discussion would not arise in this action, because the only legal object it seeks to obtain is a judgment of this court respecting the title of the defendants to their offices. That title depends upon the power of the mayor to appoint them, and, if he has this power, the ap-

pointment is not invalid because he chose them from the classes prescribed by the statute. Surely if the mayor, whether bound by the restrictive provisions of the statute or not, chose to pursue the policy therein prescribed, and appointed such persons only as fell within the classes designated, nobody can be heard to complain. Whether legally bound by this provision or not, he may rest under what he conceives to be a moral obligation to obey it; and thus be impelled to follow the wishes of that body which clothed him with the power of appointment. This course is unobjectionable, and if he follows it, taking his appointees from the classes thus designated, the title of such appointee is perfect, because they are eligible, whether the restrictions are valid or not. If the restrictions were binding on him, such appointees were eligible because within the classes which the statute named. If the restrictive statute was invalid, they were nevertheless eligible, because every elector was eligible, and they were electors. If, however, the mayor, in making an appointment, should disregard these restrictions, and appoint some one who is excluded by the law, and thereupon the title of such appointee to the office should be challenged by proceedings in quo warranto, then the question of the legality of the restrictions would at once arise; for, if such restrictions were valid, the title of such appointee would be invalid, because he would not have been taken from the class prescribed by these restrictive provisions. These observations would not have been made but for the fact that eminent counsel have interpreted the case of *State v. Smith*, 48 Ohio St. 211, 26 N. E. 1069, as approving, if not directly announcing, the doctrine that the legislature has power to make eligibility to hold office by appointment depend upon party affiliation, and the decision in this case may receive a like interpretation. I neither concur in that interpretation of the decision, nor in the doctrine itself; for, in my opinion, the title of an appointee to a public office, even in a municipal corporation, cannot, by virtue of any statute that the legislature may enact, be attacked or questioned on the ground that he belongs to a particular political party, or because he does not belong to any such party at all, nor do I think this court has committed itself to a contrary doctrine.

SHAUCK, J., dissents.

BURKET, J. I dissent from the judgment, for the reason that the requirement of the statute, that the members of the board shall be appointed from different political parties, is in conflict with section 1 of article 5, and section 4 of article 15, of the constitution.

STATE ex rel. ATTORNEY GENERAL v. STANDARD OIL CO. (No. 2,294.) (Supreme Court of Ohio. April 28, 1898.) F. S. Monnett, Atty. Gen., E. B. Kinkead, W. L. Flagg, and William Herbert Page, for plaintiff. Kline, Carr, Tolles & Goff, for defendant.

PER CURIAM. And now, on this 28th day of April, 1898, this matter is heard and submitted on the demurrer of the respondent to a portion of the seventh, of the eighth, and of the eighteenth interrogatories, and it is ordered and adjudged that the said demurrer be, and the same is hereby, overruled as to said seventh, eighth, and twenty-third interrogatories, and sustained as to said tenth and eighteenth interrogatories. It is further ordered that the respondent file its answer to the seventh, eighth, and twenty-third interrogatories on or before June 16th next. Thereupon the matter is further heard upon the motion of relator to require respondent to make its answer to the ninth, eleventh, sixteenth, eighteenth, twentieth, and twenty-second interrogatories more definite and certain, which, being heard and understood by the court, is overruled. Demurrer to interrogatories sustained in part and overruled in part.

STATE ex rel. ATTORNEY GENERAL v. VICKERS. (No. 5,813.) (Supreme Court of Ohio. June 24, 1898.) F. S. Monnett, Atty. Gen., and Henry Bannon, for plaintiff. Leonard W. Goss, Anselm T. Holcomb, and Frank B. Finney, for defendant. No opinion. Judgment for defendant on the ground that a superintendent of schools is not an officer. MINSHALL, J., dissents.

STATE ex rel. FINEFROCK et al. v. LEFFLER, Treasurer. (No. 5,110.) (Supreme Court of Ohio. April 12, 1898.) J. B. Jones, for plaintiffs. J. A. Wolford, W. E. Scofield, and J. K. Richards, for defendant. No opinion. Demurrer to reply sustained and petition dismissed.

STATE ex rel. GUILBERT, Auditor, v. HALLIDAY, Auditor. (No. 5,859.) (Supreme Court of Ohio. June 14, 1898.) F. S. Monnett, Atty. Gen., for plaintiff. C. W. Voorhees, for defendant. Demurrer to interrogatories sustained.

STATE ex rel. MARION SHOVEL CO. v. GUTHERY, Auditor. (No. 5,252.) (Supreme Court of Ohio. May 17, 1898.) J. A. Wolford, W. E. Scofield, and J. K. Richards, for plaintiff. J. B. Jones, for defendant. No opinion. Demurrer to answer sustained, and peremptory writ awarded.

STATE ex rel. PUGH et al. v. GUILBERT, Auditor. (No. 6,114.) (Supreme Court of Ohio. June 25, 1898.) David F. Pugh and Edward Kibler, for plaintiffs. F. S. Monnett, Atty. Gen., for defendant. No opinion. Demurrer to answer sustained, and writ awarded, on authority of *State v. Oglevee*, 37 Ohio St. 1; the amount to be paid out of general revenue fund.

STATE ex rel. WATKINS v. FRAME, Auditor. (No. 5,816.) (Supreme Court of Ohio. June 21, 1898.) Error to circuit court, Athens county. C. B. Pierce, for plaintiff in error. Wood & Wood, Grosvenor, Jones & Worstell, and Sleeper, Sayre & Davis, for defendant in error. No opinion. Judgment affirmed.

STEWART et al. v. KLINE et al. (No. 5,228.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Hamilton county. J. C. Harper and J. D. Brannan, for plaintiffs in error. James E. Robinson and Millikin, Shotts & Millikin, for defendants in error. No opinion. Judgment reversed, and judgment for plaintiffs in error.

THOMPSON v. PUBLIC LIBRARY BOARD OF CLEVELAND et al. (No. 5,873.) (Supreme Court of Ohio. June 25, 1898.) Error to circuit court, Cuyahoga county. Blandin & Rice, for plaintiff in error. Phillips & Phillips, for defendants in error. No opinion. Judgment affirmed. SHAUCK, J., dissents.

THOMPSON & RICHARDS v. BEERY. (No. 5,259.) (Supreme Court of Ohio. June 7, 1898.) Error to circuit court, Allen county. Cable & Parmenter and Stillings & Stillings, for plaintiff in error. Motter & Mackenzie, for defendant in error. No opinion. Judgment affirmed.

TILLINGHAST et al. v. STETZER et al. (No. 5,139.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Cuyahoga county. John O. Winship, for plaintiffs in error. T. S. Dunlap and Arnold Green, for defendants in error. No opinion. Judgment affirmed.

TRAVELERS' INS. CO. v. WOERSTLER. (No. 5,079.) (Supreme Court of Ohio. April 12, 1898.) Error to circuit court, Summit county. Oviatt, Allen & Cobbs, for plaintiff in error. H. C. Sanford and F. H. Waters, for defendant in error. No opinion. Judgment affirmed.

TUCKER v. BOARD OF EDUCATION. (No. 5,231.) (Supreme Court of Ohio. May 24, 1898.) Error to circuit court, Licking county. S. M. Hunter and Charles H. Follett, for plaintiff in error. John David Jones and Waldo Taylor, for defendant in error.

PER CURIAM. On consideration whereof, this court being of opinion that the evidence of the declarations of the superintendent and janitor were incompetent, and that it was error for the court of common pleas to admit the same in evidence at the trial, the said judgment of the circuit court, reversing the judgment of the common pleas, is affirmed on the grounds above stated. This court finds that there is no other error in the record and judgment of the court of common pleas. Judgment affirmed.

WALKER v. MCGILLIN. (No. 5,087.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Mahoning county. M. C. McNab and T. W. Sanderson, for plaintiff in error. L. W. King and M. A. Morris, for defendant in error. No opinion. Judgment affirmed.

WARD v. STATE. (No. 5,816.) (Supreme Court of Ohio. April 26, 1898.) Error to circuit court, Licking county. Wilby & Wald, for plaintiff in error. S. M. Hunter, Thomas W. Phillips, and D. L. Sleeper, for the State. No opinion. Judgment affirmed on authority of *State v. Hutchinson*, 58 Ohio St. 82, 46 N. E. 71.

WATKINS et al. v. CITIZENS' BANK. (No. 5,239.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Scioto county. J. F. McNeal & Sons, for plaintiffs in error. Nash & Lentz, Thompson & Newman, W. Z. Davis, and L. G. Addison, for defendant in error. No opinion. Judgment affirmed.

WATKINS et al. v. CITIZENS' BANK. (No. 5,240.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Scioto county. J. F. McNeal & Sons, for plaintiffs in error. Nash & Lentz, Thompson & Newman, W. Z. Davis, and L. G. Addison, for defendant in error. No opinion. Judgment affirmed.

WATKINS et al. v. CITIZENS' BANK. (No. 5,241.) (Supreme Court of Ohio. May 17, 1898.) Error to circuit court, Scioto county. J. F. McNeal & Sons, for plaintiffs in error. Nash & Lentz, Thompson & Newman, W. Z. Davis, and L. G. Addison, for defendant in error. No opinion. Judgment affirmed.

WOOD v. RAILWAY CO. (No. 5,771.) (Supreme Court of Ohio. April 18, 1898.) Error to circuit court, Marion county. Scofield, Durfee & Scofield, for plaintiff in error. W. Z. Davis, S. O. Bayless, and John T. Dye, for defendant in error. No opinion. Judgment affirmed.

END OF CASES IN VOL. 51.

